ANNEX C

Photocopies of authorities cited non available online

Childs -v- Lewis (1924) 40 T.L.R. 870

the authorities, that the payment was not a voluntary one. He (Lord Justice Bankes) entirely agreed with that view. The payment was best described as one of those which were made grudgingly and of necessity, but without open protest, because protest was felt to be useless. On the materials before the Court it seemed impossible to disturb the Judge's conclusion on that point.

Before dealing with the Indemnity Act, 1920, it was necessary to consider whether the demand for the payment was an illegal demand. Regulation 39 C C in terms recognized the grant of permission subject to conditions. It was said that the demand for a portion of the purchase price of a vessel as a condition of the grant of permission was perfectly lawful. In his opinion, that question was covered in principle by the decision of the House of Lords in *Attorney-General v. Wilts United Dairies, Limited* (38 *The Times* L.R., 781), where it was held that such a demand was illegal. The real question in the case was whether the claim was barred by the Indemnity Act, 1920. The operation of the Act was confined to acts, matters, and things done. The first point taken by the respondents was that what they complained of was not the act of the Shipping Controller in exacting the payment, but the refusal of the Crown to return the money so exacted. Mr. Justice Avory accepted that argument. A number of authorities were cited by the Attorney-General in support of his proposition that it was the act of the Shipping Controller which was the governing feature in the case and which formed the substantial part of the suppliants' cause of action. In his opinion, none of the authorities were directly in point.

In all of them it was material to consider whether the matter of complaint was an act done within the meaning of the particular statute, and in some of them whether it made any substantial difference that the plaintiff had elected to sue in *assumpsit* after waiving the tort. Some of the opinions of the learned Judges who decided those cases were of value, though they could not be decisive, as they were dealing with statutes passed for a very different object from that aimed at by the Indemnity Act, 1920. But the expressions of judicial opinion given, it was true, in different circumstances from those in the present case, confirmed him in the view which, apart from authority, he would undoubtedly have taken—namely, that in the present case an essential part of the suppliants' cause of action consisted in the illegal act of the Shipping Controller in exacting the payment as a condition of granting permission for the sale of the vessel, and that it was impossible to get rid of that fact, for the purpose of escaping the provisions of the Indemnity Act, 1920, by electing to sue in *assumpsit* after waiving the tort.

Sir John Simon argued that his clients were entitled for the present purpose to ignore the tort altogether and to sue for the recovery of the money on an implied contract to return money obtained as this money was.

In his (his Lordship's) opinion, the Indemnity Act, 1920, did apply to the present claim, and unless the suppliants could bring themselves within the proviso to section 1 (1), their claim was barred. The exemptions from the operation of the statute contained in the proviso included the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, but only in a case where a claim for payment or compensation could not be brought under section 2 of the Act. The material provisions of the section were contained in section 2 (1) (*b*). In his opinion, the suppliants had suffered direct loss or damage by reason of interference with their business through the purported exercise during the war of the power conferred upon the Minister of Shipping by Regulation 2 C C. He could not see how the action of the Shipping Controller could be described otherwise than as an interference with the suppliants' business, which must include the disposing of obsolete ships. They had therefore *prima facie* a claim to compensation. Sir John Simon attempted to avoid the position thus created by saying that the compensation (if any) fell to be assessed under Part II. of the schedule, the language of which excluded the claim of the respondents, because the loss or damage had arisen from the enforcement of a regulation of general application.

There appeared to be two answers to that contention. The first was that the compensation payable to the suppliants would fall to be assessed under section 2 (2) (iii.) (*a*), and not under (*b*). The second was that on further consideration he thought that Lord Cave's view of the construction of Part II. of the schedule as expressed in *Moss Steamship Company, Limited v. Board of Trade* (40 *The Times* L.R., 137; [1924] A.C., 133, at p. 141) was preferable to his (Lord Justice Bankes's) opinion as expressed in the same case ([1923] 1 K.B., 447, at p. 455).

The conclusion at which he had arrived on the suppliants' right to compensation under the Indemnity Act, 1920, was sufficient to dispose of the appeal. The appeal succeeded. The judgment must be set aside, and the Crown must have the costs here and below.

Lord Justice Scrutton, in concurring, said that the petition of right was barred by section 1 of the Indemnity Act, 1920, and a claim in the War Compensation Court would be barred by lapse of time. He expressed regret that the suppliants, who, in his view, had suffered a wrong at law, should be deprived of their remedy by a misunderstanding of the obscure language of the Indemnity Act, 1920, and he might be permitted to regret that the Government in those circumstances should keep money illegally obtained, but he could do no more than regret it. The appeal must be allowed.

Lord Justice Sargant concurred.

[Solicitors—Messrs. Rawle, Johnstone, and Co., for Messrs. Hill, Dickinson, and Co., Liverpool; the Solicitor to the Board of Trade.]

K.B. Div. (Lush, J.) 1924. July 30.

CHILDS v. LEWIS.*

False Imprisonment—Damages—Special damages—Recoverability.

The plaintiff was given into the custody of the police by the defendant on a charge of larceny, and was taken to the police-station, where the defendant signed the charge-sheet but went bail for the plaintiff. Before the magistrates the defendant wished to withdraw the charge, but they did not allow this and remanded the plaintiff on bail. At the adjourned hearing the magistrates dismissed the charge, the only ground being that the proceedings were not *bona fide*. In an action for false imprisonment the jury awarded the plaintiff general damages and a sum of £350, which he claimed as special damages for loss of

* Reported by J. W. Hall, Esq., Barrister-at-Law.

director's fees on the ground that when his co-directors saw that he had been taken into custody charged with larceny they demanded his resignation from the board and he resigned. It was admitted that this special damage would flow from malicious prosecution. The only claim was, however, for false imprisonment.

Held, that as the inevitable result of the signing of the charge-sheet was the plaintiff's appearance before the magistrates, and as the plaintiff's co-directors would hear of his arrest before the magistrates dealt with the case, it was open to the jury to take the view that the special damage flowed from the false imprisonment.

This was the further consideration of an action tried at Swansea Assizes before Mr. Justice Lush and a common jury. The question reserved was whether certain special damages awarded by the jury were recoverable in law.

Mr. A. Lincoln Reed appeared for the plaintiff; Mr. A. T. James for the defendant.

Mr. Justice Lush, in giving judgment, said that the case raised an interesting and a novel point with regard to the measure of damages. The parties were two shipowners at Cardiff, the plaintiff being the father-in-law of the defendant, but for some years they had been on bad terms. During the shipping "boom" they had both been very wealthy men, but after the war the plaintiff lost a large sum. Just before he suffered that loss he bought a high-powered motor-car for £2,500. He wished his daughter to have the use of this car; the defendant had two cars of his own. The plaintiff also owed his daughter some £500, so he lent her the car and gave her a written charge on it. Later, the plaintiff found that his son-in-law was using the car, and that his daughter was not having the use of it which the plaintiff intended. He thereupon made up his mind to repossess himself of the car. Finding one day that the defendant had left the car unattended at the entrance to the golf links, the plaintiff got into it and drove off to a garage at Newport. From there the defendant again recovered it, and the plaintiff again found it at the golf links and again drove away in it, this time to his own house. He had no garage there, so he put the car in the garden and removed the carburettor to prevent the defendant from using it. At 11 p.m. the son-in-law got three policemen, and with them went to the plaintiff's house about midnight. He put back the carburettor and said to the plaintiff: "If you don't give up the car to me I'll give you into custody." The plaintiff said: "It is my car, and you can do what you like." Thereupon about 2 a.m. the defendant said to the policemen: "Take that man into custody on a charge of larceny." The plaintiff was taken at that early hour to the police station, four miles away. The police asked the defendant to sign the charge-sheet, and he did so. The police suggested bail, and the defendant then became bail for his father-in-law. The defendant and the policemen drove back, leaving the plaintiff, whom they passed on the way, to walk home. When the plaintiff was brought before the magistrates, the defendant had apparently thought better of it, and wished to withdraw the charge. The magistrates would not allow that, and they remanded the plaintiff for a fortnight on bail. They then dismissed the charge and ordered the defendant to pay the costs, which they could only do if they were satisfied that the proceedings were not *bona fide*.

The plaintiff then brought his action for false imprisonment: the defence—the only possible defence—was that a felony had been committed, that the plaintiff was the felon, and that the defendant was entitled to arrest him. The defendant also said that the plaintiff, in addition to giving his daughter a charge on the car, had pledged the car to the defendant, so as to give him a special property in it. The jury did not accept that, so there was really no defence to the action for false imprisonment. He (his Lordship) thought that the police behaved in a way that they should not have done in taking the plaintiff into custody, for he was obviously setting up a claim of right. The jury took a very strong line and awarded the plaintiff £1,000. But the plaintiff also claimed special damages. He was a director of an insurance company and he received £350 a year as director's fees. When his co-directors saw that he had been taken into custody charged with larceny they demanded his resignation from the board, and he resigned. Clearly if he had not resigned, the other directors would have taken steps to remove him. He claimed special damages for the loss of his director's fees. There was no claim for malicious prosecution, but he (his Lordship) had left the question to the jury, who took the view that the damages flowed from the false imprisonment, and awarded £350.

The question was whether in the absence of a claim for malicious prosecution that damage flowed from the false imprisonment. It was admitted that it would flow from malicious prosecution. On the whole he (his Lordship) had come to the conclusion that it was open to the jury to take the view that they did, because the police always insisted on the charge-sheet being signed, and that having been done the inevitable result was the plaintiff's appearance before the magistrates. His co-directors would hear of his arrest before the prosecution started, or certainly before the magistrates dealt with it. He would be sorry to have to hold otherwise, for it would probably have meant simply another writ for malicious prosecution.

A stay of execution was granted subject to the payment into Court of the special damages and part of the general damages.

[Solicitors—Mr. Harold M. Lloyd, Cardiff; Messrs. Nicholas and Evans, Cardiff.]

Chan. Div. } 1924.
(Tomlin, J.) } July 31.

IN RE NATIONAL UNION OF SHIPS' STEWARDS, COOKS, BUTCHERS, AND BAKERS.*

Trade Union — Registration — Requisite conditions—Existence—Trade Union Act, 1871 (34 and 35 Vict., c. 31), ss. 6, 13, 14.

Only an existing trade union can be registered, and not a prospective trade union.

This was an originating motion by an unregistered trade union desiring to register itself under the above title as a trade union and by the seven persons signing the application for such registration. The respondents were another body seeking to register itself under the same name and the seven persons signing the application for such registration.

---

* Reported by H. C. Garsia, Esq., Barrister-at-Law.

Derby & Co Ltd v Weldon (nos 3 and 4) [1990] Ch 65

[COURT OF APPEAL]

DERBY & CO. LTD. AND OTHERS v. WELDON AND OTHERS (NOS. 3 AND 4)

1988 Nov. 28, 29, 30; Dec. 1; 16

Lord Donaldson of Lymington M.R., Neill and Butler-Sloss L.JJ.

Injunction—Mareva injunction—Jurisdiction—Luxembourg and Panamanian companies with no assets in United Kingdom—Plaintiff seeking to prevent dissipation of their assets before judgment—Whether jurisdiction to grant injunction and appoint receiver of assets

In an action for damages for breach of contract, negligence, breach of fiduciary duty, deceit and conspiracy to defraud in connection with dealings on the cocoa market the plaintiffs obtained *Mareva* injunctions against the first two defendants. The third defendant was a Panamanian company which, according to the evidence, had no assets in the United Kingdom. The fourth defendant was a Luxembourg company with, so far as appeared from the evidence, no assets in the United Kingdom. The plaintiffs applied for *Mareva* injunctions against the third and fourth defendants, and sought to have receivers appointed in furtherance of the injunctions. On 4 November 1988 Sir Nicolas Browne-Wilkinson V.-C. granted a *Mareva* injunction restraining the fourth defendant from dealing with its assets, wherever situate, save in so far as they exceeded £25m., and on 7 November he appointed a receiver of its assets and made a disclosure order. He refused to grant similar relief in the case of the third defendant, holding that although, in the case of the fourth defendant, the order could be enforced in Luxembourg under the provisions of the European Judgments Convention, as scheduled to the Civil Jurisdiction and Judgments Act 1982, there was no evidence that a *Mareva* injunction could be enforced in Panama against the third defendant, even if it had any assets. The *Mareva* injunction and the receivership order were made subject to a "*Babanaft* proviso" which provided, in effect, that no person other than specified companies and individuals and any individual resident in the jurisdiction who had notice of the order should be liable with regard to acts done outside the jurisdiction for breaches of the order, save to the extent that the order had been declared enforceable by a court outside the jurisdiction.

On appeal by the fourth defendant and cross-appeal by the plaintiffs against the refusal to grant an injunction in the case of the third defendant:—

Held, dismissing the appeal, (1) that the purpose of a *Mareva* injunction was to prevent a defendant from taking action designed to frustrate subsequent orders of the court; that, although a *Mareva* injunction should normally be confined to assets within the jurisdiction, in an appropriate case the court had power to make an order concerning foreign assets in order to achieve the purpose of the injunction, subject to the ordinary principles of international law, and the existence of assets within the jurisdiction was not a pre-condition of granting a *Mareva* injunction; that it was normally a sufficient sanction to ensure

compliance with a *Mareva* injunction, even in the case of a foreign defendant, that failure to comply with it would result in the defendant being debarred from defending the action; and that since a *Mareva* injunction operated in personam it did not offend against the principle that the courts should not make orders which infringed the exclusive jurisdiction of other countries; that in order to safeguard the position of third parties outside the jurisdiction there was a practical need for a proviso to make it clear that the court was not seeking to exercise an exorbitant jurisdiction, to be even-handed between natural and juridical persons and to avoid any argument that because the order was, ex facie, not extra-territorial in its effect it could not be recognised and enforced under the European Judgments Convention; and that, accordingly, there was jurisdiction to grant a *Mareva* injunction against both the third and fourth defendants, and there was no reason to make a distinction between them (post, pp. 79B–G, 81D–E, G—82A, D–E, 83F—84E, 87C–D, 93E—94B, D–E, 95D–E, H—96A, D–F).

Babanaft International Co. S.A. v. Bassatne [1990] Ch. 13, C.A.; *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48, C.A. and *Republic of Haiti v. Duvalier* [1990] Q.B. 202, C.A. applied.

Ashtiani v. Kashi [1987] Q.B. 888, C.A. and *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, H.L.(E.) considered.

(2) Allowing the cross-appeal, that as a party to the action the third defendant could properly be ordered to deal with its assets in accordance with the orders of the court, regardless of whether or not those orders were directly enforceable abroad (under the European Judgments Convention or otherwise); that there was no reason to distinguish between the third and fourth defendants in relation to the appointment of a receiver; and that, accordingly, subject to amendment of the proviso, it was proper to appoint a receiver in respect of both the third and fourth defendants (post, pp. 86B–F, 94E–G, 97H—98B).

Per curiam. The existence of sufficient assets within the jurisdiction is an excellent reason for confining the operation of the jurisdiction to such assets (post, pp. 79G–H, 87D, 96A).

Quaere. Whether it is right to make an order for disclosure of assets which is not in pursuance of an order for *Mareva* relief or which is wider than the *Mareva* injunction to which it is ancillary (post, pp. 86G, 94G—95B, 96A).

Order of Sir Nicolas Browne-Wilkinson V.-C. varied.

The following cases are referred to in the judgments:

Ashtiani v. Kashi [1987] Q.B. 888; [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.

Babanaft International Co. S.A. v. Bassatne [1990] Ch. 13; [1989] 2 W.L.R. 232; [1989] 1 All E.R. 433, C.A.

Beddow v. Beddow (1878) 9 Ch.D. 89

Bekhor (A. J.) & Co. Ltd. v. Bilton [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.

Blunt v. Blunt [1943] A.C. 517; [1943] 2 All E.R. 76, H.L.(E.)

Chartered Bank v. Daklouche [1980] 1 W.L.R. 107; [1980] 1 All E.R. 205, C.A.

Derby & Co. Ltd. v. Weldon [1990] Ch. 48; [1989] 2 W.L.R. 276; [1989] 1 All E.R. 469, C.A.

A *Faith Panton Property Plan Ltd. v. Hodgetts* [1981] 1 W.L.R. 927; [1981] 2 All E.R. 877, C.A.

Haiti (Republic of) v. Duvalier [1990] Q.B. 202; [1989] 2 W.L.R. 261; [1989] 1 All E.R. 456, C.A.

Hamlin v. Hamlin [1986] Fam. 11; [1985] 3 W.L.R. 629; [1985] 2 All E.R. 1037, C.A.

Intraco Ltd. v. Notis Shipping Corporation [1981] 2 Lloyd's Rep. 256, C.A.

B *Jagger v. Jagger* [1926] P. 93, C.A.

Liddell's Settlement Trusts, In re [1936] Ch. 365, C.A.

Lister & Co. v. Stubbs (1890) 45 Ch.D. 1, C.A.

Locabail International Finance Ltd. v. Agroexport [1986] 1 W.L.R. 657; [1986] 1 All E.R. 901, C.A.

MBPXL Corporation v. Intercontinental Banking Corporation Ltd. (unreported), 28 August 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, C.A.

C *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213n, C.A.

Newton v. Newton (1885) 11 P.D. 11

Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. und Co. K.G. [1983] 1 W.L.R. 1412; [1984] 1 All E.R. 398, C.A.

Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

D *Ownbey v. Morgan* (1921) 256 U.S. 94

Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha [1980] 1 W.L.R. 1268; [1980] 3 All E.R. 409, C.A.

Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia Intervening) [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.

Robinson v. Pickering (1881) 16 Ch.D. 660, C.A.

E *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24; [1986] 3 W.L.R. 398; [1986] 3 All E.R. 487, H.L.(E.)

Third Chandris Shipping Corporation v. Unimarine S.A. [1979] Q.B. 645; [1979] 3 W.L.R. 122; [1979] 2 All E.R. 972, C.A.

Ward v. James [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563, C.A.

F *Wickins v. Wickins* [1918] P. 265, C.A.

The following additional cases were cited in argument:

Allied Arab Bank Ltd. v. Hajjar [1988] Q.B. 787; [1988] 2 W.L.R. 942; [1987] 3 All E.R. 739

Altertext Inc. v. Advanced Data Communications Ltd. [1985] 1 W.L.R. 457; [1985] 1 All E.R. 395

G *Ballabil Holdings Pty. Ltd. v. Hospital Products Ltd.* (1985) 1 N.S.W.L.R. 155

Bayer A.G. v. Winter [1986] 1 W.L.R. 497; [1986] 1 All E.R. 733, C.A.

Chellaram v. Chellaram [1985] Ch. 409; [1985] 2 W.L.R. 510; [1985] 1 All E.R. 1043

de Cavel v. de Cavel (Case 143/78) [1979] E.C.R. 1055, E.C.J.

Denilauler v. S.n.c. Couchet Frères (Case 125/79) [1980] E.C.R. 1553, E.C.J.

H *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132

Evans v. Clayhope Properties Ltd. [1988] 1 W.L.R. 358; [1988] 1 All E.R. 444, C.A.

Hart v. Emelkirk Ltd. [1983] 1 W.L.R. 1289; [1983] 3 All E.R. 15

Interpool Ltd. v. Galani [1988] Q.B. 738; [1987] 3 W.L.R. 1042; [1987] 2 All E.R. 981, C.A.

Mediterranea Raffineria Siciliana Petroli S.p.A. v. Mabanaft G.m.b.H. (unreported), 1 December 1978; Court of Appeal (Civil Division) Transcript No. 816 of 1978, C.A.

"Morocco Bound" Syndicate Ltd. v. Harris [1895] 1 Ch. 534

National Bank of Greece v. Constantinos Dimitriou, The Times, 16 November 1987; Court of Appeal (Civil Division) Transcript No. 1107 of 1987, C.A.

Schemmer v. Property Resources Ltd. [1975] Ch. 273; [1974] 3 W.L.R. 406; [1974] 3 All E.R. 451

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.)

Vocalion (Foreign) Ltd., In re [1932] 2 Ch. 196

Westbourne Galleries Ltd., In re [1973] A.C. 360; [1972] 2 W.L.R. 1289; [1972] 2 All E.R. 492, H.L.(E.)

INTERLOCUTORY APPEAL from Sir Nicolas Browne-Wilkinson V.-C.

By a writ issued on 25 June 1987 and a statement of claim dated 15 January 1988 and amended on 31 March 1988 the plaintiffs, Derby & Co. Ltd., Cocoa Merchants Ltd., Phibro-Salomon Finance A.G., Phibro-Salomon Ltd., Philipp Brothers Inc., Philipp Brothers Ltd. and Salomon Inc., claimed against the defendants, Anthony Henry David Weldon, Ian Jay, Milco Corporation, Panama ("Milco") and C.M.L. Holding S.A., Luxembourg ("C.M.I."), damages for breach of contract, negligence, breach of fiduciary duty, deceit and conspiracy to defraud in connection with dealings on the cocoa market. The plaintiffs, on appeal from Mervyn Davies J. [1989] 2 W.L.R. 276, obtained an interlocutory *Mareva* injunction against the first two defendants, preventing them from dissipating their assets pending the hearing of the action. They sought similar relief against Milco and C.M.I., and on 4 November 1988 Sir Nicolas Browne-Wilkinson V.-C. granted a *Mareva* injunction against C.M.I. restraining it from dealing with its assets, wherever situate, save in so far as they exceeded £25m. By an order made on 7 November and amended on 11 November he appointed Christopher Morris as receiver of C.M.I.'s assets and made a disclosure order. Both the *Mareva* injunction and the order appointing the receiver incorporated a proviso in accordance with the considerations discussed in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, that no person other than specified companies and individuals and any individual resident in the jurisdiction who had notice of the order should be affected by the order or concerned to inquire whether acts done outside the jurisdiction were in breach of the order, save to the extent that the order had been declared enforceable or enforced by a court outside the jurisdiction, and then only within the jurisdiction of that court. He declined to grant similar relief in relation to Milco.

By a notice of appeal dated 9 November 1988 C.M.I. appealed against the orders of 4 and 7 November on the grounds, inter alia, that (1) the Vice-Chancellor, having correctly held that C.M.I. was not resident within the jurisdiction of the court and had no assets within the jurisdiction of the court, erred in principle and in law holding that he

A was not bound by the decision of the Court of Appeal in *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256 to refuse the grant of a pre-judgment *Mareva* injunction against C.M.I. and/or to refuse to make the *Mareva* order; (2) the Vice-Chancellor, having correctly held (a) that the court's settled practice was not to grant any pre-judgment *Mareva* injunction or ancillary relief against parties who were not resident within the jurisdiction of the court and who did not have any B assets within the jurisdiction of the court, and (b) that C.M.I. was not resident within the jurisdiction of the court and had no assets within the jurisdiction of the court, erred in principle and in law in holding that in a special case he would be at liberty not to follow the settled practice of the court and instead to make the *Mareva* order; (3) if, contrary to C.M.I.'s contention in (2) above, in a special case the court was at C liberty not to follow the settled practice and to grant a pre-judgment *Mareva* injunction against a non-resident who did not have any assets within the jurisdiction of the court, the Vice-Chancellor erred in principle and in law in holding that the present would be a special case if C.M.I. was the creature of the first and second defendants, both of whom were resident within the jurisdiction of the court; (4) the Vice-Chancellor, having held, not that C.M.I. was the mere creature of the first and D second defendants but only that it might be their mere creature, erred in principle and in law in holding that the present was a special case such that he was at liberty not to follow the settled practice of the court and instead to make the *Mareva* order; (5) the Vice-Chancellor's holding as to C.M.I. possibly being the mere creature of the first and second defendants was wrong in principle and in law; (6) the Vice-Chancellor, E in making the *Mareva* order, exercised on a wrong basis his discretionary power to grant interlocutory injunctions; (7) the Vice-Chancellor, having correctly held that an order such as the discovery order could only be made as ancillary to a *Mareva* injunction, erred in principle and in law in making the discovery order in that the discovery order was made as ancillary to the receivership order and not to any *Mareva* injunction, alternatively in that the discovery order was made as ancillary to the F *Mareva* order which itself should not have been made; (8) the Vice-Chancellor made the receivership order as ancillary to the *Mareva* order, which itself should not have been made; (9) the Vice-Chancellor, in making the receivership order, erred in principle and in law, alternatively exercised his discretionary powers on a wrong basis, in that the receivership order went further in the direction of treating C.M.I. as a G judgment debtor and of displacing C.M.I.'s right to manage its own affairs than could properly be justified in the case of an order made, as the receivership order was, as ancillary to and in aid of the *Mareva* order; (10) in making the receivership order the Vice-Chancellor took into account matters of which he should not have taken account and exercised his discretion on wrong principles in that he held (a) that Milco was no longer a subsidiary of C.M.I.; (b) that Milco has dissipated H or parted with its assets; (c) that C.M.I. has changed its assets; and (d) that each of (a) to (c) above has come about since the commencement of the present action, which holding was unsupported by any evidence and was erroneous.

By a respondent's notice dated 23 November 1988 the plaintiffs appealed from the Vice-Chancellor's refusal to grant a *Mareva* injunction in respect of Milco. The grounds of the appeal were, inter alia, that (1) the judge erred in holding that it was not proper for the court to grant *Mareva* relief against a non-resident company in the absence of evidence that such an order could be effectively enforced in some court; (2) the judge failed properly to take into account that having dismissed Milco's application to set aside service upon it of the re-amended writ, Milco was a party properly served with the process of the court and amenable to the court's jurisdiction; (3) the judge misdirected himself in contemplating that an order made against Milco might not be obeyed, further or alternatively that the judge gave insufficient weight to the fact that Milco had ostensibly complied with at least one order previously made in the present proceedings; (4) the judge erred in holding that the rationale behind the *Babanaft* proviso applied to mandatory orders of the court; (5) the judge erred in making the enforcement of paragraph 2(a) of his order of 7 November 1988 dependent on its enforcement in Luxembourg because: (a) C.M.I. having submitted to the jurisdiction of the court, the paragraph should have had full in personam effect against C.M.I. within the jurisdiction of the court; (b) further or in the alternative, it was contrary to articles 25 and 26, further or alternatively the spirit and intendment, of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed by the high contracting parties to the Treaty establishing the European Economic Community, to make the enforcement within the jurisdiction of the court of orders which (subject to registration) were enforceable in the territories of other contracting states dependent upon the enforcement of such orders in another contracting state; (c) further or in the further alternative, the court should assume that an order made against a party which had submitted to its jurisdiction would be obeyed; (6) (as regards Milco) there was evidence indicating wholesale dissipation of its assets (including dissipation of assets since and as a result of the present proceedings).

The plaintiffs also sought to contend that the judge's decisions should be affirmed (as regards C.M.I.) and the orders sought should be made (as regards Milco) on the additional grounds (1) that on the evidence before the judge the circumstances of the case justified the grant (in the exercise of the court's in personam jurisdiction) of an injunction to restrain the dissipation of assets situate outside the jurisdiction and/or the appointment of a receiver whether or not (a) Milco or C.M.I. had assets within the jurisdiction of the court; (b) any interlocutory order of the court would be recognised or enforced in any other jurisdiction; (c) Milco or C.M.I. was or might be a creature of the first or second defendants; (2) that on ordinary principles of international law the court had jurisdiction and ought to make such orders as might be appropriate (including the grant of an injunction and the appointment of a receiver) over parties submitting to or otherwise amenable to its jurisdiction and/or who choose to appear and contest the proceedings on the merits.

A The facts are stated in the judgment of Lord Donaldson M.R.

A. G. Bompas and *Rosalind Nicholson* for Milco and C.M.I. It is conceded for the purposes of this appeal (1) that there was material on which the judge could find that the first defendant, Mr. Weldon and the second defendant, Mr. Jay, might be likely to dissipate their own assets so as not to be available to satisfy any judgment against them in this B action; (2) that the first two defendants are to be assumed to exercise a high degree of control over C.M.I. and Milco; (3) that in view of those concessions C.M.I. and Milco might be likely to dissipate their assets so as not to be available to satisfy any judgment against them in this action; and (4) that C.M.I. and Milco might at trial be found liable to some or other of the plaintiffs in respect of some of the claims, and that C the approximate amount of the judgment could with interest be as much as £25 million.

It is accepted that the *Mareva* jurisdiction is an established feature of English law. However, it should be granted only where the plaintiff is likely to recover judgment against the defendant for a certain or approximate sum and there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment in whole or in part, D but might remove them from the jurisdiction or dispose of them so that they are untraceable or unavailable to meet the judgment.

The jurisdiction is founded on the power given by section 27 of the Supreme Court Act 1981 to grant injunctions where it is just and convenient to do so. That wide power to grant *Mareva* injunctions has been circumscribed by judicial authority: see *Beddow v. Beddow* (1878) E 9 Ch.D. 89, 93, *per* Sir George Jessel M.R. That approach was approved by the House of Lords in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24 in which Lord Brandon of Oakbrook's speech sets the parameters of the *Mareva* injunction.

One of the necessary preconditions for the grant of a pre-judgment F *Mareva* injunction is that the defendant against whom it is sought has assets within the jurisdiction of the English court: see *Intraco v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256 and compare *MBPXL Corporation v. Intercontinental Banking Corporation Ltd.* (unreported), 28 August 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975. That decision is consistent with the practice in granting *Mareva* injunctions: see *Third Chandris Shipping Corporation v. Unimarine S.A.* G [1979] Q.B. 645; *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923; *Interpool Ltd. v. Galani* [1988] Q.B. 738; *Ashtiani v. Kashi* [1987] Q.B. 888 and *Allied Arab Bank Ltd. v. Hajjar* [1988] Q.B. 787.

The three recent cases, *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13; *Republic of Haiti v. Duvalier* [1990] Q.B. 202 and *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48 do not conflict with that principle. *Babanaft* was a post-judgment case; the *Duvalier* case was a *Mareva* H injunction sought in aid of a tracing claim, and in any event the funds there were thought to be under the control of English solicitors; and *Derby & Co. Ltd. v. Weldon* was a case in which the defendants had English assets. Those cases did not remove the requirement that the

defendant should have assets in the jurisdiction. The springboard for the change in approach apparent in the last three cases appears to have been the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968: see the Civil Jurisdiction and Judgments Act 1982, Sch. 1. However, nothing in the 1968 Convention justifies such a change.

Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A. [1979] A.C. 210, 258 and 259, *per* Lord Diplock is relied on. There is no suggestion that a foreign court would have jurisdiction to seize assets in, for example, England. The particular decision in the *Siskina* case was reversed by section 25 of the Civil Jurisdiction and Judgments Act 1982. The 1968 European Convention does not lead to the conclusion that there is a free-roaming power to make orders in pursuance of article 24. In relation to *Denilauler v. S.n.c. Couchet Frères* (Case 125/79) [1980] E.C.R. 1553 and *de Cavel v. de Cavel* (Case 143/78) [1979] E.C.R. 1055 an order made by a court of a convention country is not directly enforceable unless on its face it falls within the scope of the subject matter of the Convention, and ex parte protective measures are not directly enforceable, so that application must be made under article 24 to a court of the country in which enforcement is sought. *Mareva* injunctions are within these limitations. If the plaintiffs wish to freeze the defendants' bank account in Luxembourg the right course is for them to apply to the Luxembourg court.

Mareva injunctions in practice have an "in rem" effect. The in rem effect suggests that it is appropriate for such measures to be strictly domestic. Nothing in the Convention suggests that the established approach should be changed. English courts should not create problems for European courts by creating remedies not available hitherto: see *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, 35F–G, *per* Kerr L.J., and see *Denilauler v. S.n.c. Couchet Frères* (Case 125/79) [1980] E.C.R. 1553.

Babanaft International Co. S.A. v. Bassatne [1989] 2 W.L.R. 232 was a post-judgment case, and it was a short-term order intended to hold the ring. All three judges in that court were concerned about the effect of the order in foreign jurisdictions.

Republic of Haiti v. Duvalier [1990] Q.B. 202 was correct and consistent with these submissions, but if necessary the case is distinguishable because the court's jurisdiction was there founded on assets within the United Kingdom.

The conditions necessary for an internal *Mareva* injunction are necessary but not sufficient conditions for an extra-territorial *Mareva*: see *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48, *per* Parker L.J. A worldwide *Mareva* should not lie in an ordinary case. It is necessary to show some special feature to justify the exercise of an exorbitant jurisdiction.

Courts should have regard to the consequences of the orders they contemplate making. They should not make orders which they cannot themselves enforce: see *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196. For the approach of Kekewich J. to the grant of injunctive relief, see *"Morocco Bound" Syndicate Ltd. v. Harris* [1895] 1 Ch. 534. The court

declined to grant an unenforceable injunction in *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657.

As a matter of precedent and principle the *Mareva* injunction should not have been granted in this case. The receivership order was made in aid of the *Mareva* injunction and therefore falls with it.

Michael Lyndon-Stanford Q.C., Charles Purle and *J. Stephen Smith* for the plaintiffs. First, for the grant of a *Mareva* injunction the plaintiff must have a good arguable case: see *Republic of Haiti v. Duvalier* [1990] Q.B. 202 and *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48. Secondly, there must be a real risk of dissipation or secretion of assets which would render the plaintiff's relief nugatory. Thirdly, there must be insufficient English assets before the court will grant a worldwide *Mareva*. Insufficient assets may mean no assets. Fourthly, there must be grounds for supposing that the defendant has assets overseas: see *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] Q.B. 645, 668. Fifthly there must be suitable restrictions, either by undertaking or proviso as to the effect of the order on third parties overseas, on the use of the information by the plaintiff and there must be control of the proceedings overseas. Sixthly, in the case of worldwide *Marevas* special factors may be required before the court will make an order (although Parker L.J. did not think them necessary in *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48).

The court in the *Duvalier* case [1989] 2 W.L.R. 261 appears to have found special factors. All the factors there found apply in the present case as well.

The first matter at issue is the plaintiffs' submission that a pre-judgment *Mareva* stops at Dover. That is the *South Carolina Insurance Co.* point: see [1987] A.C. 24, 39, *per* Lord Brandon of Oakbrook. That is all obiter. In *Bayer A.G. v. Winter* [1986] 1 W.L.R. 497 there was an *Anton Piller* type of order in which there was development of that category. Similarly in *In re Westbourne Galleries Ltd.* [1973] A.C. 360 there was an extension of the "just and equitable" ground of winding up a company. If the *South Carolina* point is good and the position is frozen, it is noteworthy that there is no decision that a *Mareva* stops at Dover. Before 1988 there was no case in which it was sought to have an overseas injunction.

Great weight is placed by the defendants on *Ashtiani v. Kashi* [1987] Q.B. 888. The real issue in that case is disclosure, not the grant of an injunction. The injunction sought was always local in its effect. The case is authority for the proposition that disclosure should be co-terminous with the injunction. The summary of *Ashtiani v. Kashi* given in *Interpool Ltd. v. Galani* [1988] Q.B. 738 is not correct.

In *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, 26H—28A, Kerr L.J. said that *Ashtiani* did not freeze the position: see also *per* Nicholls L.J. at pp. 46F—47C. Nicholls L.J. also said that *Ashtiani* was a "disclosure" case: see p. 42F. In *National Bank of Greece v. Constantinos Dimitriou,* The Times, 16 November 1987; Court of Appeal (Civil Division) Transcript No. 1107 of 1987 the underlying order was a worldwide *Mareva* with a disclosure order attached. The particular issue in the appeal was the exception for legal expenses.

In respect of the appointment of receivers there have recently been developments in the law: see *Hart v. Emelkirk Ltd.* [1983] 1 W.L.R. 1289, approved by the Court of Appeal in *Evans v. Clayhope Properties Ltd.* [1988] 1 W.L.R. 358.

There are two authorities empowering the court to make a worldwide *Mareva*: the *Duvalier* case [1990] Q.B. 202, which was a purely monetary claim, and *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48, where *Ashtiani v. Kashi* [1987] Q.B. 888 was considered at length. There is no reason why the absence of English assets should govern the issue of the grant of an overseas *Mareva* if all the other conditions are present. Indeed, it might be said that the absence of English assets should be a requirement for the grant of an overseas *Mareva.* In the tracing cases there is no suggestion that there are assets in the United Kingdom. *Mediterranea Raffiniera Siciliana Petroli S.p.A. v. Mabanaft G.m.b.H.* (unreported), 1 December 1978; Court of Appeal (Civil Division) Transcript No. 816 of 1978 is a rather dubious tracing claim.

The practice of the Chancery division is that the order for disclosure should be no wider than the injunction to which it is ancillary. The point about a court not making an order that will not be enforced, said to be a maxim of equity, is to be found in specific performance cases or where the order asked for would be futile because it is not in the interest of any of the parties. The correct principle is *In re Liddell's Settlement Trusts* [1936] Ch. 365: see also *Chellaram v. Chellaram* [1965] Ch. 409. *In re Vocalion (Foreign) Ltd.* [1932] 2 Ch. 196, 210 shows that the enforcement point was not in the judge's mind. *"Morocco Bound" Syndicate Ltd. v. Harris* [1895] 1 Ch. 534 was a question of breach of copyright in Germany. On the normal principles for the court to make an order the tort had to be the same here and abroad. *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657 was an impossibility case, where it would have been futile to grant an injunction.

On the cross-appeal against the refusal to grant an injunction against Milco, there is no reason why a court should not make an order relating to property overseas where the defendant is amenable to the jurisdiction of the court: see *Duder v. Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132; *Schemmer v. Property Resources Ltd.* [1975] Ch. 273 and *Altertext Inc. v. Advanced Data Communications Ltd.* [1985] 1 W.L.R. 457.

It is not disputed that there is power to appoint a receiver in aid of a *Mareva* injunction: see *Ballabil Holdings Pty. Ltd. v. Hospital Products Ltd.* (1985) 1 N.S.W.L.R. 155 for a discussion of this question.

The enforceability of the *Mareva* injunction and the receivership order under the Civil Jurisdiction and Judgments Act 1982 and the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters set out in Schedule 1 to the Act is an additional reason for making the order in this case. The judge was wrong in saying that that part of his order, relating to the delivery up of assets to the receiver, should not be enforceable until it had been declared enforceable by the Luxembourg court or otherwise enforced by that court. The effect of the order in this country should not depend on its enforcement abroad under the Convention.

The plaintiffs reserve the right to argue that a *Babanaft* proviso is not necessary, but we leave that aspect for the moment. The objections to the proviso in this case are that it treats natural persons differently from juridical persons. An English bank is placed in a difficult position by such a proviso. The proviso may deprive it of its excuse for not complying with the instructions of a defendant who wishes to frustrate an order of the court. Also it is illogical for the enforcement of an order of the English court to depend on enforceability in some other jurisdiction. This creates a "chicken-and-egg" situation in which the Luxembourg court may not enforce the order until it is enforceable in this country.

Leslie Kosmin for the receiver was not called upon to argue.

Bompas in reply.

Cur. adv. vult.

16 December. The following judgments were handed down.

LORD DONALDSON OF LYMINGTON M.R. The complexity of the issues involved in this action is only matched by the size of the sums in dispute—not less than £25 million and probably more. However, the issues in the appeal and cross-appeal which concern protective interlocutory measures—*Mareva* injunctions, the appointment of receivers and disclosure of the nature, amount and whereabouts of assets—are much more confined. So far as the action as a whole is concerned, it is sufficient to say that the plaintiffs complain that they have been defrauded by the defendants by or in connection with dealings in the cocoa market.

The action first came before this court in July 1988 when the plaintiffs successfully appealed against the refusal of Mervyn Davies J. to grant *Mareva* relief on a worldwide basis against the first two defendants (Mr. Anthony Weldon and Mr. Ian Jay): *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48. In so far as this court then decided any matters of law, its decision of course binds us. I refer to this judgment by May, Parker and Nicholls L.JJ. as *Derby v. Weldon (No. 1)*. The present appeal is by the fourth defendant, C.M.L. Holding S.A. of Luxembourg (referred to in argument and hereafter in this judgment as "C.M.I." in order to distinguish it from the plaintiff Cocoa Merchants Ltd.). C.M.I. appeals against orders by Sir Nicolas Browne-Wilkinson V.-C. on 4 and 7 November 1988 as amended by a further order on 11 November 1988 granting a worldwide *Mareva* injunction, appointing a receiver of the assets of C.M.I. and a disclosure order. The plaintiffs cross-appeal against the refusal of the Vice-Chancellor to continue a worldwide *Mareva* injunction granted ex parte against the third defendant, Milco Corporation of Panama, ("Milco") and his refusal to appoint a receiver of its assets and to order disclosure of its assets. The plaintiffs also seek modification of the orders against C.M.I.

The issues confronting this court have been simplified, but by no means resolved, by four concessions which have very sensibly been made (for the purposes of the appeal only) on behalf of C.M.I. and

Milco following the hearings before the Vice-Chancellor. They are: (a) that the first defendant (Mr. Weldon) and the second defendant (Mr. Jay) might be likely to dissipate their own assets so as not to be available to satisfy any judgment against them in this action; (b) that Mr. Weldon and Mr. Jay are to be assumed to exercise a high degree of control over C.M.I. and Milco; (c) that, in view of (a) and (b) above, C.M.I. and Milco might be likely to dissipate their assets so as not to be available to satisfy any judgment against them or either of them in this action, and (d) that C.M.I. and Milco might at trial be found liable to some one or other of the plaintiffs in respect of the claims (referred to in specified paragraphs of the amended statement of claim) and that the approximate amount of the judgment against C.M.I. or Milco could with interest be as much as £25 million.

Three issues arise, namely: (1) whether, and if so in what circumstances and on what terms, a pre-judgment *Mareva* injunction should be granted against a foreign defendant who has no assets within the jurisdiction of the court; (2) whether, and if so in what circumstances and on what terms, a receiver of the assets of such a foreign defendant should be appointed before judgment for purposes similar to those served by a *Mareva* injunction; (3) whether, and if so in what circumstances and on what terms, such a foreign defendant should be required to disclose the nature, value and whereabouts of his assets.

The Mareva jurisdiction generally

The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, the court should not permit the defendant artificially to create such a situation.

The jurisdictional basis of the *Mareva* injunction is to be found in section 37(1) to (3) of the Supreme Court Act 1981 which, in subsection (1), is the lineal successor of section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, and section 25(8) of the Judicature Act 1873. Those subsections provide:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just. (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets

A located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

In *Beddow v. Beddow* (1878) 9 Ch.D. 89, Sir George Jessel M.R. said, at p. 93:

B ". . . I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."

That remains the position to this day, the only issue being whether in particular circumstances the grant is "right or just." What changes is not C the power or the principles but the circumstances, both special and general, in which courts are asked to exercise this jurisdiction. This can and does call for changes in the practice of the courts. We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of D such orders on the merits of their case. Hence it comes about that, as was pointed out by Neill L.J. in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, 37F, and by May L.J. in *Derby v. Weldon (No. 1)* [1990] Ch. 48, 54C–D, this is a developing branch of the law. To that I would add that a failure or refusal to grant an injunction in any particular case is an exercise of discretion which cannot, as such, provide a precedent binding upon another court concerned with another case, E save in so far as that refusal is based upon basic principles applicable in both such cases.

The relevance of an absence of assets within the jurisdiction

When the matter was before Sir Nicolas Browne-Wilkinson V.-C. F there was no evidence showing, or giving rise to any inference, that C.M.I., which is a Luxembourg company, had any assets within the jurisdiction. That remains the position to this day, although as a result of the compulsory disclosure of information it now appears that a company within the group of companies of which C.M.I. is the holding company may have such assets. In this situation the first submission on behalf of C.M.I. is that a necessary pre-condition for granting a *Mareva* G injunction is that the defendant has some assets within the jurisdiction. The significance of this submission is that, if correct, it would distinguish this appeal from *Derby v. Weldon (No. 1)* where the relevant defendants had assets within the jurisdiction.

Mr. Bompas, appearing for C.M.I., submitted that this was the ratio of the decision of this court in *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256. In that case Staughton J. had H been asked to restrain the defendants from claiming under a guarantee given by the London branch of a French bank and had refused to do so upon the well-established principle that the courts will not grant such an injunction unless fraud is involved. Instead, he looked to the proceeds

of the guarantee and enjoined the defendants from removing such proceeds from the jurisdiction. On appeal the plaintiffs unsuccessfully appealed against the refusal to prevent the defendants claiming under the guarantee. The defendants, however, successfully appealed against the *Mareva* injunction upon the grounds that any moneys payable under the guarantee were payable in Greece, a matter which had never been pointed out to Staughton J., and that accordingly these moneys would never be within the jurisdiction and capable of being removed from it. No one suggested that there were any other assets within the jurisdiction *or* that the injunction should be extended to cover the dissipation of Greek assets. This decision accordingly neither supports nor detracts from C.M.I.'s contention.

When a similar submission was made to the Vice-Chancellor he was also referred to the decisions of this court in *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] Q.B. 645, 668, 673; *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923 and *Ashtiani v. Kashi* [1987] Q.B. 888. He concluded that it might just be possible to say that in these three cases the statements as to the need for local assets were obiter, but that in the *Intraco* case it was plainly the ratio decidendi. For the reasons which I have given, I think that in this latter respect he was mistaken. This is not of great significance because it now appears that in *MBPXL Corporation v. Intercontinental Banking Corporation Ltd.* (unreported), 28 August 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, this court (Stephenson and Scarman L.JJ.) held in terms and as the ratio of the court's decision that a *Mareva* injunction is an exceptional remedy "which will only be granted by the court where there is clear evidence that there are assets in this country—not immovable but movable assets—in the possession of the defendant."

The Vice-Chancellor said:

> "It has been said many times that *Mareva* relief is a developing field. There is no doubt that as a matter of English law this court has jurisdiction to grant relief against any party properly before it in relation to assets wherever situate. However, the circumstances under which such jurisdiction should be exercised must depend upon and vary with the circumstances of every case. The rationale of the earlier decisions was plain—the court was seeking to freeze assets against which an eventual judgment in the English court could be enforced. In my judgment the earlier decisions merely show what was a settled practice in the ordinary case; that is to say, in a case where there was no question of extending the order beyond local assets. For myself, I believe that the practice of requiring some grounds for believing there are local assets is still applicable in such cases.
>
> "But the three recent Court of Appeal cases were not the normal case. In each judgment the Court of Appeal stressed they were very special cases. They involved a claim for *Mareva* relief over assets not situate here. If *Derby & Co. Ltd. v. Weldon* [1989] 2 W.L.R. 276 before the Court of Appeal was a very special case, so is this application, which is intimately linked with exactly the same matter.

A "In my judgment, I am free to exercise the undoubted jurisdiction to make the orders sought in the particular circumstances of this case. But, to my mind, three requirements ought to be satisfied before the court takes the extreme step that is asked for in this case. The first requirement is that the special circumstances of the case justify such an exceptional order. Secondly, that the order is in accordance with the rationale on which *Mareva* relief has been B based in the past. Thirdly, that the order does not conflict with the ordinary principles of international law."

In substance I agree. The normal form of order should indeed be confined to assets within the jurisdiction, although the practice has changed since the decision in the *MBPXL* case and such an order could C well extend to the disposition of a freehold interest in a house. The reason for that change is that, whereas initially the courts focused upon assets being removed from the jurisdiction in an attempt to make the defendant "judgment proof," later experience suggested that there were other ways of achieving this object and at least as much attention was then paid to that part of the common form order which forbade the disposal of assets as to that which prohibited their removal from the D jurisdiction. The reason why at present the normal form of order should be so confined is that most defendants operate nationally rather than internationally. But, once the court is concerned with an international operator, the position may well be different.

In my judgment, the key requirement for any *Mareva* injunction, whether or not it extends to foreign assets, is that it shall accord with E the rationale upon which *Mareva* relief has been based in the past. That rationale, legitimate purpose and fundamental principle I have already stated, namely, that no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law. When the Vice-Chancellor said F that special circumstances had to be present to justify such an exceptional order, I do not understand him to have been saying more than that the court should not go further than necessity dictates, that in the first instance it should look to assets within the jurisdiction and that in the majority of cases there will be no justification for looking to foreign assets.

G Returning to Mr. Bompas' submission, I can see neither rhyme nor reason in regarding the existence of some asset within the jurisdiction of however little value as a pre-condition for granting a *Mareva* injunction in respect of assets outside the jurisdiction. The existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking H protective measures in relation to those outside it.

The reality is, I think, that it is only recently that litigants have sought extra-territorial relief and that the courts have had to consider whether to grant it and upon what conditions. During the last year it has

been granted in the three cases to which the Vice-Chancellor referred, namely, *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13; *Republic of Haiti v. Duvalier* [1990] Q.B. 202 and *Derby v. Weldon (No. 1)* [1990] Ch. 48. Mr. Bompas seeks to distinguish the *Babanaft* case upon the grounds that the injunction was granted in aid of execution of an existing judgment. This I accept as a distinction in that the court will have less hesitation in taking measures in support of a judgment creditor than it would in support of a *potential* judgment creditor. The decision in the *Duvalier* case he seeks to distinguish upon the grounds that it was a tracing case and that the funds were under the control of an agent resident within the jurisdiction. This is certainly a distinction in fact, although I am not sure that it is one of principle. *Derby v. Weldon (No. 1)* he seeks to distinguish upon the ground that the defendants had assets within the jurisdiction, but, for the reasons which I have already given, I do not consider this to be a distinction in principle.

There remains one other authority to which I should refer. This is the decision of the House of Lords in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24. Mr. Bompas relied upon it for the general proposition that the jurisdiction of the court under section 37(1) of the Act of 1981 was "circumscribed by judicial authority dating back many years:" *per* Lord Brandon of Oakbrook, at p. 40. It followed, so he said, that there was no scope for a new and extended use of the power. I do not accept this submission for at least two reasons. First, Lord Brandon said in terms that the jurisdiction in relation to *Mareva* injunctions was an exception to the principle that its exercise was circumscribed by judicial authority: see p. 40G–H. Second, the House was not considering a case which involved *Mareva* injunctions.

Once the suggested distinction based upon the absence of *any* assets within the jurisdiction is rejected, the short answer to the submission that the court cannot, or alternatively should not, grant a *Mareva* injunction extending to the overseas assets of C.M.I. is provided by *Derby v. Weldon (No. 1)* [1990] Ch. 48. This is binding authority for the proposition that the court *can* grant such an injunction in the circumstances of this case and persuasive authority for doing so.

The Vice-Chancellor then went on to consider other aspects stemming from the fact that C.M.I. and Milco differ from Mr. Weldon and Mr. Jay in that they are juridical and not natural persons and are incorporated abroad—C.M.I. in Luxembourg and Milco in Panama.

Enforceability of the injunctions

First amongst these considerations was that, as he said, "nothing brings the law into greater disrepute than the making of orders which cannot be enforced. The maxim 'equity does not act in vain' is a very sound one." It was suggested in argument that, on the authorities, the maxim referred not to enforceability but to the making of orders with which it was impossible to comply, e.g., to fell a tree which had already been blown down or which lawfully could at once be nullified, e.g., to

A grant the plaintiff a tenancy at will. However that may be, the Vice-Chancellor was plainly right in his general proposition, although it requires careful examination in the context of particular circumstances.

I find it difficult to believe that, in using the words "cannot be enforced," he meant "cannot be specifically enforced." That that is not the true test is clear, because it is not uncommon for a court to order the disclosure of information which exists only in the mind of an B individual. If he is unusually obdurate the order is unenforceable in the sense that the information will not be disclosed. Courts assume, rightly, that those who are subject to its jurisdiction will obey its orders: see *In re Liddell's Settlement Trusts* [1936] Ch. 365, 374 which, although said in relation to an order affecting wards of court normally resident in this country against a mother normally so resident, is I think of general C application. It is only if there is doubt about whether the order will be obeyed and if, should that occur, no real sanction would exist, that the court should refrain from making an order which the justice of the case requires.

This consideration led the Vice-Chancellor to examine the extent to which a *Mareva* injunction could be enforced against C.M.I. in Luxembourg, which is a party to the European Convention on D Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters to which this country gave effect by the Civil Jurisdiction and Judgments Act 1982. This certainly is deserving of examination but, in the context of the grant of the *Mareva* injunction, I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a E consequence which it could contemplate lightly as it would become a fugitive from a final judgment given against it without its explanations having been heard and which might well be enforced against it by other courts. It may be that C.M.I. is inherently law-abiding or that some such consideration has occurred to it, but it is certainly the fact that it has co-operated fully with the receiver appointed by the Vice-Chancellor, has made some disclosure of its assets and began to do so before the F Luxembourg court made an order enforcing that of the Vice-Chancellor.

When it came to Milco, which is incorporated in Panama, but no doubt like most Panamanian companies has its base of operations elsewhere, the Vice-Chancellor said that "there is no evidence before me that either a *Mareva* order or any eventual judgment can be enforced against Milco in Panama even if it has any assets." This involves two G considerations—lack of assets and Panamanian enforcement.

So far as lack of assets is concerned, there was evidence that, until recently Milco had very considerable assets. Whether they have indeed gone elsewhere and how and why they have disappeared will be a matter of some interest to the plaintiffs if they become judgment creditors of Milco, and I do not think that any alleged and unproved lack of assets should be regarded as a bar to the making of the order.

H So far as enforcement is concerned, I have already indicated that the ordinary sanction of being debarred from defending should suffice, but in any event I think that it is a mistake to spend time considering whether English orders and judgments can be enforced against

Panamanian companies in Panama. Whilst that is not perhaps the last forum to be considered in the context of such enforcement, it is certainly not the first. If in due time the plaintiffs are concerned to enforce a judgment against Milco, they will be resorting to the jurisdiction where its assets, if any, happen to be.

In the event the Vice-Chancellor refused to make any order against Milco, but made an order against C.M.I. calling for the disclosure of assets of its subsidiary Dumaine and subsidiaries of that subsidiary, which includes Milco.

For my part, for the reasons which I have given, I would make no distinction between C.M.I. and Milco in relation to the grant of a *Mareva* injunction.

The impact of international law

The third requirement examined by Sir Nicolas Browne-Wilkinson V.-C. was that the *Mareva* injunction, and indeed any other order of the court, should not conflict with the ordinary principles of international law. This has two aspects. The first is the nature or content of the order itself. The second is its effect upon third parties.

(1) The nature and content of the order

Considerations of comity require the courts of this country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries. For present purposes it suffices to refer to article 16 of the Convention set out in the Schedule to the Civil Jurisdiction and Judgments Act 1982, under the heading of "Exclusive Jurisdiction," as indicating the scope of this impediment.

A *Mareva* injunction operates solely in personam and does not normally offend this principle in any way. I will revert to this aspect when considering the appointment of a receiver.

(2) The effect on third parties

Here there is a real problem. Court orders only bind those to whom they are addressed. However, it is a serious contempt of court, punishable as such, for anyone to interfere with or impede the administration of justice. This occurs if someone, knowing of the terms of the court order, assists in the breach of that order by the person to whom it is addressed. All this is common sense and works well so long as the "aider and abettor" is wholly within the jurisdiction of the court or wholly outside it. If he is wholly within the jurisdiction of the court there is no problem whatsoever. If he is wholly outside the jurisdiction of the court, he is either not to be regarded as being in contempt or it would involve an excess of jurisdiction to seek to punish him for that contempt. Unfortunately, juridical persons, notably banks, operate across frontiers. A foreign bank may have a branch within the jurisdiction and so be subject to the English courts. An English bank may have branches abroad and be asked by a defendant to take action at such a branch which will constitute a breach by the defendant of the court's order. Is action by the foreign bank to be regarded as contempt,

A although it would not be so regarded but for the probably irrelevant fact that it happens to have an English branch? Is action by the foreign branch of an English bank to be regarded as contempt, when other banks in the area are free to comply with the defendant's instructions?

All this was considered in the *Babanaft* appeal [1990] Ch. 13 and gave rise to what is known as the "*Babanaft* proviso" which was included in the order made by the Vice-Chancellor. This is not in fact the proviso B adopted by the Court of Appeal in the *Babanaft* case itself, but was its preferred solution. As applied by the Vice-Chancellor to the circumstances of the application before him, it read:

> "(a) No person other than Rea Bros. Plc., Walsa Nominees Ltd. [C.M.I.] and any officer and any agent appointed by power of attorney of [C.M.I.] and any individual resident in England and C Wales who has notice of this paragraph shall as regards acts done or to be done outside England and Wales be affected by the terms of this paragraph or concerned to inquire whether any instruction given by or on behalf of [C.M.I.] or anyone else, whether acting on behalf of [C.M.I.] or otherwise, is or may be a breach of this paragraph save to the extent that this paragraph is declared D enforceable by or is otherwise enforced by an order of a court outside England and Wales and then only within the jurisdiction of that other court; . . ."

The express reason for including such a proviso was that *Mareva* injunctions "have an in rem effect on third parties" and that "*Mareva* injunctions have a direct effect on third parties who are notified of them E and hold assets comprised in the order:" *per* Kerr L.J. in the *Babanaft* case, at p. 25C–E. I know what was meant, but I am not sure that it is possible to have an "in rem effect" upon persons whether natural or juridical and a *Mareva* injunction does not have any in rem effect on the assets themselves or the defendant's title to them. Nor does such an injunction have a *direct* effect on third parties. The injunction (a) restrains those to whom it is directed from exercising what would otherwise be F their rights and (b) indirectly affects the rights of some, but not all, third parties to give effect to instructions from those directly bound by the order to do or concur in the doing of acts which are prohibited by the order. Whether any particular third party is indirectly affected, depends upon whether that person is subject to the jurisdiction of the English courts.

G I have no doubt of the practical need for some proviso, because in its absence banks operating abroad do not know where they stand and foreign banks without any branch in England who are thus outside the jurisdiction of the English courts may take, and have indeed taken, offence at being, as they see it, "ordered about" by the English courts. All this is recorded in the judgment of Kerr L.J. in the *Babanaft* case. However I am not sure that the *Babanaft* proviso is the right answer to H this dilemma.

The first objection is that it treats natural persons differently from juridical persons. Why should an English merchant bank which is a partnership, if such there still be, and carries on business abroad as well

as in this country be treated differently from a company, yet the proviso does not apply to "any individual resident in England."

The second objection is that it places an English corporate bank in a very difficult position. It may know of the injunction and wish to support the court in its efforts to prevent the defendant from frustrating the due course of justice, but the proviso deprives it of the one justification which it would otherwise have for refusing to comply with his instructions.

The third objection I record without expressing any view on its validity. It is that an order which includes this proviso has ex facie no extraterritorial effect and so is not of a character enabling it to be recognised under the European Judgments Convention and enforced abroad thereunder. In other words, the proviso has a circular effect. This is apparently being argued in the Luxembourg Court of Appeal following an order for the recognition and enforcement of the Vice-Chancellor's order by the Luxembourg court of first instance.

What should be done? I should prefer a proviso on the following lines:

> "Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."

This seems to me to meet any charge that the court is seeking to exercise an exorbitant jurisdiction, to be even handed as between natural and juridical persons and to avoid any argument based upon circularity.

The receivership

By an order made on 7 November 1988 as amended by a further order made on 11 November, the Vice-Chancellor appointed a receiver of the assets of C.M.I. and ordered the two individual defendants and C.M.I. to do all in their power to vest these assets in the receiver. This order was subject to a *Babanaft* proviso covering the position of third parties and to a special proviso that no steps should be taken to enforce the vesting of the assets until after the courts of Luxembourg should have declared his order enforceable or otherwise enforced it. Finally the receiver was instructed to allow C.M.I. to defend this action independently of him.

Extraterritoriality

Sir Nicolas Browne-Wilkinson V.-C. posed the question of whether it was right for the court to appoint a receiver of assets outside the

jurisdiction belonging to a company which had no residence in this country. He answered it by saying:

> "I have grave doubts whether, in the absence of proper evidence of Luxembourg law, I would have been prepared to appoint a receiver. It seems to me that the court should not appoint receivers over non-residents in relation to assets which are not within the jurisdiction of this court, unless satisfied that the local court either of residence or of the situation of the assets will act in aid of the English court in enforcing it. That is why the evidence of Luxembourg law is, to my mind, important in this case.
>
> "The evidence of Luxembourg law is not in any way full at this stage but, broadly, it appears to be this. Under the 1968 European Judgments Convention which is incorporated in English law in the Civil Jurisdiction and Judgments Act 1982, article 24 provides under the rubric 'Provisional, including protective, measures' as follows: 'Application may be made to the courts of a contracting state for such provisional, including protective, measures as may be available under the law of that state, even if, under this Convention, the courts of another contracting state have jurisdiction as to the substance of the matter.' Under article 24, therefore, it is proper for this court to make protective orders of the kind such as in *Mareva* relief or in aid of *Mareva* relief, which can be enforced under the Convention in the other Convention countries including Luxembourg. The evidence before me suggests that the Luxembourg court will probably enforce any order that I make for the appointment of a receiver. The exact working out of such order and the manner in which the effect of the English order is reproduced under Luxembourg law may give rise to trouble. But the basic position, as I understand the evidence before me, is that if the order properly falls within article 24 (as it does), the Luxembourg court will enforce it.
>
> "I am not seeking by this order in any way to make an order encroaching on the jurisdiction of the Luxembourg court. I will require the insertion in the order of a proviso modelled on the proviso in the *Babanaft* case . . .
>
> "Accordingly, the order I propose to make today will not be directly enforceable within Luxembourg save to the extent that the Luxembourg court itself thinks it proper so to do in a case falling within article 24."

I think that there may have been some confusion between the objects and effects of article 24 on the one hand and articles 25 et seq. on the other.

The Convention in no way affects the powers of the courts of state A which is properly seised of the substance of the dispute. However, it provides for the courts of another contracting state, state B, to assist in two quite different ways. First, in articles 25 et seq. it provides a code for the recognition and enforcement of the orders of the courts of state A by the courts of state B. Second, in article 24, it authorises the courts of state B to entertain a direct application for protective orders in

support of the primary proceedings before the courts of state A. In the instant case the Vice-Chancellor seems, rightly as events have shown, to have contemplated that the Luxembourg courts would be invited to recognise and enforce his orders, i.e., would act under articles 25 et seq. and not under article 24.

In this situation I do not understand why the order that the assets vest in the receiver should only take effect if and when the order was recognised by the Luxembourg courts. True it is that C.M.I. is a Luxembourg company, but it is a party to the action and can properly be ordered to deal with its assets in accordance with the orders of this court, regardless of whether the order is recognised and enforced in Luxembourg. The only effect of non-recognition would be to remove one of the potential sanctions for disobedience.

C.M.I.

I would affirm the orders of the Vice-Chancellor in relation to the receivership of the assets of C.M.I., subject only to (a) amending the *Babanaft* proviso in the terms which I have already indicated and (b) deleting the proviso that the order requiring C.M.I. and the two individual defendants to vest the assets in the receiver should only take effect if the order was recognised by the Luxembourg courts.

Milco

Panama is not a party to the European Judgments Convention or to any agreement to which effect would be given under the Foreign Judgments (Reciprocal Enforcement) Act 1933. There would therefore be problems in enforcing the orders of the English courts in Panama. However, I do not think that this should be regarded as an absolute bar to the appointment of a receiver of its assets. What really matters is the extent to which the receiver could effectively carry out his task, whatever that might be. In the instant case it would be to preserve any assets of Milco. He would be assisted by the sanction that, absent co-operation, Milco would not be allowed to defend the action. He would also be able to make use of the European Judgments Convention if, as seems not unlikely, any assets of Milco were situated in countries which were parties to that Convention. In the circumstances I see no reason why Milco should be treated differently from C.M.I.

Disclosure of assets

Once it is decided that a receiver should be appointed of all Milco's assets, it follows that Milco should be required to reveal the nature, value and whereabouts of those assets. It is not therefore necessary to consider whether it would be right to order such disclosure if no other relief were to be granted against Milco.

Conclusion

I would vary the orders in relation to C.M.I. by deleting the proviso in the *Mareva* injunction (order of 4 November) and the proviso in

paragraph (2) of the receivership order (order of 7 November) substituting in each case the following proviso:

> "Provided that, in so far as this order purports to have any effect outside England and Wales, no person shall be affected by it or concerned with the terms of it until it shall have been declared enforceable or shall have been recognised or registered or enforced by a foreign court (and then it shall only affect such person to the extent of such declaration or recognition or registration or enforcement) unless that person is: (a) a person to whom this order is addressed or an officer or an agent appointed by power of attorney of such a person, or (b) a person who is subject to the jurisdiction of this court and who; (i) has been given written notice of this order at his or its residence or place of business within the jurisdiction; and (ii) is able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order."

I would make orders in relation to Milco in the same terms mutatis mutandis as those in relation to C.M.I.

NEILL L.J. I have had the advantage of reading in draft the judgment of Lord Donaldson of Lymington M.R. I agree with it and with the orders which Lord Donaldson proposes. Nevertheless I think it right to deal with some of the issues which arise in this appeal in my own words. In particular, I intend to consider the questions whether the court has power to grant a *Mareva* injunction in respect of assets overseas or in cases where the defendant has no assets within the jurisdiction.

The Mareva injunction

By his order dated 4 November 1988 Sir Nicolas Browne-Wilkinson V.-C. granted an injunction against C.M.I.:

> "from disposing of or transferring charging or diminishing or in any way howsoever dealing with any of its assets wheresoever the same might be situate save in so far as the value of such assets exceeds the sum of £25m."

C.M.I. has appealed against this order. It was argued in support of the appeal (a) that the court was precluded by binding authority from granting a *Mareva* injunction against a foreign defendant who had no assets within the jurisdiction; and (b) that even if the court had such jurisdiction in an exceptional case, the judge erred in principle in granting an injunction in the present case.

In order to consider these arguments it is necessary to examine the history of the *Mareva* jurisdiction and to try to discover the basis on which it is founded.

Before the decisions of the Court of Appeal in 1975 in *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 W.L.R. 1093 and in *Mareva Compania Naviera S.A. v. International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 it was generally thought that any order preventing a defendant from

dealing freely with his assets would infringe the principle recognised by the Court of Appeal in *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1.

Indeed in the *Mareva* case [1975] 2 Lloyd's Rep. 509, which came before the Court of Appeal ex parte, Roskill L.J., at p. 511, drew attention to the fact that in the Commercial Court an injunction of the kind sought had from time to time been asked for but had been consistently refused.

In *Lister & Co. v. Stubbs,* 45 Ch.D. 1 the defendant was employed by the plaintiffs to buy materials on their behalf. It was alleged that by a corrupt bargain Stubbs had obtained commissions or bribes from a firm who supplied goods to the plaintiffs and that he had used the money in purchasing houses and property and in making deposits in banks. Before the judge the plaintiffs sought an interlocutory injunction to restrain Stubbs from dealing with the real estate upon which part of the money had been spent and an order directing him to bring the other investments and the cash into court. The judge rejected the argument that the plaintiffs could follow the money as trust money and refused any relief. The plaintiffs appealed.

It seems clear, however, that in the Court of Appeal the plaintiffs' argument was to the effect that, if the money could not be followed as trust money, at any rate the money in cash, or in investments which could be so dealt with, should be paid or brought into court. This argument was rejected. Cotton L.J. pointed out that it was not a case where payment in was asked for as a term of the grant of leave to defend under Order 14. He said, at p. 13:

> "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree."

In the light of the argument advanced in the Court of Appeal in *Lister & Co. v. Stubbs* it can be said that the *Mareva* cases are distinguishable because a *Mareva* injunction does not constitute the plaintiff a secured creditor. This may be a valid point of distinction as far as *Lister & Co. v. Stubbs* itself is concerned, but it seems to me that, in order to determine how far the *Mareva* decision represented a departure from the pre-1975 practice, it is helpful to look shortly at some of the other earlier authorities.

These earlier authorities were considered by the Court of Appeal when the new phenomenon of the *Mareva* injunction was examined inter partes in *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia Intervening)* [1978] Q.B. 644. Lord Denning M.R., at p. 657, drew attention to the old process of foreign attachment, which had fallen into desuetude in England though it had survived in the United States: *Ownbey v. Morgan* (1921) 256 U.S. 94. Lord Denning stated what he believed to be the practice at that time relating to defendants who were within the jurisdiction and who had assets here. He said, at p. 659:

A "So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well-established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so."

Lord Denning then referred to earlier dicta. It is sufficient to take B three examples. (a) In *Robinson v. Pickering* (1881) 16 Ch.D. 660 James L.J. said in the course of argument, at p. 661: "You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property." (b) In *Newton v. Newton* (1885) 11 P.D. 11, 13 Sir James Hannen P. said: "it is not competent for a court, merely quia timet, to restrain a respondent from dealing with his property." (c) In *Jagger v. Jagger* [1926] P. 93, 102 Scrutton L.J. said: "I am not aware of C any statutory or other power in the court to restrain a person from dealing with his property . . ."

Pausing there, it seems to me to be clear that 30 years ago an injunction on the lines of a *Mareva* injunction would not have been available in any division of the High Court.

In 1973, however, the court was given a statutory power to grant D injunctions to stop transactions intended to prevent or reduce financial relief in matrimonial proceedings.

Section 37(2) of the Matrimonial Causes Act 1973 is in these terms:

"Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—(*a*) if it is satisfied that the other party to the E proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim; . . ."

It is not necessary for the purpose of the present judgment to make F any further detailed reference to the Act of 1973. It may be observed, however, that in *Hamlin v. Hamlin* [1986] Fam. 11 the Court of Appeal held that the court had power under section 37(2) of the Act of 1973 to restrain the respondent from disposing of a house in Spain.

The early *Mareva* injunctions had three limiting characteristics: (a) they were only granted against persons resident outside the jurisdiction; (b) they were only granted against persons who had G property within the jurisdiction; and (c) they were only granted to restrain the removal of property from the jurisdiction. In order to obtain an injunction all these elements had to be shown to be present.

In the course of time a number of developments took place. I should refer to some of these.

In *Chartered Bank v. Daklouche* [1980] 1 W.L.R. 107, and in other cases decided at about the same time, it was held that *Mareva* injunctions H could be granted whether the defendant was resident inside or outside the jurisdiction and whatever his domicile or nationality might be.

Next, in *Prince Abdul Rahman bin Turki al Sudairy v. Abu-Taha* [1980] 1 W.L.R. 1268, Lord Denning M.R. expressed the opinion

obiter, at p. 1273, that a *Mareva* injunction could be obtained if the plaintiff established that there was a danger that the defendant would dispose of his assets within the jurisdiction. This dictum of Lord Denning was doubted by some other members of the Court of Appeal in *Faith Panton Property Plan Ltd. v. Hodgetts* [1981] 1 W.L.R. 927 and in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923. But later authorities, including *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. und Co. K.G.* [1983] 1 W.L.R. 1412, have clearly established that a *Mareva* injunction may be granted if it is shown that there is a risk that the defendant may dispose of his assets within the jurisdiction.

It is to be noted, however, that in reaching this conclusion the courts have placed some reliance on the wording of section 37(3) of the Supreme Court Act 1981. This subsection provides:

> "The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

Finally, in the summer of 1988, the previous practice in regard to *Mareva* injunctions was extended in three cases which reached the Court of Appeal by the grant of an injunction relating to the assets of the defendant wherever they might be situated. At this stage it is sufficient to refer to them as the *Babanaft* case [1990] Ch. 13, the *Duvalier* case [1990] Q.B. 202 and *Derby v. Weldon (No. 1)* [1990] Ch. 48.

In support of the present appeal it was submitted: (a) that the world-wide injunction granted in the *Babanaft* case could be explained and justified on the basis that it was granted post-judgment by which time the defendants had become judgment debtors; (b) that the *Duvalier* case and *Derby v. Weldon (No. 1)*, which were pre-judgment cases, involved an impermissible extension of the *Mareva* jurisdiction and of the recognised practice which had become established over the past 13 years; (c) that in any event the injunction which was granted in the present case could not be supported because it involved the grant of an injunction against a defendant who had no assets within the jurisdiction and was therefore contrary to the decision of the Court of Appeal in *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256.

In the course of his careful and persuasive argument counsel referred us to a number of the earlier authorities, and to the words of Sir George Jessel M.R. in *Beddow v. Beddow* (1878) 9 Ch.D. 89, 93 where, having drawn attention to the width of the discretion given by section 25(8) of the Supreme Court of Judicature Act 1873 (now section 37(1) of the Supreme Court Act 1981), he emphasised that the discretion had to be exercised "according to sufficient legal reasons or on settled legal principles."

He also referred us to the speech of Lord Brandon of Oakbrook in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, 39–40 where he set out the basic

principles governing the grant of injunctions under the statutory powers contained in section 37 of the Supreme Court Act 1981.

Counsel placed particular emphasis on the following passages in Lord Brandon's speech, where he said, at p. 40:

> "The second basic principle is that, although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years. The nature of the limitations to which the power is subject has been considered in a number of recent cases in your Lordships' House: . . . The effect of these authorities, so far as material to the present case, can be summarised by saying that the power of the High Court to grant injunctions is, subject to two exceptions to which I shall refer shortly, limited to two situations. Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable. . . .
>
> "The power of the court to grant *Mareva* injunctions may also, before it was statutorily recognised, have been a further exception to the second basic principle stated above. That power, however, has now been expressly recognised by section 37(3) of the Supreme Court Act 1981, and again the present case is in no way concerned with it."

In addition, counsel drew our attention to the decision of the Court of Appeal in *Ashtiani v. Kashi* [1987] Q.B. 888, in which it was recognised that it was the established practice of the courts not to grant *Mareva* injunctions over assets which were situated outside the jurisdiction.

I do not find it necessary for the purpose of the present appeal to come to a final conclusion whether the decision in the *Intraco* case [1981] 2 Lloyd's Rep. 256 can be relied upon as authority for the proposition that a *Mareva* injunction can only be granted where there is clear evidence that there are assets within the jurisdiction. The matter is academic because, as Lord Donaldson M.R. has already pointed out, in *MBPXL Corporation v. Intercontinental Banking Corporation Ltd.* (unreported), 28 August 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, the Court of Appeal held in terms that a *Mareva* injunction could only be granted if there was evidence that there were movable assets in the possession of the defendant within the jurisdiction of the court.

In these circumstances it is necessary to consider two questions: (a) whether the court is prevented by binding authority from granting a *Mareva* injunction in the circumstances of the present case and on a worldwide basis; (b) whether the grant of such an injunction can be reconciled with the basic principles enunciated by Lord Brandon in the *South Carolina* case [1987] A.C. 24.

I have come to the conclusion that the court is entitled to grant an injunction in the circumstances of the present case against C.M.I. and to grant such an injunction on a worldwide basis. I can state the reasons for my conclusion as follows.

1. One starts with the wording of section 37(1) of the Supreme Court Act 1981, which provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

2. In *Blunt v. Blunt* [1943] A.C. 517, 525 Viscount Simon L.C. adopted the view of the Court of Appeal in *Wickins v. Wickins* [1918] P. 265, 272:

> "where Parliament has invested the court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised . . ."

This principle was applied by the Court of Appeal in *Ward v. James* [1966] 1 Q.B. 273, where Lord Denning M.R. gave this guidance as to the way in which a discretion is to be exercised, at p. 295:

> "the courts can lay down the considerations which should be borne in mind in exercising the discretion . . . From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process."

The principle was further considered by the Court of Appeal in the context of *Mareva* injunctions in the *Pertambangan* case [1978] Q.B. 644.

3. As I ventured to suggest in the course of my judgment in the *Babanaft* case [1990] Ch. 13, 37F the practice as to the grant of *Mareva* injunctions is still in the course of development. Having regard to the changes in the practice which have already taken place since 1975 I see no good reason for saying that a practice which has so recently come into existence has already become ossified. Circumstances change. It is to be remembered that exchange control was withdrawn in the United Kingdom as recently as 1979. The transfer of funds from one jurisdiction to another grows ever more speedy and the methods of transfer more sophisticated.

4. The true basis for the grant of a *Mareva* injunction is that which was stated in the *Mareva* case itself [1975] 2 Lloyd's Rep. 509, 510 by Lord Denning M.R.:

> "If it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

To the same effect were the words used by Kerr L.J. in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. und Co. K.G.* [1983] 1 W.L.R. 1412, 1422:

> "In our view the test is whether, on the assumption that the plaintiffs have shown at least 'a good arguable case,' the court concludes, on the whole of the evidence then before it, that the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied."

5. It is to be noted that in the *Mareva* case [1975] 2 Lloyd's Rep. 509, 510 Lord Denning M.R. referred to a passage in *Halsbury's Laws of England*, 3rd ed., vol. 21 (1957), p. 348, para. 729, to the effect that

> "whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right."

The plaintiff has to show a good arguable case that money is due to him and that he needs the protection of an injunction to ensure that any judgment which he obtains from the court is not rendered nugatory by the actions of the defendant. Lord Denning applied the principle which he had cited from *Halsbury's Laws of England* to the case of a creditor who was seeking judgment for payment of a debt and who wanted to protect the right to enforce that judgment. On this analysis it seems to me possible to fit the grant of *Mareva* injunctions within the first of the two situations considered by Lord Brandon in his examination of the basic principles in the *South Carolina* case [1987] A.C. 24. The injunction is an ancillary power which is required for the enforcement of the plaintiff's right.

6. It seems to me that the time has come to state unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court. The jurisdiction to grant such injunctions is one which the court requires and it seems to me that it is consistent with the wide words of section 37(1) of the Act of 1981.

In matters of this kind it is essential that the court should adapt the guidelines for the exercise of a discretion to meet changing circumstances and new conditions provided always the court does not exceed the jurisdiction which is conferred on it by Parliament or by subordinate legislation.

It remains true of course that the jurisdiction must be exercised with care.

The legitimate interests of the defendant must be respected and he must be allowed to continue his normal business and to have funds to meet his reasonable living expenses. I anticipate that orders against a defendant's foreign assets or in cases where the defendant has no assets within the jurisdiction will be unusual. In such cases it will be necessary

to safeguard the position of third parties outside this country. But I see no reason in principle to reject the existence of the jurisdiction to grant a *Mareva* injunction in these cases or why fetters should be placed on the exercise of the wide discretion given by statute if the purpose of the injunction is to enable the court to protect the effectiveness of its own procedures. Moreover, it seems to me that this approach is consistent with the policy underlying section 37(2)(*a*) of the Matrimonial Causes Act 1973 which is designed to protect the rights of those seeking financial relief in matrimonial proceedings from being defeated by deliberate transfers of property by the other party.

I can turn now to consider some of the other matters which have been argued in the course of this appeal.

The Babanaft proviso

I have already drawn attention to the fact that, where an injunction is granted which affects the transfer or other disposition of property which is situated outside the jurisdiction of the court, steps must be taken to safeguard the position of third parties who are themselves outside the jurisdiction. This question arose for consideration in the *Babanaft* case and led to the incorporation in the order in that case of a proviso designed to protect overseas banks and other persons over whom the court was not seeking to assert any direct control.

I have now been able to read that part of the judgment of Lord Donaldson M.R. in which he deals in some detail with this aspect of the case. I agree with the revised form of proviso which he suggests. It may be that in some future case a further refinement may be developed, but at this stage is seems to me that the wording proposed by Lord Donaldson M.R. gives the right degree of protection to the third parties whom it is intended to assist.

The appointment of a receiver

Section 37(1) of the Act of 1981 gives the High Court a similar jurisdiction to appoint a receiver to that conferred for the grant of an injunction. The remedies are of course separate remedies and in some cases it may be appropriate to grant only one of these remedies rather than both. I am quite satisfied, however, that in this case the judge was right to appoint a receiver of the assets of C.M.I. as well as granting an injunction.

I agree with Lord Donaldson M.R that the precise form of order should be modified in the manner which he proposes.

The discovery of assets

It may be open to argument in some future case that in certain circumstances a discovery order can be made with a wider ambit than the *Mareva* injunction to which it is ancillary. As at present advised, however, I remain of the opinion which I expressed in *Ashtiani v. Kashi* [1987] Q.B. 888, 905 that the discovery order, if made at all, should not go further than the injunction. The basis of the jurisdiction to make an

A order for discovery was examined by this court in *A. J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923.

It was there held by the majority of the court that the order for discovery, being ancillary to the *Mareva* injunction, should not go beyond the ambit of the injunction. I do not find it necessary in this case to consider further whether, and, if so, in what circumstances, there may be exceptions to this general rule. I would only urge that in this field the B court should scrutinise very carefully any submission that its powers are circumscribed more narrowly than the justice of the case demands.

In the course of this appeal some reference was made to the fact that assets, like the Cheshire cat, may disappear unexpectedly. It is also to be remembered that modern technology and the ingenuity of its beneficiaries may enable assets to depart at a speed which can make any C feline powers of evanescence appear to be sluggish by comparison.

To return to the facts of the present case.

I am satisfied that Sir Nicolas Browne-Wilkinson V.-C. was fully justified in making the order for discovery against C.M.I. which he made in this case.

The relevance of enforceability

D It was argued on behalf of C.M.I. that one of the strongest reasons against the grant of worldwide *Mareva* injunctions was the difficulty of enforcement.

We were referred to a number of authorities including *Locabail International Finance Ltd. v. Agroexport* [1986] 1 W.L.R. 657 in support of the proposition that it is a general principle of the law relating to E injunctions not to make orders which cannot be enforced.

This aspect of the matter has, however, already been dealt with by Lord Donaldson M.R. in the section of his judgment headed "Enforceability of the injunctions."

I agree with his analysis of the position. I also agree that there is no adequate reason to make any distinction between C.M.I. and Milco. The same relief should be granted against both companies.

F

The relevance of the European Judgments Convention

The main action is proceeding in this country. We are therefore not concerned with the powers referred to in article 24 which enable the courts in one Convention country to make interlocutory orders in aid of actions which are proceeding in another Convention country.

G At a later stage of the action, however, it may be necessary to look further at the way the present orders are enforced by registration or otherwise both in Convention countries and elsewhere. It is to be remembered that a *Mareva* injunction is a remedy which takes effect in personam and may have characteristics which are unfamiliar in some jurisdictions overseas.

H *Conclusion*

I too would dismiss the appeal by C.M.I. and allow the cross-appeal by the plaintiffs against Milco on the terms proposed by Lord Donaldson M.R.

BUTLER-SLOSS L.J. I agree with the judgments of Lord Donaldson of Lymington M.R. and Neill L.J.

I would venture to summarise the present position. The jurisdiction to grant *Mareva* injunctions is now to be found in section 37(1) of the Supreme Court Act 1981. The practice has considerably developed since Roskill L.J. said in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, 511:

> "Indeed it is right to say that, as far as my own experience in the Commercial Court is concerned, an injunction in this form has in the past from time to time been applied for but has been consistently refused."

It is adapting to meet changing circumstances and the increased mobility of assets and interchangeability of international companies. The developing practice was referred to by Kerr L.J. in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, 27c and by Nicholls L.J. in *Derby v. Weldon (No. 1)* [1990] Ch. 48. Neill L.J. in the *Babanaft* case [1990] Ch. 13, 37F said:

> "We are concerned in this appeal with a branch of the law which is in a stage of development and where the court will be asked to exercise its discretion to grant injunctive relief in many differing sets of circumstances. It seems to me therefore that any guidelines which are laid down by this court should be expressed in general terms."

The *Mareva* injunction is an equitable remedy which operates in personam, in circumstances in which the plaintiffs show a good arguable case and that it is likely that the defendants will dissipate their assets so as not to be available to satisfy a judgment against them. It may be granted either pre-judgment or post-judgment. If there are insufficient or no assets within the jurisdiction the relief may be granted against assets held outside the jurisdiction, either within the Convention countries or worldwide. It has been granted to support an action brought in another Convention country: *Republic of Haiti v. Duvalier* [1990] Q.B. 202. In analogous proceedings for an injunction under the provisions of section 37(2)(*a*) of the Matrimonial Causes Act 1973 relief has been granted to restrain a husband from disposing of real property owned by him in Spain: *Hamlin v. Hamlin* [1986] Fam. 11.

It is a matter of discretion for the judge as to whether in the circumstances it appears to be just and convenient to grant the relief sought. The court may be more willing to restrain a defendant from dealing with his assets after than before judgment has been given against him. It is only in an unusual case that the court will make a worldwide, pre-judgment *Mareva* order. Factors such as the impossibility of compliance with or enforcement of the equitable remedy are relevant considerations in the exercise of discretion.

To assist the effectiveness of the pre-judgment *Mareva* an order for disclosure of assets may within the ambit of the injunction be granted. An order for a receiver may either be made independently under section 37(1) or in support of the *Mareva.*

The grant of such remedies against defendants must not be oppressive in its outcome. Specific terms or undertakings should therefore generally

A be part of any worldwide, pre-judgment *Mareva*. The conditions imposed in the wording of the order must balance on the one side the need to freeze the assets in question and gain the information required against restrictions to protect the defendants, inter alia, from unjustified results in other jurisdictions, a misuse of the information gained or an unwarranted invasion of privacy and to permit them to have funds to continue business and to meet reasonable living expenses. They should B also contain qualifications to safeguard the position of third parties under the English order, leaving it open for orders to be sought in the courts of the country asked to enforce the English order. I would therefore respectfully enforse the form of order set out in the judgment of Lord Donaldson M.R.

Turning to this appeal, in *Derby v. Weldon (No. 1)* [1990] Ch. 48 the C Court of Appeal were satisfied that the first and second defendants were "well used to moving funds worldwide." May L.J. said in respect of the first two defendants, at p. 54G: "for my part I think that this case also is one which cries out for a worldwide *Mareva* injunction even though it is being sought before judgment."

Lord Donaldson M.R. has set out in his judgment the concessions of the appellants in their skeleton argument on behalf of C.M.I. (the D holding company) which include that the first and second defendants "are to be assumed to exercise a high degree of control over C.M.I." and the likelihood of dissipation of the assets of C.M.I. In the circumstances of this case the relief granted was entirely justified. I would dismiss the appeal.

In considering the cross-appeal in respect of Milco, this company is E to be deemed a creature of the first and second defendants against whom *Mareva* injunctions have been granted outside the jurisdiction. It is a Panamanian company with no assets within the jurisdiction. If, as I consider it is, it is proper to grant a *Mareva* injunction outside the jurisdiction against the holding company, I cannot see in principle why such an order should not be made against the subsidiary. It had at one time in the recent past very substantial assets. We are now told it has no F assets anywhere. The companies of the group have now been restructured so that Milco is now a subsidiary of Dumaine, itself a subsidiary of C.M.I. The ability of C.M.I. as the holding company to control Milco under the existing order is therefore at one remove. There are separate claims in the pleadings against Milco in addition to joint and several claims with the other three defendants.

G Sir Nicolas Browne-Wilkinson V.-C. declined to make an order against Milco on the ground that

> "there is no evidence before me that either a *Mareva* order or any eventual judgment in this action can be enforced against Milco in Panama even if it has any assets. On that basis, I decline to make an order directly against Milco."

H I, for my part, would prefer to turn the proposition round. Although Milco is registered in Panama there is no evidence of assets held in Panama. On the contrary, the assets at one time held by Milco were likely to have been held elsewhere. If there are assets there is at present

no evidence that the order would be unenforceable and the granting of an order for a receiver may greatly assist in understanding the position of Milco. The Vice-Chancellor may have been unduly pessimistic as to the effect of an order which subject to unenforceability it appears he would have been prepared to make. To make or refuse to make the order against Milco is a matter of discretion, not of jurisdiction. I would allow the cross-appeal and grant the relief sought in the terms set out by Lord Donaldson M.R.

Appeal dismissed.
Cross-appeal allowed.
Leave to appeal refused.

Solicitors: Theodore Goddard; Lovell White Durrant; Cameron Markby.

R. C. W.

[COURT OF APPEAL]

DUBAI BANK LTD. v. GALADARI AND OTHERS

1989 Aug. 7

Dillon and Farquharson L.J. and Sir John Megaw

Practice—Discovery—Privilege—Professional privilege—Affidavit sworn in connection with dispute between defendants and person not party to action brought by plaintiffs—Defendants seeking legal advice in connection with that dispute—Copy of affidavit passed to defendants' solicitors—No evidence whether copy passed to solicitors made by defendants—Whether affidavit privileged in action between plaintiffs and defendants

Pursuant to an order for discovery and inspection in an action between the plaintiff and the defendants, an affidavit of M. relating to a dispute between M. and the defendants was disclosed. In that affidavit, M. made reference to an earlier affidavit which had been sworn in connection with the dispute between M. and the defendants. The defendants sought legal advice in connection with the dispute, for which purpose they supplied their solicitors with a copy of this earlier affidavit. There was no evidence to indicate whether the copy of that affidavit actually sent to the defendants' solicitors was the copy of the affidavit given by M. to the defendants or another copy

Lunt -v- Liverpool City Justices (unreported) [1991] C.A Transcript No. 158

George Lunt v Liverpool City Justices

Mixed Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
5 March 1991

In the Supreme Court of Judicature

Court of Appeal (Civil Division)

On Appeal from the High Court of Justice

Queen's Bench Division

Crown Court List

1991 WL 11666777

Lord Justice Bingham Lord Justice Butler-Sloss and Lord Justice Mann

Tuesday, 5th March 1991

Representation

MR. PATRICK O'CONNOR (instructed by Messrs E.D. Walters & Co., Liverpool) appeared on behalf of the Appellant (Plaintiff).
MR. MICHAEL KENT (instructed by The Treasury Solicitor) appeared on behalf of the Respondents (Defendants).

JUDGMENT (Revised)

LORD JUSTICE BINGHAM:

This is an appeal by the plaintiff against an order of Master Warren made on 30th November 1989 when he assessed the damages for wrongful imprisonment to which Mr. Lunt was entitled in the sum of £13,500 plus interest.

The facts giving rise to the appeal can be quite briefly summarised and they are these. In July 1981 Mr. Lunt and his wife moved into a house at 2 Grove Park Avenue, West Derby, Liverpool. A few months later, in November 1981, that house was the subject of an aggravated burglary which caused Mr. Lunt and his wife to move to another address. Early in 1982 they were advised by the City Treasurer's Department in Liverpool to remove everything from 2 Grove Park Avenue, except the carpets and curtains. This Mr. Lunt did, believing that as a result of doing so he would become exempt from payment of rates. In July 1982, however, a rate demand was served on him. It is not in issue that that was a proper demand, although Mr. Lunt thought it was not and did not pay the sum claimed.

In January 1983 the rating authority applied for a distress warrant which was heard in February 1983 when it appears that it was adjourned on the ground that Mr. Lunt was not then working. On 17th February 1984 an application for a distress warrant was heard. By this time Mr. Lunt was in employment and a distress warrant was issued. The return to that warrant showed that there were insufficient chattels, and on 16th August 1984 the Liverpool justices heard an application for issue of a warrant to commit

Mr. Lunt to prison for non-payment of the rates. The outcome of that application was that no warrant was issued there and then but a term of imprisonment was fixed at 42 days. In making that decision the justices carried out a proper inquiry under section 103 of the General Rate Act 1967 and Mr. Lunt was duly notified.

Mr. Lunt was aggrieved by that decision and appealed against it. Before the appeal was heard, in February of 1985, he received notice of the hearing for a warrant for his committal to prison which was due to be heard on 12th March 1985. He wrote a letter on 1st March to the court saying that he would try to attend but might not be able to do so and he told the justices of his pending appeal. By some misfortune that letter was mislaid and was not before the justices when they considered the case on 12th March, nor did they know of Mr. Lunt's appeal although it appears that it had by then, unknown to him, been dismissed. The outcome of the hearing on 12th March was that the justices issued a warrant in Mr. Lunt's absence and without hearing anything from him. The warrant was executed on 15th October 1985 when, by arrangement with the police, Mr. Lunt surrendered to their custody at his own house. He was taken to the police station and from the police station to Walton Prison in Liverpool where he served the sentence of 42 days imprisonment from 15th October to 26th November 1985.

On release from prison Mr. Lunt applied for judicial review and, having initially been refused leave to move, was granted leave by the Court of Appeal. That application was heard on 6th December 1988 by Parker L.J. and Henry J. The court held that the justices were obliged to make an inquiry into Mr. Lunt's means on the second occasion, on 12th March 1985, as they had done on the first occasion on 16th August 1964 and that since they had failed to make such an inquiry their order of committal was made without jurisdiction, with the consequence that Mr. Lunt had been wrongly imprisoned. The Divisional Court quashed the order of imprisonment, ordered that the case should proceed as if it had been commenced by writ, and gave judgment for Mr. Lunt for damages to be assessed by a Queen's Bench Master. The hearing, as I have said, took place before Master Warren on 30th November 1989 when he assessed the damages in the sum of £13,500 that I have already mentioned.

It is right, I think, to refer to the note of Master Warren's judgment since it is criticised in some respects by Mr. O'Connor who argues this appeal on behalf of Mr. Lunt. Master Warren said this:

> "This is an assessment of damages in respect of the wrongful imprisonment of the plaintiff in Walton Prison for 42 days. It started when, by arrangement with the warrant officer he attended at a police station and was conveyed to Walton Prison. He was questioned and examined by a medical orderly, was stripped and searched and given a prison uniform. He was placed in a cell of extremely modest dimensions (3 such cells would fit into this court room) which he shared with 5 other prisoners. There were bunk beds, a table and 6 chairs, and 2 small tables. A jug and basin and a bucket were provided as the only means of sanitation.
>
> The plaintiff worked Monday to Friday and a half day on Saturday. His duties were menial duties in the ablutions – cleaning the wash-basins, urinals and lavatory pans. These were adjacent to the exercise area to which prisoners were admitted in rotation. After each rotation he carried out his cleaning duties.
>
> The plaintiff was confined to his cell apart from when he was working. On non-working days there was 1 hour of exercise. At meal times the doors were opened. A tray was taken in a queue. There was no common room and meals were eaten in the cell.
>
> As regards visits, the plaintiff enjoyed the privilege of a visit every day except at the weekend, but his wife was able to visit only 2 or 3 times per week and the plaintiff found that distressing. It was also humiliating for his wife as she was searched and questioned on each occasion and on the first occasion when she arrived the plaintiff saw that she was visibly distressed. The plaintiff testified that these experiences were embedded on his mind, although he was not permanently embittered. Nevertheless, the imprisonment was distressing and humiliating for him and he suffered loss of liberty for 6 weeks.
>
> The defendants argued that had the inquiry taken place Mr. Lunt would have been imprisoned just the same. I do not think I can on the evidence come to that conclusion. The plaintiff was only in employment from time to time. In 1981 – 1985 he had 18 months work and has not worked since. How much of his future would have been apparent one doesn't know. One can only speculate, and the evidence would

> have been that the plaintiff's future was uncertain. I can't predicate on the balance of probabilities that the justices would have come to the same conclusion.
>
> The plaintiff had to wear prison clothes. The sanitation was squalid.
>
> I have therefore come to the conclusion that the appropriate sum of damages is £13,500. That sum is not calculated by an hourly rate. It is in large part made up by the humiliation and discomfort and is not measured on a daily rate".

Mr. O'Connor on behalf of Mr. Lunt submits that the sum of £13,500 is not enough, and the short issue on the appeal is whether the award was correct, by which I mean within the appropriate bracket of awards so as not to be challengeable on appeal, or whether it is outside that bracket so as to justify this court in substituting such larger figure as it considers to be correct.

Mr. Lunt was born on 1st October 1928 and was therefore aged 57 when he was imprisoned. He is by profession an instrument engineer and it is common ground that he is of impeccable character and reputation.

Those facts lead on to the first of Mr. O'Connor's submissions, which is that the learned Master failed to give proper weight to the personal qualities of this plaintiff, in particular the fact that he was then aged 57, that he was of impeccable character and that he had never suffered any experience of custody previously. Those facts are in themselves not in dispute and it appears that the Master did not expressly allude to them although, for my part, I would not doubt that he had them in mind.

Mr. O'Connor also draws attention to Mr. Lunt's physical condition. It appears that there was some reference before the Master to the fact that Mr. Lunt was in poor health. But it appears that very little was made of that in argument before the Master and it does not seem to me to be a factor to which great weight can be given. It is, nonetheless, a consideration that the imprisonment which is here in question was of a man in later middle age whose character and reputation were of the highest and who had not previously been incarcerated at all.

Mr. O'Connor's second submission is that the Master failed to give any or any proper weight to the injury to reputation which Mr. Lunt suffered. This is, Mr. O'Connor argued, a factor which follows inevitably from liability in false imprisonment and continues until such time as the imprisonment is declared unlawful.

In support of that submission Mr. O'Connor referred us to McGregor on Damages and in particular paragraphs 16.19, 16.20 and 16.23 in two of which paragraphs reference is made to *Walter v. Alltools (1944) 61 T.L.R. 39 where, at page 40* , Lawrence L.J. said:

> "… any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false".

I do not for my part doubt that that is a correct principle of law. But, equally, it appears that on the facts of this case the damage to Mr. Lunt's reputation was of a relatively minor kind since his imprisonment was not the subject of any widespread publicity, nor was he arrested in the face of any body of the public and those to whom it was known (mainly his inner circle of relatives and friends) would appreciate that it was imprisonment that flowed not from any accusation of crime but from a non-payment

of rates. Nonetheless, Mr. O'Connor is in my judgment entitled to submit that any form of imprisonment gives rise to a stigma and that that stigma is not removed until the reputation of the imprisoned party is vindicated in an appropriate manner.

Thirdly, Mr. O'Connor submits that the learned Master failed to use any objective criteria in reaching his assessment and ignored all of the proper guidance from other judicial awards in false imprisonment cases. Thus, Mr. O'Connor says, the Master reached an award which was wholly out of proportion with other approved awards and resulted in an hourly rate for this plaintiff of about £13.50 per hour. In making this submission, Mr. O'Connor has deftly disavowed a mechanistic approach and has acknowledged that it would be quite wrong to fix an hourly or a daily rate for each period of imprisonment and he has expressly disavowed any argument that the award should be based on any rate combined with a multiplier. He has not therefore suggested that we should fix a rate and then apply it to reach a total for the appropriate period. What he has submitted is that the award which is made, while necessarily reflecting the impression of the tribunal of fact, should not be wholly subjective and should be related to that which is not in doubt, namely the period which the successful plaintiff has actually spent wrongly imprisoned. Here, he submits, Master Warren's award is out of line with such judicial awards as there are and Mr. O'Connor has not sought to rely on any awards by juries.

I refer briefly to the cases to which he has referred us. The first is *Wershof v. Commissioner of Police for the Metropolis [1978] 3 All E. R 540* . This case concerned a young solicitor of 12 days' standing who was telephoned on a Saturday afternoon to go to the family jewellers' shop where his younger brother was in dispute with the police as to whether a ring on sale in the jewellers' shop was stolen or not. The upshot of the incident was that the police officer arrested the plaintiff, taking him by a firm and temporarily painful grip and marching him out of the shop in front of the plaintiff's brother and employees and customers in the shop. He was then escorted down the road to a police car, some 30 yards away, driven to a police station and detained in a locked room for about an hour before being charged by the station sergeant and then released on bail. The sum ultimately awarded by May J. sitting at first instance was £1,000 and before reaching that figure the learned judge said:

> "… The latter [the plaintiff] was an admitted solicitor of only 12 days' standing; I have already referred to what his thoughts and feelings must have been from the time of his arrest until he was released from the police station on bail. His mental state thereafter, however, I must leave out of account; that would only be relevant had he satisfied me that there had been a malicious prosecution of him. I think that Sgt Brand used more force than was reasonably necessary in arresting the plaintiff, though not excessively so. The plaintiff was marched out of the shop in the full view of the shop assistants and customers, and down the busy road to the police car in the sight of all those there on that Saturday afternoon. In all the circumstances I do not think it was reasonably necessary to lock and bolt the plaintiff in the detention room, even for an hour or thereabouts. Finally, I must take into account the value of money today and remember that the sum which might have been a reasonable award of damages five years ago should today be perhaps twice that or more".

Mr. O'Connor contrasts that case with the present and suggests that even making allowance for the difference between the cases the award in the present case should be higher.

Secondly, Mr. O'Connor refers us to the case of *Reynolds v. Commissioner of Police for the Metropolis [1982] Crim. L.R. 600* . In that case the plaintiff was arrested in the early hours of the morning by police officers who suspected her of being concerned in offences of obtaining money by deception. She was taken by car to a police station in a journey that took two and a half hours. She was then detained until 8.p.m., and did not return home until 11 o'clock at night. The jury assessed the damages at £12,000 and the defendant appealed. According to the brief summary of the decision the Court of Appeal held, dismissing the appeal, that on the evidence before him the judge was right to conclude that there was no reasonable ground to justify the suspicion that the plaintiff had committed an arrestable offence, that the only question was whether the damages were excessive and that the incidents that occurred where such as to make her life more unpleasant than it would otherwise have been and that they constituted a serious case of false imprisonment. The court evidently held that though the damages were high they were not so high that no reasonable jury ought to have awarded them and accordingly they could not be interfered with. Mr. O'Connor

again submits that, even making all due allowances for the difference between the cases and for the fact that this was a jury decision, nonetheless the total is one that is hard to reconcile with the present.

Thirdly, he referred us to the case of Hayward v. Commissioner of Police for the Metropolis reported in The Times on 25th March 1984. In that case a respectable plaintiff who went to sell goods in the Portobello Road was arrested and kept in custody for four and a half hours until his bona fides were confirmed. The learned judge assessed the proper sum of damages at £1,750.

Fourthly, reference was made to Houghton v. Chief Constable of Greater Manchester (1987) 84 Cr.App. R. In this case the plaintiff, who had been to a fancy dress party dressed as a policeman and as part of his fancy dress had been carrying a truncheon, was arrested on suspicion of possessing an offensive weapon. He was arrested shortly after midnight and, it appears, detained for some two and a half hours. The court proceeded on the basis that a cause of action lay in wrongful arrest as well as false imprisonment, and awarded a sum of £600 plus interest.

Lastly, reference was made to a decision of this court given as recently as 23rd October 1989, Warby & Anr. v. Cascarino & Ors. heard by Lord Donaldson M.R. and Woolf and Beldam L.JJ. The brief facts there were that the two plaintiffs had been shopping in a branch of Tesco's in Harlow and were accused of shoplifting. The Master of the Rolls described the events which followed as “traumatic in the extreme” . The plaintiffs were accused by the store detective. They were taken into custody by the police and were detained from 11.40 in the morning until 5.10 in the evening when they were released. They were prosecuted but at the trial no evidence was offered and they were discharged. They then brought this action against the store detective and the store itself, claiming damages for false imprisonment, libel and slander. The case was heard before Macpherson J. and a jury over three days and at the end of the trial the jury awarded each plaintiff the sum of £500 in respect of the false imprisonment and £300 in respect of the libel and slander. A particular feature of that case was that the defendants, the store detective and the store persisted in the accusation of dishonesty throughout the trial and it was only in the Court of Appeal that that allegation was dropped. It is pertinent to refer to what the Master of the Rolls said in giving judgment:

> “In assessing the damages, we have to take full account of the trauma suffered by the plaintiffs. We have to remember that this was Christmas shopping undertaken just before Christmas. It must in many ways have been a blighted Christmas for these ladies, and those members of their family who knew about it, the following summer, and it continued thereafter in a different form in that Tesco's did not withdraw the charge until today. So they are entitled to substantial damages – greater damages, we all think, than the jury awarded. Above all, they are entitled to receive a figure to which they can turn, if anybody ever raises this charge again, and say, ‘Not only were we cleared, but we received £X damages to show that it was fully accepted that we were the victims of a charge which should never have been brought against us’ .
>
> It is extremely difficult, as has been made clear in other contexts, for judges to put themselves in the position of a jury, but we obviously have to seek to do so. It would also be quite wrong that, because we happen to have been asked in this case to substitute a figure for that which a jury would have awarded, that this figure should in any way be treated as fixing a scale of damages. If and when Parliament says that judges are to award damages, then scales may emerge, but, meanwhile, our figure should be treated by the profession as having no more significance than would the verdict of a jury.
>
> It is well known that juries are warned against looking at awards in other cases because they can only understand the significance (if any) of those awards if they know the full facts. This is particularly true where aggravated damages are involved. The facts are difficult to unearth and depend very much on subjective evaluations by particular juries. I say that by way of warning to the profession, not to the ladies. They are not concerned with any other cases.
>
> Since this case is the first time for some little while I have been asked to take the same course, I did not want the profession to think that we are moving over into establishing any sort of scale of damages.
>
> Having said that, we have to arrive at a figure: and we thought it right as a preliminary to our discussion that each of us should say what figure we had in mind. I can tell you, though it is not perhaps material, but it may be some comfort or assistance to the two ladies, that all three of us arrived at precisely the

> same figure. We discussed it further to see whether we thought that our first impressions were right and we came to the conclusion that they were.
>
> The figure which we think it right to award, which takes into account all the factors which have been urged upon us and which also takes into account the fact that, belatedly, Tesco's have acknowledged the falseness of the charge which was made against the ladies, is £7,500 to each plaintiff, not in respect of each cause of action but in respect of the two causes of action put together. Whether we are technically right in failing to break the sum down I do not pause to consider because I am quite sure that the parties are only interested in the total sum and it would unduly complicate it if we apportioned it between the two charges".

Mr. O'Connor did not, as I wish to emphasise, urge that any of these cases gave a direct lead to the sum which would be appropriate in this case, but he did urge that they gave some sort of sense as to the appropriate bracket.

In upholding the award of the learned Master, Mr. Kent acknowledged that the matter was very much one of impression. He reminded us that the award of damages in this case is compensatory only and that the case lacks any element of aggravation such as is to be found in many other cases. He furthermore pointed out, quite correctly, that Reynolds is a jury award and that the court should for that reason attach less significance than it otherwise might to the court's refusal to interfere with the award in that case. Mr. Kent suggested, as I have already accepted, that in terms of reputation the claim in this case fell towards the lowest end of the bracket and he pointed out that the plaintiff cannot in this case, unlike some of the others, have thought himself the victim of unwarranted persecution. He further suggested that the plaintiff had been vindicated by the decision of the Divisional Court and thereafter the injury to his reputation must have been cured. In summary, Mr. Kent submitted that while loss of liberty was a serious matter, nonetheless it should not attract an exaggerated award and he urged that the Master's award was certainly sustainable and, if anything, generous. He submitted that it was certainly not so obviously wrong as to entitle this court to interfere.

Despite the assistance which we have been given by reference to other authorities, we feel it important to make quite clear that this is not a field, as with the loss of sight in an eye or the loss of a finger, where very much help is given by seeing what has happened to other plaintiffs on other occasions. It is trite to observe that the facts of two cases are never the same. But, in this particular field, the differences between the facts of different cases are more than ordinarily striking. Here there was no sudden trauma such as is caused by an arrest in the middle of the night or the early morning. There was no sudden and unwarranted accusation of serious crime. There was no arrest in the face of the public, the arrest itself having taken place privately at Mr. Lunt's house and not, as the Master mistakenly stated, at the police station. Here Mr. Lunt had ample warning of the sentence to be served, the circumstances of his surrender to custody were arranged with minimum publicity, and there was no conduct on the part of any other party to the action to aggravate the injury to him. There was no malice, no wilful or deliberate abuse of power or authority or anything of that kind. Furthermore, he was, as I have said, spared the false accusation of serious crime and the damage to his reputation was limited. All those factors bring the appropriate award of damages down. On the other hand, and this is the real force of Mr. O'Connor's submission, we are dealing here with a man in later middle age, of good reputation, with no previous experience of incarceration, not in the best of health, who lost his liberty, as it has now been held unlawfully, for 42 days and who did so in circumstances of extreme unpleasantness.

It is quite clear from the facts which the learned Master summarised that Mr. Lunt suffered humiliation, distress, degradation and the sense of anxiety which would be inseparable from the experiences which he endured. We have followed the advice given by the Master of the Rolls that awards should not be treated as setting a scale or bracket and have ourselves asked what we think the appropriate award of damages in this case is, and whether the learned Master's award is within the appropriate bracket. We have unanimously come to the conclusion that the Master's award is too low and does not give Mr. Lunt appropriate compensation for what undoubtedly was, even in the circumstances that I have described, an horrific experience. We feel that the Master's award was not in the appropriate bracket and that it is in all the circumstances right that this court should substitute such figure as it considers to be right. I for my part, endeavouring to take account of all relevant circumstances and not to pay too much regard to previous awards but at the same time not to award excessive compensation, conclude that the proper award in all the circumstances is one of £25,000.

LORD JUSTICE BUTLER-SLOSS:

I agree with the judgment of Bingham L.J. and that there should be substituted a sum of £25,000.

LORD JUSTICE MANN:

I also agree.

Order: Appeal allowed, order varied, award of £25,000 damages substituted, with costs and legal aid taxation.

MR. O'CONNOR: I ask for the costs of this appeal against the respondents and for legal aid taxation of my costs.

LORD JUSTICE BINGHAM: That must follow, Mr. Kent, must not it?

MR. KENT: Yes, my Lord.

LORD JUSTICE BINGHAM: Thank you very much. We shall allow the appeal, substitute the figure of £25,000 damages, award costs for the plaintiff and make an order for legal aid taxation.

Okoro -v- The Commissioner of Police for the Metropolis **[2011] EWHC 3 (QB)**

Neutral Citation Number: [2011] EWHC 0003 (QB)

Case No: HQ09X04761

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2011

Before :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.
(sitting as a Judge of the High Court)

- -

Between :

ANDREW OKORO	**Claimant**
- and -	
THE COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

- -
- -

Mr. George Mentu, by permission, for the claimant
Barney Branston (instructed by **Weightmans LLP)** for the defendant

Hearing dates: 22, 23, 24 and 25 November 2010

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

His Honour Judge Richard Seymour Q.C. :

Introduction

1. The circumstances giving rise to the claims of the claimant, Mr. Andrew Okoro, against the defendant, the Commissioner of Police of the Metropolis (*"the Commissioner"*) were, on any view, most unfortunate. Mr. Okoro, an entirely innocent man, was arrested just before 7.30 in the evening of 18 October 2007 in Hornsey Road, London N7 by P.C. Launa Watkins. She was accompanied by P.C. Paul Phillips. Mr. Okoro was taken initially to Islington Police Station. Later that evening Mr. Okoro was transferred to Limehouse Police Station. At Limehouse Police Station it was established that Mr. Okoro had been the victim of mistaken identity, and he was released at 11.24 p.m. on 18 October 2007.

2. In this action Mr. Okoro claimed damages against the Commissioner for alleged wrongful arrest and false imprisonment, and also for alleged assault. It was common ground that the Commissioner was vicariously liable for any wrongful arrest, false imprisonment or assault committed by any of the officers of the Metropolitan Police during the course of their duties.

3. The basic facts as to the arrest of Mr. Okoro were not in dispute. P.C. Watkins and P.C. Phillips were on duty in a police van. They noticed a Mercedes motor-car, registration number G987GSC, (*"the Car"*) being driven along the road in the opposite direction from that in which they were travelling. The driver was Mr. Okoro. P.C. Watkins was driving the police van. P.C. Phillips decided to check the Car by reference to the data held by the Driver and Vehicle Licensing Agency by use of a mobile computer terminal, called a mobile data terminal, or *"MDT"*, in the van. The details obtained identified Mr. Okoro as the registered keeper of the Car, but indicated that no insurance cover existed in respect of the use of the Car. P.C. Phillips then decided to check the name of Mr. Okoro on a database different from that which contained details of motor vehicles. This check, of the Police National Computer, revealed that an Andrew Okoro was a wanted person, but apparently it was not established at this time by whom he was wanted, or for what reason.

4. P.C. Watkins and P.C. Phillips decided to stop the Car. P.C. Phillips asked Mr. Okoro and his passenger to get out of the Car, and they did so. P.C. Phillips enquired whether Mr. Okoro had any identification documents with him. Mr. Okoro produced both his passport and his driving licence. P.C. Watkins joined P.C. Phillips and Mr. Okoro. P.C. Watkins took Mr. Okoro's passport and conducted a further check of the Police National Computer. This further check revealed that the wanted person with the name Andrew Okoro was born, as Mr. Okoro himself had been, on 31 January 1967. It also was said to reveal that this person was wanted for fraud by false misrepresentation in attempting to obtain a pass for the management offices at Canary Wharf, London E14, on 17 July 2007. P.C. Watkins returned with this information to where P.C. Phillips and Mr. Okoro were standing. No copy of a print of the screen containing the information that Mr. Okoro was wanted for fraud by false misrepresentation, or any print-out of that information from the Police National Computer in any other form, was produced in evidence at the trial.

5. On her return to where P.C. Phillips and Mr. Okoro were standing P.C. Watkins decided that she could smell alcohol on Mr. Okoro's breath. Mr. Okoro was asked

about that. He said that he had just had a glass of wine. P.C. Watkins decided to require Mr. Okoro to provide a specimen of breath for testing as to whether he had been driving having consumed alcohol over the prescribed limit. Mr. Okoro agreed to provide the requested specimen. The test indicated that the alcohol which he had consumed was not in excess of the prescribed limit.

6. P.C. Watkins then told Mr. Okoro that a person with his name and date of birth was shown on the Police National Computer as wanted for fraud by false representation in attempting to obtain a pass for the management offices at Canary Wharf. He said that he had done nothing wrong. She decided to arrest him.

7. What then happened was described rather differently in the witness statement of P.C. Watkins prepared for the purposes of this action, and that of P.C. Phillips prepared for the same purpose. Each of P.C. Watkins and P.C. Phillips was called to give evidence at the trial and was cross-examined. The other live witness called on behalf of the Commissioner was Police Sergeant Gary Butler, who also made a witness statement for the purposes of this action. Mr. Okoro gave an account which was significantly different from those of each of the police officers. It is convenient to consider next the evidence of fact led on behalf of the Commissioner about the matters which formed the bases for the claims made by Mr. Okoro in this action.

The evidence of fact for the Commissioner

8. There was put in evidence a print-out of the Police National Computer showing what was produced, at 10.34 a.m. on 8 January 2009, when the name of Mr. Okoro and his date of birth were inserted as the details to be searched. All that was produced were two entries showing the name and date of birth of Mr. Okoro, together with other codes which were not readily capable of being understood without interpretation. For one entry the birthplace of Mr. Okoro was blank. For the other entry the birthplace was entered as Nigeria.

9. One of the codes on the print-out was *"N"*. P.C. Watkins told me that she did not know what that stood for, but that if in the same column on the print-out there appeared a *"W"*, that meant that the person by whose name that appeared was *"wanted"*. She told me that the fact that someone was shown as *"wanted"*, told one nothing at all about why he or she was *"wanted"*. In particular someone could be *"wanted"* simply because he or she was a missing person.

10. Possibly by pursuing one of the unexplained codes in the print-out which I have mentioned, it seemed to be possible to obtain a different print-out from the Police National Computer. This print-out, timed at 15.46 hours on 7 January 2009, in the version put in evidence, recorded, so far as is presently material:-

> *"20/07/07 METROPOLITAN POLICE*
>
> *REMANDED ON POLICE BAIL*
>
> *NEXT APPEARING ON 22/08/07 AT METROPOLITAN POLICE*
>
> *21/08/07 METROPOLITAN POLICE*

REMANDED ON POLICE BAIL

NEXT APPEARING ON 11/09/07 AT METROPOLITAN POLICE"

11. Neither of the print-outs to which I have referred identified the offence in respect of which Mr. Okoro was apparently arrested. What the second print-out did indicate was that a person giving the name of Mr. Okoro had been arrested, but then released on bail on 20 July 2007. P.C. Watkins told me in answer to a question from me that the second print-out was not accessible from the MDT in the police van, but only from a computer terminal at a police station. It was not explained why this should be. One might have thought that if a police officer had access to the data on the Police National Computer, he or she had access at least to whatever data was freely available, that is to say, not subject to restricted access for some reason. There was no obvious reason for the information contained on the second print-out to which I have referred to be restricted. Certainly none was suggested in evidence.

12. I was told by Mr. Barney Branston, who appeared on behalf of the Commissioner, that no copy of the information that Mr. Okoro was wanted, or what for, was retained on the Police National Computer, and so it had not been possible to produce a copy of whatever it was that P.C. Watkins saw on the screen when she said she obtained the information about the offence for which Mr. Okoro was said to be wanted. I do find this extraordinary. It may be, as Mr. Branston suggested, that, once a "*wanted*" person had been found, the information that he or she was "*wanted*" was deleted from the Police National Computer. That it was deleted beyond retrieval would be surprising. What would be even more surprising would be if it was impossible to produce a version – perhaps modified to show that Mr. Okoro was no longer wanted, or who the real criminal was – which at least showed the details of the alleged offence.

13. P.C. Phillips dealt with events after the arrest of Mr. Okoro on 18 October 2007 in this way:-

> "*15. We then handcuffed the Claimant in the rear stack position. This was reasonable and necessary to ensure officer safety as the Claimant, being unknown to both myself and PC WATKINS, was unknown risk. The Claimant had been quite verbal and aggressive towards PC WATKINS and me prior to being arrested. He was large in stature and owing to his behaviour, we did not know how the Claimant would behave when being transported to Islington Police Station. At one point the Claimant told us that he was bigger than PC WATKINS and me and that we should respect him. The Claimant had also been arrested for fraud by false representation which is a serious crime.*
>
> *16. The handcuffs were checked for tightness and double locked. Double locking prevents the handcuffs from tightening any further. The Claimant never cried out in pain when he was handcuffed or afterwards.*

…

19. When we arrived at Islington Police Station we took the Claimant into the custody area.

20. The Claimant kept saying that he wanted to go to the toilet. He was not crying. His demeanour was somewhat un-cooperative. We explained to him that he could not go to the toilet at that stage because he had to be booked in by the custody sergeant and had to be searched.

21. While in custody the claimant was clearly agitated and continued shouting.

22. When we were at the custody desk, PC WATKINS was relaying the facts to the custody sergeant PS BUTLER.

23. I attempted to take the handcuffs off the Claimant. The handcuff came off the Claimant's left wrist but would not come off his right wrist. This appeared to irritate the Claimant. It was explained to the Claimant that the handcuff would not come off and that he needed to remain calm. Several handcuff keys were tried on the handcuff.

24. The Claimant became aggressive and starting [sic] *moving his arms around. The handcuff was still on his right wrist and could have been used as a weapon to cause harm to officers present as well as the Claimant himself.*

25. I kept informing the Claimant that he needed to remain calm. He refused to listen to me, continuing to be aggressive and started lashing out. While I was trying to control the Claimant's right hand to ensure the handcuff could not injure anyone, I sustained a cut to my fingers and had to release my grip. This was because the Claimant was so strong and difficult to control. I did not see the FME in relation to the cut to my fingers.

26. The Claimant refused to sit down and calm down. He was moving around the area in front of the custody desk.

27. Other officers came to our assistance to try and control the Claimant. The custody sergeant, PS BUTLER climbed over the custody desk to assist us. PS BUTLER did not jump on top of the Claimant.

28. The Claimant was then restrained and calmed down. He was sat down on the bench in the custody suite. He was told that the London Fire Brigade had been requested to cut the handcuff off.

29. When the London Fire Brigade arrived we went into an interview room and they used bolt cutters to cut the handcuff from the Claimant's right hand.

30. At no stage did the Claimant complain that he had sustained any injury to either wrists or hands. "

14. According to P.C. Watkins what happened was:-

"*18. I then informed the Claimant that with the details he had provided from his passport he was shown on the Police National Computer as being wanted by an officer from the Tower Hamlets Borough and that they needed to speak to him in reference to allegations of fraud.*

19. The Claimant suddenly became verbally abusive and obstructive as I tried to explain what would happen and what the matter was about. The Claimant refused to listen and started becoming more aggressive, waving his arms around and shouting in the street.

20. At 19.30 hours I informed the Claimant that he was under arrest on suspicion of fraud by false representation. I fully cautioned him. He made no reply to the caution.

21. Owing to the Claimant's stature, large build and aggressive behaviour towards me and PC PHILLIPS, we placed the Claimant in handcuffs in the rear stack position. This was necessary to ensure officer safety as the Claimant, who was unknown to both myself and PC PHILLIPS posed an unknown risk.

22. I checked the handcuffs for tightness. As I did this the claimant started to struggle more using his arms and upper body. He was screaming and shouting that it was not right that he was being arrested and treated in this way. The Claimant's behaviour made it very difficult for me to check the handcuffs.

23. I managed to check the handcuffs for tightness by placing my fingers within the gap between his wrist and the handcuffs. While I did this I explained to the Claimant that the handcuffs were not too tight. This seemed to only antagonise the Claimant. He started to scream again and struggle in the streets as I removed my hand from the handcuffs.

24. I attempted to re check the handcuffs. I requested the Claimant to calm down. He ignored me. He continued to struggle and shout, becoming more aggressive.

25. Although he had been handcuffed in the rear stack position, the Claimant was of a large build and had a lot of upper body

strength. He was still able to use a lot of force to struggle and resist PC PHILLIPS and me. PC PHILLIPS and I were restraining the Claimant by holding his arms to prevent injury to himself and us.

26. The Claimant continued to shout and be aggressive towards me and PC PHILLIPS. Because of his behaviour we immediately placed the Claimant in the caged area in the rear of the police van. I seized the passport the Claimant had provided as identification to PC PHILLIPS.

27. We then drove the police van back to Islington Police Station. Our route included driving down Liverpool Street. I deny that the manner in which I drove the police van caused the Claimant distress or any injuries. Owing to traffic calming devices, such as speed humps, it was not possible to drive quickly.

28. When we arrived at the station we took the Claimant to the custody suite.

29. The Claimant wanted to go to the toilet but we could not allow him to do this because he had to be booked in and searched. We were not able to remove the handcuffs without first speaking with the Custody Sergeant. This is because the Custody Sergeant is responsible for the safety and wellbeing of all people in the custody area. The Claimant was still an unknown risk.

30. I relayed the facts of the Claimant's arrest to the custody sergeant PS BUTLER. As I was doing this, PC PHILLIPS attempted to remove the handcuffs. The handcuff on the Claimant's left wrist was removed but the handcuff on the Claimant's right wrist would not unlock. It had become stuck.

31. This appeared to infuriate the Claimant. By this stage the Claimant was very vocal, refusing to allow officers to try and remove the handcuffs. The Claimant wanted the handcuffs to remain on until his solicitor arrived.

32. Officers told the Claimant to calm down. He did not listen. He started walking away from the custody desk. More officers arrived to assist in restraining the Claimant. The Custody Sergeant climbed over the custody desk to assist. PS BUTLER did not jump on top of the Claimant.

33. There was a struggle between the officers and the Claimant. At one point I recall telling the officers to watch out for the Claimant's head. I did this to ensure the Claimant's head was not banged against the wall, floor or any other object. It was

> *simply a verbal notification to remind the officers involved in the struggle to watch out for the Claimant's head.*
>
> *34. The London Fire Brigade attended and removed the handcuff from the Claimant's hand.*
>
> *35. The Claimant did not cry out in pain when he was handcuffed. He did not inform me at any stage that he had suffered an injury to his left wrist.*
>
> *36. The Claimant was not crying when we arrived in the custody suite. His demeanour was confrontational. He was agitated and very unhelpful.*"

15. Whilst P.C. Phillips said that Mr. Okoro had been, "*quite verbal and aggressive … prior to being arrested*", P.C. Watkins considered that Mr. Okoro "*suddenly became verbally aggressive and obstructive as I tried to explain* [before he was arrested] *what would happen and what the matter was about*". "*What would happen*" was, presumably, that Mr. Okoro was to be arrested. There was no suggestion, for example, that his address would be taken so that he could be visited at a later date, or that he should present himself by appointment at a police station. P.C. Phillips made no reference in his witness statement to Mr. Okoro, having been, according to him, at one stage, "*quite verbal and aggressive*", thereafter having become more hostile, unlike P.C. Watkins, who contended that Mr. Okoro "*refused to listen and started becoming more aggressive, waving his arms around and shouting in the street*".

16. P.C. Watkins was cross-examined as to why she had arrested Mr. Okoro. She told me several times that she was not happy with the address of Mr. Okoro. Why this should be so was very difficult to understand. What had actually happened in relation to the address of Mr. Okoro, P.C. Watkins told me, was that she had asked him for his address and the address he had given was that at which the Car was registered as being normally kept. One would have thought that the fact that Mr. Okoro gave an address which coincided with the registered address of the Car would suggest that the address which he had given was his true address. Moreover, if P.C. Watkins had a genuine concern about the correct address of Mr. Okoro, it would have been open to her to inspect the driving licence produced by Mr. Okoro to P.C. Phillips to see what address for Mr. Okoro appeared in that document. Somewhat surprisingly she told me, in answer to a question from me, that she was unaware that Mr. Okoro had produced his driving licence to P.C. Phillips.

17. On her account P.C. Watkins was, after the handcuffs were applied to Mr. Okoro, concerned about the tightness of the handcuffs. She said that her concern was that the handcuffs should not be too tight, rather than that they should not be too loose. Her evidence in her witness statement was that she checked the handcuffs with some difficulty as Mr. Okoro was screaming, shouting and struggling. Having checked the handcuffs, ascertained, she said, that they were not too tight, and having told Mr. Okoro that, he continued to scream and to struggle. P.C. Watkins wrote in her witness statement that, after the initial check of the handcuffs, and ascertaining that they were not too tight, she attempted to check them again. Why she should have done this is unclear. If she had, indeed, checked the handcuffs after they had been first applied and found them to be satisfactory, there was no need to seek to check them again. If

she did seek to check them again, that suggests that she was not confident that in fact the handcuffs were not too tight. As I shall explain, there was other evidence adduced on the defendant's side which was certainly consistent with the handcuffs having been too tight. P.C. Phillips spoke only of the handcuffs being checked once. While he said that Mr. Okoro never cried out in pain when he was handcuffed or otherwise, equally he did not speak of Mr. Okoro struggling, screaming or shouting after the handcuffs had been applied.

18. In the course of his cross-examination P.C. Phillips described the demeanour of Mr. Okoro whilst in custody as *"aggressive"*. When asked what he meant by that he said that Mr. Okoro was shouting and refusing to sit down. Video and audio evidence of the events in Islington Police Station, to which I shall come, showed that, at the time Mr. Okoro was declining to sit down, he had just arrived in the police station and was still handcuffed. It seemed to me from the video and audio evidence that, at that point, Mr. Okoro was simply asking in a normal voice to be allowed to use the lavatory. He was not struggling, or kicking out. He was simply standing beside the bench on which he was being invited to sit. The oral evidence of P.C. Phillips that Mr. Okoro was *"aggressive"* at the point of refusing to sit down was rather in contrast to the description used by P.C. Phillips at paragraph 20 of his witness statement, which was a rather more realistic *"somewhat un-cooperative"*.

19. Another piece of evidence given by P. C. Phillips orally which seemed, from the video evidence, to be incorrect, was that after the failure of several attempts to release the right hand handcuff, he held onto that handcuff because he was trying to control it. From the video evidence it was plain that in fact he held onto Mr. Okoro's left arm, not the right.

20. In cross-examination P.C. Watkins explained that, at the time of the events described in paragraph 33 of her witness statement, Mr. Okoro was in fact being held on the arms by probably six police officers. She accepted that, *"telling the officers to watch out for the Claimant's head"*, was not simply a question of following standard police procedure, as the way in which it was explained in paragraph 33 of the witness statement perhaps suggested, but prompted by the fact that Mr. Okoro was being pushed towards a wall in the custody suite, obviously by the police officers holding onto him. She said that another female officer, a sergeant, also called out a similar warning at about the same time she did.

21. There was put in evidence a copy of the *"Evidence & Actions Book"* (*"Notebook"*) completed by each of P.C. Phillips and P.C. Watkins in relation to the arrest of Mr. Okoro and what happened thereafter. The police number of P.C. Watkins seems to be PC 516 NI, and that of P.C. Phillips PC 529 NI. In their respective accounts in their Notebooks they referred to each other by these numbers.

22. In his Notebook P.C. Phillips wrote his account, according to the Notebook, between 9.00 p.m. and 9.25 p.m., apparently on 18 October 2007. Picking up the story at the point at which the identity of Mr. Okoro was confirmed, P.C. Phillips said:-

> *"Having confirmed that the male was ANDREW OKORO dob* [date of birth] *31/1/67 at 1930 hrs PC 515 NI informed OKORO that he was wanted for fraud by false representation on 01/07/07* [sic – the date was recorded incorrectly] *at the*

> *management offices in Canary Wharf. He gave no reply to caution. OKORO stated he had done nothing wrong. He was then handcuffed in the rear stack by PC 516 NI. He was then conveyed to NI custody where his detention was authorised. In custody the handcuff on OKORO's Right wrist would not come off so the fire brigade were called and it had to be cut off.*"

23. That was the end of the account of events in P.C. Phillips's Notebook.

24. In her Notebook made up at exactly the same time as that of P.C. Phillips P.C. Watkins wrote, starting the quotation with the check of the Police National Computer which showed that Mr. Okoro was wanted:-

> "*As I have then check* [sic] *the wanted report it showed OKORO was wanted for fraud by representation as he obtained a pass for management offices, Canary Wharf E14 on 17/09/2007* [sic – once more the date of the alleged offence was recorded incorrectly, but with a different error from that made by P.C. Phillips]. *As I went to speak* [to] *OKORO I could immediately smell alcohol on his breath and he admitted having had some one* [sic]. *I then required him for* [sic] *a specimin* [sic] *of breath which I* [sic] *provided with a negative result. I then informed OKORO then* [sic] *he was shown as being wanted by an officer in HT and that they needed to speak to him in ref to allegations of fraud. With this OKORO then suddenly became verbally abusive and obstructive as officers* [presumably P.C. Watkins and P.C. Phillips] *tried to speak to him. Due to his stature, large build and aggressive behaviour towards myself and PC 529 OKORO was placed into a rear stack. OKORO has continued to shout in the street as he was placed into the rear of the van. OKORO's passport was then seized by myself at the scene which I exhibit as LAW/2 and he was conveyed to Islington custody. On attempting to book in OKORO officers attempted to remove the handcuffs but the right handcuff would not unlock which infuriated OKORO who has then refused to have the handcuff removed. Eventually OKORO has calmed down and fire brigade attended to have handcuffs cut off to remove them which they did. I exhibit this quick cuffs as LAW/1.*
>
> *(A) under arrest for susp*[ected] *fraud at 1930 hours and fully cautioned to which he made no reply.*"

25. The references to Mr. Okoro's stature and large build in the witness statement of P.C. Watkins and in her Notebook perhaps suggest to the reader that Mr. Okoro is unusually tall or unusually heavy. At paragraph 13 of her witness statement P.C. Watkins described Mr. Okoro as "*approximately 6'4" with a stocky build*". That, I think, overestimated Mr. Okoro's height quite considerably and indicated that the rest of his body was not in proportion to his height. In the custody record ("*the Record*") completed by Sergeant Butler in relation to Mr. Okoro following the arrival of Mr. Okoro at Islington Police Station the height of Mr. Okoro was noted as 1.88 metres, or

6 feet 2 inches. Having seen Mr. Okoro, that seems to me to be a more realistic estimate of his height. Given that Police Constable Watkins told me that she is 5 feet 10 inches tall, so not much shorter than Mr. Okoro, it seemed surprising that she had put his height at 6 feet 4 inches. Neither as seen in court during the trial, nor as shown in the video evidence, to which I shall come, on 18 October 2007, did Mr. Okoro appear to me to be "*stocky*" or of large stature. He seemed simply to be a gentleman whose body was in the usual proportion to his height. He was not thin, but equally he was not larger than a normal, reasonably fit person of his height.

26. The question of the size of Mr. Okoro featured again in the witness statement of Sergeant Butler. Sergeant Butler was one of three custody sergeants on duty at Islington Police Station on the evening of 18 October 2007. Interestingly, given the passage from his witness statement which follows, it seemed to me that Police Sergeant Butler was about the same height as Mr. Okoro, but rather heavier. So far as is material for present purposes, what Sergeant Butler said in his witness statement prepared for the purposes of this action was:-

> "*7. I recall the Claimant as being a very large man. I do not recall him ever crying while he was in custody. I do recall however the Claimant refused to calm down despite being told to do so by officers.*
>
> *8. The Claimant arrived in custody at 19:45 hours. The Claimant was handcuffed in the rear stack position. I opened the custody record at 19:51 hours. The arresting officer, PC Watkins relayed the facts to me. I was informed that the Claimant was arrested at 19:30 hours for an offence of attempted fraud at Canary Wharf in July 2007. The Claimant had been circulated on the Police National Computer as being wanted for this offence.*
>
> *9. At 19:55 hours I authorised the Claimant's detention. The reason for authorising his detention was for evidence to be obtained by questioning the Claimant. The grounds for the Claimant's detention were to allow the Claimant to be interviewed on tape by the Officer in Charge of the original offence and to prevent the Claimant from escaping.*
>
> *10. The Claimant was present when PC Watkins relayed the facts to me. He was informed about the facts and about his detention being authorised. The Claimant made no comment when I explained the reasons to him.*
>
> *11. I recall the Claimant refused to calm down and his behaviour was erratic. I recorded the Claimant's demeanour as aggressive on his custody record.*
>
> *12. At approximately 20:07 hours I conducted a risk assessment by asking the Claimant various questions and recording his answers on the custody record. When the Claimant was asked whether he had any illness or injury, he*

informed me that he had a bad heart and had been treated for this condition at Homerton Hospital. The Claimant did not inform me of having sustained any injuries during his arrest and transportation to Islington Police Station. I recorded this by ticking the "no" box on page two of the custody record.

13. The Claimant alleges that he wanted to go to the toilet. It would not have been possible to permit the Claimant to go to the toilet until he had been booked into custody and searched. This is necessary to ensure all evidence the Claimant may have had on him was preserved and for the safety of all the people in the custody area. Once the Claimant had been booked into custody and searched he would have been permitted to go to the toilet under supervision. If the Claimant had been totally compliant this would have been easier and officers would have supervised him going to the toilet. Owing to the Claimant's behaviour it was not possible to do that.

14. I recall that during the booking in procedure PC Phillips attempted to remove the handcuffs from the Claimant's hands. The handcuff on the left hand was removed. The handcuff on the Claimant's right hand became stuck and could not be removed.

15. The Claimant insisted on the handcuff on his right wrist being kept on until his solicitor arrived. I recall checking the Claimant's wrist to confirm that the handcuff was not tight, that it was loose. I did this by placing two fingers between the handcuff and the Claimant's wrist.

16. I do not know whether the handcuff was ever examined. In my experience it is very unusual for a handcuff to become stuck. The handcuff might have become stuck owing to a mechanical fault or had been too worn.

17. The Claimant remained aggressive and agitated. He refused to calm down and to sit down on the custody bench. I could see officers attempting to restrain the Claimant.

18. It was necessary to restrain the Claimant because the handcuff on the Claimant's right wrist posed a danger to both the Claimant and other people around him. The Claimant was animated and swung his arm around. If someone had been struck by the handcuff they could have been seriously injured.

19. I saw that the officers attempting to restrain the Claimant were much smaller in stature than the Claimant and they were struggling. They were attempting to calm the Claimant down.

20. I felt it was necessary for me to assist the officers. I climbed over the custody desk. The desk is approximately 30 feet long.

> *It was quicker for me to climb over the desk because had I walked around the desk I needed to get through a locked door in order to reach the officers and the Claimant. It has been necessary for me to climb over the desk on other occasions.*
>
> *21. It took six officers to restrain the Claimant and prevent him from causing harm to himself and other people in the custody suite.*
>
> *22. Once the Claimant had calmed down and sat on the custody bench, I requested the London Fire Brigade via the Integrated Borough Operations unit (IBO). I telephoned the IBO and explained that the handcuffs had become stuck on the Claimant's right wrist. We needed the London Fire Brigade's assistance because we did not have the necessary specialist equipment at Islington Police Station to remove the handcuff. This was equipment such as bolt cutters.*
>
> *23. The London Fire Brigade attended and removed the handcuff.*"

27. In cross-examination Sergeant Butler was asked about climbing over the custody desk. It seemed to me from the video evidence to which I shall come in more detail later in this judgment that the use of the word "*climbing*" possibly suggested that the action was more arduous and took longer than was in fact the case. Sergeant Butler stood up behind the desk, placed his left knee, and then his right foot upon it, raised himself up, and jumped down on the other side. His justification for doing that was that he thought that the police officers holding Mr. Okoro needed his help, although there were five or six of them, because they were each physically smaller than Mr. Okoro, and P.C. Phillips had lost his hold on Mr. Okoro, having been brushed aside by Mr. Okoro. Sergeant Butler's evidence, in contrast to that of P.C. Phillips, was that P.C. Phillips had been holding Mr. Okoro's left arm and wrist before he lost his grip. As I have noted, that was what could be seen in the video.

28. It appeared from the copy of the Record put in evidence that the first entry, details of the officer opening the custody record, was indeed made at 19.51 hours on 18 October 2007. However, Version 1 of the front sheet (in fact, two sheets) was timed 20.05 on that day. The first entry in the detention log was not made until 20.39. That entry, made by Sergeant Butler, was:-

> "*Dp* [presumably detained person] *arrived in custody in rear stack position, dp is very verbually* [sic] *aggressive and disputing he has committed any offence. dp is present when a/o* [presumably arresting officer] *relates information that dp was stoipped* [sic] *driving a m/v* [presumably motor vehicle] *index G879 GJF. The vehicle was stopped by A/O as it showed No* [sic] *insurance on the MDT in the vehicle, a subsequent name check on dp resulted in the information that he had been circulated was wanted POA for a fraud offence at canary* [sic] *Wharf in July this year.*

> *Arrested in order that he could be interviewed on tape, to prevent escape.*
>
> *Detention authorised, dp immediately starts to resist officers, shouting and raising his fists, at this point the officer was still trying to release his right wrist from the cuffs, but it had become stuck, although very loose (I could get 2 fingers easily between bar and wrist). It took it* [sic] *6 officers to restarin* [sic] *DP from causing injury to self or others, as at one point he tried to bang his head off custody wall. After a while DP calmed down sufficiently to continue with booking in procedure, R+E's given and he asks for own solicitor, but when called changes his mind to duty, he asks for a phone call, but cannot remeber* [sic] *any number at this time. The FME* [Forensic Medical Examiner – that is, the police doctor] *is in custody at the time and DP sees him (Dr CASH) who pronounces him fit to be dealt with. Due to the stuck hand cuff, the LFB* [London Fire Brigade] *were called, call sign A302 who cut the cuff off with bolt croppers, in interview room.*
>
> *Dp informed he had been arrested for a recordable offence, L/scan, DNA authoriosed* [sic] *dp taken to M4 after above procedure after checking for servicability* [sic].
>
> *The details of restraining equipment used are KWIK CUFFS R/S 345693."*

29. This rather colourful account was not repeated in the witness statement of Sergeant Butler in all its glory. Missing from the witness statement were the details of Mr. Okoro raising his fists in starting to resist officers, attempting to bang his head against the wall, and the consultation with Dr. Cash.

30. The contention that Mr. Okoro had raised his fists was not advanced by Sergeant Butler in his oral evidence.

31. In cross-examination Sergeant Butler rather modified the position stated in the Record about Mr. Okoro attempting to bang his head against the wall. His evidence seemed to be that he was afraid that that was something which Mr. Okoro might try to do, rather than something which he did actually attempt.

32. The evidence in the Record of the consultation with Dr. Cash was in fact supported by a witness statement of Dr. Cash himself and the production of a contemporaneously completed standard printed form entitled *"Forensic Medical Examination"* (*"the Examination Form"*). Dr. Cash was not called to give evidence in person because he had recently suffered a family bereavement, but his witness statement was admitted pursuant to the provisions of *Civil Evidence Act 1995*.

33. The Examination Form was completed to indicate that Dr. Cash examined Mr. Okoro between 19.57 hours and 20.06 hours on 18 October 2007. A manuscript note upon it read, *"Cuff Marks to both wrists – slight swelling"*. It is that observation which appeared to me to be consistent with the handcuffs applied to Mr. Okoro having been

too tight. The other independent evidence that the handcuffs might not have been applied correctly was the fact that the right hand cuff could not be released at Islington Police Station without the assistance of bolt cutters. It was common ground that it was most unusual for it not to be possible to release handcuffs using the keys provided. When she was asked about it P.C. Watkins contended that the handcuffs were working correctly when fitted to Mr. Okoro, and correctly applied, because otherwise she would not have been able to get them on to Mr. Okoro. I do not accept that evidence from her. She did not put herself forward as an expert in the mechanical functioning of handcuffs. The actual handcuffs which had to be broken by use of bolt cutters were never, apparently, examined to establish what had been the cause of the right hand cuff becoming stuck. All that could be said with confidence was that, at the point at which attempts were made to release Mr. Okoro's right wrist from the handcuffs, it was plain that the handcuffs which had been put on him were not working as they should. At what point, and in what precise manner, the handcuffs ceased to work properly was not established. While I accept that P.C. Watkins was able to apply the handcuffs to Mr. Okoro in such a manner as to restrain his ability to use his arms and hands, that of itself does not indicate that the handcuffs were not then defective, merely that P.C. Watkins was able to apply them.

34. The witness statement of Dr. Cash which was put in evidence included:-

> "*7. On examination he* [Mr. Okoro] *was relaxed, orientated in time and space and co-operative. He did not appear to be in any discomfort.*
>
> *8. Clinical examination was normal apart from some swelling to both wrists from the handcuffs. He had no other complaints. He did not request medication. In my opinion he was fit to detain and fit to interview.*
>
> *9. In my normal practice when I examine a member of the public who is in police detention, if the person has been handcuffed and was experiencing any pain, I would expect the person to complain and point to the source of the pain. I would examine the person, looking for signs of redness or swelling or any clinical deformity. I would also check for full range of movement of the wrist and fingers and if I felt it was necessary I would advise an x-ray.*
>
> *10. In my experience as a medical practitioner and a Forensic Medical Examiner if a person had sustained an injury to the left wrist through the use of handcuffs as the Claimant alleges, I would expect the Claimant to have asked for an x-ray or pain killers. I would have expected the Claimant to have mentioned this to me during my examination. The Claimant did not complain of sustaining any injury to either wrist as a result of being handcuffed or being in any pain. Had the Claimant done so I would have recorded it on the Form 83 and my normal practice would be to then send them to hospital for an x-ray as it is impossible at times to confirm a bony injury without an x-ray being done.*"

35. As I have explained, Dr. Cash, according to the Examination Form, saw Mr. Okoro between 19.57 hours and 20.06 hours on 18 October 2007. Between those times he found Mr. Okoro, according to his witness statement, to be, *"relaxed, orientated in time and space and co-operative"*. Puzzlingly, in completing the two front sheets of the Record at 20.05 on that day Sergeant Butler noted the *"Demeanour"* of Mr. Okoro as *"Aggressive"*.

36. The other curious circumstance which strikes one about the evidence of Dr. Cash is why did he see Mr. Okoro? According to Dr. Cash Mr. Okoro, *"had no complaints. He did not request medication"*. What, then, was the point of Dr. Cash seeing Mr. Okoro at all? Sergeant Butler was cross-examined about that. He said that Mr. Okoro was complaining that his wrist was painful. A little later he volunteered that Mr. Okoro was complaining about most things, but that his main complaint was his left wrist. Mr. Branston re-examined Sergeant Butler with a view to eliciting a retraction of this evidence. Sergeant Butler was led to retreat a certain distance. However, I accept his evidence in cross-examination. He volunteered the evidence he gave about the left wrist being the main complaint. It was not elicited by any ambiguous question, but rather by an open question which Sergeant Butler chose to answer in the way I have noted.

37. Apart from the evidence of witnesses set out in witness statements, the evidence called on behalf of the Commissioner included two DVDs containing audio and video tapes made in Islington Police Station on the evening of 18 October 2007, and an expert report from Mr. Christopher McCullough, a consultant orthopaedic surgeon. I shall consider separately the medical evidence later in this judgment.

38. The two DVDs were compiled at different times. The first, and longer (*"the Composite DVD"*), seems to have been prepared by some unidentified person from a variety of different original digital materials, which it is convenient, albeit not strictly accurate, to call *"films"* in this judgment. In Islington Police Station on 18 October 2007 there seem to have been at least 28 different cameras which were recording what was taking place. Each of the cameras appears to have been fixed, and thus only able to record what was within its fixed field of vision. On each piece of film recorded was included the time, by reference to hours, minutes and seconds noted on a 24 hour basis, and the number of the camera on which the relevant pictures were recorded. The compiler of the Composite DVD in effect spliced together film from 13 different cameras, numbered, respectively, 1, 3, 6, 8, 9, 10, 11, 13, 14, 15, 26, 27 and 28. The splicing was made in such a way that there was a more or less continuous showing of events from 19:31:55 hours until 20:55:33 hours, but no event was seen from more than one camera angle. It was unclear why whoever decided to compile the Composite DVD in that way made that decision. It might well have been easier to form a clearer view of contested episodes had views of such episodes from more than one camera angle been included in the Composite DVD, but whoever decided to compile the Composite DVD determined, for reasons not explained, not to do that.

39. The deficiencies in the Composite DVD were ameliorated to a degree by the fact that the audio recording of events seems to have been made separately from the video recording, and had been added to the Composite DVD as a soundtrack. What could be heard being said added some colour to what could be seen.

40. The second DVD (*"the Camera 11 DVD"*) was produced shortly before the trial following an application to the court. Camera 11 was a camera immediately behind the desk in the custody area of Islington Police Station. The Camera 11 DVD showed what was recorded on that camera between 19.40 hours and 19.48 hours on 18 October 2007. The Composite DVD included what was recorded on camera 11 between 19:35:45 and 19:40:31, but at 19:40:32 the Composite DVD moved to show what was recorded on camera 10 until 19:42:36, and then to show what was recorded on camera 9 from 19:42:36 until 19:47:59. 19:40:31 was almost exactly the moment at which Sergeant Butler moved across the custody desk. The decision to cut the film from camera 11 on the Composite DVD at that point thus meant that it was impossible to see exactly from that DVD where Sergeant Butler landed after jumping over the desk. That said, it was not very clear from what could be seen on the Camera 11 DVD.

41. I shall return to indicate my conclusions based on what could be seen on the Composite DVD and the Camera 11 DVD.

The complaints of Mr. Okoro and his evidence

42. Mr. Okoro has acted as a litigant in person throughout this action. At the trial he sought permission for Mr. George Mentu to present his case, and I granted permission. Mr. Mentu has been called to the Bar, but is not practising. He assisted Mr. Okoro in a voluntary capacity.

43. I think that it is appropriate, when looking at Mr. Okoro's Particulars of Claim and his witness statement, to recognise that, although he may have had some assistance in the preparation of those documents, they were essentially his own.

44. The Particulars of Claim were set out in a narrative fashion, starting from the moment when Mr. Okoro was first approached by P.C. Watkins and P.C. Phillips in the police van. The core of the allegations in the Particulars of Claim relevant to the issues in this action seemed to be:-

> "*4. The Claimant then provided his passport – the Defendants carried out the necessary checks and arrested him for the fraudulent use of a passport.*
>
> *5. Handcuffs were then placed on the Claimant's left hand first. As soon as the handcuff was secure on his wrist he begun* [sic] *to feel immense pain and as a result began to cry. The other handcuff was then placed on his right wrist and both of his hands were behind his back.*
>
> *6. The Claimant was then taken to Islington Police station. During the journey the Defendants drove at such a speed which caused the Claimant discomfort. Despite the Claimant's protestations about how he was being treated the Defendant's* [sic] *ridiculed him.*
>
> *7. At the arrival of* [sic] *Islington Police station the Claimant was still tearful. He requested to use the toilet; he was informed*

that this would not be possible as he had to be searched by the custody officer.

8. The Defendants were unable to remove the right handcuff because it had been put tightly on the Claimant's wrist. He was then asked to sit down – but he refused as he needed to relieve himself and be seen by a doctor. Consequently the Defendant twisted his right wrist under the counter in the custody room. He did not resist.

9. The Defendant then grabbed the Claimant's arm – here were 3 Defendants on 1 arm and 2 on the other. Another Defendant then jumped on his back from over the counter. He did not offer any resistance and was forcibly pinned on the wall of the custody room.

10. The Claimant's forehead was then banged about 3 to 5 times on the wall of the custody room which caused him severe pain. The Claimant was then released to go to the toilet, still with his right wrist being handcuffed. The fire brigade was then called and the handcuff was removed.

11. The police doctor then examined the Claimant, he explained what had happened to him, and the Defendant present said that the Claimant talks too much. The doctor concluded, he had suffered only bruising and swelling. The Defendant then sat down with the Claimant and asked him if his cravat and watch were genuine and then threw his cravat to him. The Claimant was then fingerprinted and placed in a cell prior to speaking with a duty solicitor.

…

16. The Defendant wrongfully and without lawful justification arrested the Claimant and imprisoned him. The Defendant wrongly accused the Claimant of possessing and or controlling a passport for fraudulent purposes. The true offender has a light complexion and his DNA did not match the Claimants [sic].

17. As a result of the matters set above the Claimant lost his liberty and suffered pain, injuries and sustained loss and damage.

PARTICULARS OF INJURY

18. The Defendant assaulted and beat the Claimant.

a. Severe bruising to his back, legs, upper torso and arms. This subsided after 2 weeks.

b. Swelling to his head.

c. Swollen wrists which led to surgery and require further surgery.

d. Swollen knee.

e. Broken hand.

f. Pain.

g. Shock.

The Claimant, born on the 31st January 1967, was seen by an orthopaedic surgeon, on the 24th October 2007. The surgeon made the following observations: his ulnar styloid appeared prominent, there was tenderness over his disatl [sic] *radioulnar joint, an x-ray confirmed that his distal radioulnar joint had been dislocated. As a result he was placed on a waiting list to have his distal radioulnar joint reduced under GA* [that is, general anaesthetic] *and k* [that is, Kirschner]*-wired during that week. The orthopaedic surgeon also concluded that there was a disruption to his wrist and swelling around his left knee. As a result he remains unable to sleep and is in constant pain. The Claimant after the attack has had to wear a brace on his wrist for several weeks and* [that] *has prevented him from working as a chef. It is predicted that these ongoing problems with his left wrist is* [sic] *likely to be ongoing.*

Further details are set out in the medical report served with these Particulars of Claim."

45. There followed immediately after the passage set out from the Particulars of Claim a heading, "*PARTICULARS OF SPECIAL DAMAGE*", but nothing followed that heading before paragraph 19, in which interest was claimed.

46. It was clarified at the start of the trial that the principal injury of which Mr. Okoro complained was the subluxation or dislocation of his left wrist which was the subject of the bulk of the text under paragraph 18 of the Particulars of Claim. Item e under that paragraph was in fact intended to cover that injury.

47. From the Particulars of Claim it appeared that Mr. Okoro contended that his arrest by P.C. Watkins had not been justified, and that consequently the period of his detention until his release just after 11.30 p.m. on 18 October 2007 amounted to false imprisonment. In addition, so it seemed, he contended that he had suffered injury as a result of being assaulted, or, more accurately, battered, by police officers. It was unclear from the Particulars of Claim whether Mr. Okoro contended that the application of handcuffs to him amounted to a battery. It was also unclear whether Mr. Okoro contended that he had sustained any injury as a result of being transported to Islington Police Station in the manner complained of, or whether he asserted that he had sustained anything more than temporary discomfort as a result of not being

allowed to relieve himself immediately on arrival at the police station. However, it was plain that he complained of being battered by having his right hand twisted and his head banged on a wall. It seemed that he was also complaining of having his arms injured by being held by police officers, described in the Particulars of Claim as *"Defendants"*.

48. In his witness statement Mr. Okoro said this, taking up the story just before the arrest:-

> "*8. She* [P.C. Watkins] *then took my passport to the Police Van as I handed it over and conducted some checks on it, possibly to establish its authenticity. She returned to inform me that I have been using a forged passport to defraud the country. She hastily and unexpectedly without any caution grabbed my left arm twisted it on my back, and, put a handcuff on my wrist. The force with which she grabbed my arm was so much that I buckled and nearly fell. I heard a quick click and a sharp pain on my wrist that I became disorientated.*
>
> *9. The PC* [apparently P.C. Phillips, as Mr. Okoro referred to P.C. Watkins in his witness statement as "*the WPC"*] *came to twist my right arm, equally so aggressively on my back, to assist her to put the other cuff on my right wrist without reasoning what they were doing. I did not resist arrest, and I would not have resisted if they had requested me to put my hands on my back for the handcuff. I knew I had not done anything wrong, and I have no criminal conviction.*
>
> *10. They treated me not only like a criminal but also like an animal. I suppose they would have treated an animal better. The pains I experienced were so excruciating that I began to cry. They pushed me to the rear of the Police Van, bungled me in to a very small space at the back of it that I consider it more or less a box. Because of my stature and height, I could hardly stretch my self in anyway* [sic]. *They quickly drove me at a high speed over ramps without due care, or any consideration that I was at the back of the van.*
>
> *11. As I was crying the PC was giggling and making mockery of me. The PC stretched his radio on my mouth, as if he was recording me crying. I was crying in pain, I thought I was going to die. They drove me to Islington Police Station.*
>
> *12. At the Police station I requested to use the lavatory. I was denied the use of the lavatory. The Custody officer refused to authorise my request. He said I had to be booked-in first. Also due to the fact that I was in handcuff, he instructed the WPC to remove the hand cuff. One was easily released, but the other was jammed. She could not open it.*

13. I was requested to sit down, but I could not do so because my bladder was busting. The pains I was experiencing from my both wrists and the bruise that resulted from the negligent manner with which they put the handcuff on, together with my busting bladder made it impossible for me to sit down.

14. I was crying uncontrollable [sic] *to be allowed to use the lavatory, but all my cries fell into death* [sic] *ears. I became unsettled, as a result of the pain and my urgent need to use the lavatory. As I persisted with my request to use the lavatory, the officers were insisting that I should sit down. This was something I found very difficult to do.*

15. As over three officers were forcing me to sit down another officer climbed over the counter, and jumped landing forcefully on my back. I was knocked over to the wall and I hit my forehead on the wall. Other officers were banging my head on the wall, in desperate attempt to force me to sit. What escaped them was that I was suffering in pain and the fracture and bruises they inflicted on me were beginning to swell, and I was extremely pressed [by which Mr. Okoro appeared, from his use of the expression during the trial, to mean that he had an urgent need to urinate].

16. They were altogether about five or six officers who were trying to force me to sit down while I was unsettled and insisting I wanted to use the lavatory. Another WPC was so horrified that she was shouting in anguish, searg [apparently intended as *"Sarge"*], *searg, searg, you are going to kill him … This was one of the incidents that I suppose was recorded on the CCTV. As my former lawyer requested and watched the CCTV footage, that bit and many others were edited. I suppose the court would be assisted if the original is seen by the judge. I requested the original for disclosure, but again my request was not dealt with. The one sent was the edited version of the original.*

17. I was eventually granted the opportunity to use the lavatory after I had wet myself. It was thereafter that the Duty Sergeant called the Fire Brigade to come over to the Police station to cut the handcuff open with, what I suppose to be a pair of shears. The whole incident is a clear evidence of the negligent nature with which the Police officer who arrested me negligently put me on handcuff [sic].

18. …

19. My broken wrist could not have been caused by any other reason. It was the negligence and the lack of experience of the two young officers that lead [sic] *to the fracture of my wrist. I had had a surgery*[sic] *to insert pins in my wrist to stabilize it. I*

> *was in excruciating pains. That has not stopped. I am unable to use my left wrist as I used to.*
>
> *20. I am due to have a new surgery on my wrist. The previous surgery was carried out at Homerton University Hospital. I was seen by the Police Doctor at the Police station, as I was speaking the arresting PC intervened, and shouted me* [sic] *to keep quiet. It was the PC whom the Doctor listened to and not me, which I considered was unusual. This was because it was me and not the PC who was injured.*
>
> *21. I was admitted at the Homerton and a later report by Consultant McCarthy on 28th April 2008, gives a picture of his opinion. I was also seen by Dr. Saravanan, and Dr. Zurgani. My medical notes from my doctor's notes* [sic].
>
> *22. As a result of the injury, I was unable to work. As a caterer, I am unsure how this is going to affect me in the future. Whatever the position it is evident that that would affect my profession.*"

49. Mr. Okoro said nothing in his witness statement about any specific financial losses which he contended he had sustained as a result of the injuries of which he complained. No documents were produced by him to show any past or prospective future losses.

50. The only witness of fact called on behalf of Mr. Okoro was himself. However, he did rely also upon a medical report produced by Mr. D.M. McCarthy, a consultant orthopaedic surgeon. It is convenient now to turn to the medical evidence.

The medical evidence

51. Although both sides at the trial sought to rely upon medical expert evidence, the usual steps in relation to putting expert evidence before the court were not taken.

52. A hearing for directions took place on 17 March 2010 before Master Kay. Mr. Okoro attended on his own behalf. Kylie Jamieson, a solicitor, attended on behalf of the Commissioner. The orders made by Master Kay in relation to expert evidence were these:-

> "*3. The Claimant to have permission to call expert evidence from up to two doctors as to the nature of his injuries and the treatment he received. Such evidence to be made by report. The reports to be served on the Defendant by 4.00 pm on 31 May 2010.*
>
> *4. Upon receipt of the Claimant's expert reports, the Defendant has permission to obtain and serve an expert's report by 30 July 2010 or to provide questions to be put to the Claimant's expert by 30 June 2010. In that event, the Claimant's experts are to reply to such questions by 30 July 2010.*"

53. No further directions in relation to expert evidence were given then, or subsequently. Consequently the usual provision under CPR 35.12(3) for experts to prepare a statement of those issues upon which they agree, and those issues upon which they disagree, with a summary of their reasons for disagreeing, was not made. However, even worse, in terms of the difficulties presented at the trial, was that no consideration was given to how the trial judge was supposed to resolve any differences between the views of the experts.

54. What in the event happened was that Mr. McCarthy, under whose care Mr. Okoro had been when he underwent surgery on his left wrist, prepared a report dated 15 June 2010 which was served by Mr. Okoro. No questions were put to Mr. McCarthy, as envisaged by the order of Master Kay as a possibility. Mr. McCullough produced a report dated 6 August 2010 which was served on behalf of the Commissioner. That report was plainly served outside the timescale provided for by the order of Master Kay. No extension of time for service of the report of Mr. McCullough was ever sought. However, no formal objection was made to the admissibility of that report.

55. The respective reports of Mr. McCarthy and Mr. McCullough had different foci. In accordance with the direction of Master Kay the report of Mr. McCarthy was focused on the nature of Mr. Okoro's injuries and the treatment which he had received. However, the report of Mr. McCullough had a wider focus. In particular he considered whether, in his opinion, Mr. Okoro could have suffered damage to his left wrist in the way he contended, that is to say, as a result of the manner in which the handcuffs were applied to him after he had been arrested. It was, to say the least, unfortunate that the respective experts were invited to consider different issues, not least because no provision was made at any stage for a response on behalf of Mr. Okoro to opinions expressed by a medical expert on behalf of the Commissioner.

56. As if matters could not get worse, a consideration of the medical evidence which was adduced at trial identified what appeared to be internal inconsistencies which were incapable of being resolved without oral evidence.

57. The two most obvious examples of such inconsistencies were one in the evidence of Mr. McCarthy and one in the evidence of Mr. McCullough.

58. At paragraph 2.2 of his report dated 15 June 2010 Mr. McCarthy wrote:-

> "*He* [Mr. Okoro] *presented to the Accident and Emergency Department at Homerton Hospital on the 23rd October 2007 about five days after the material incident and in the triage note it was suggested that he had been assaulted by police and quotes that as well as the aforementioned assaults that he had been spanked against the wall of the police station and that he had hit his hand on the wall. He was then thrown on the floor and jumped out* [sic]. *He was noted to be tender over both distal radius but there did not appear to be any obvious deformity. There was some discomfort around the distal radioulnar joint of the left wrist and it was thought that he might have an injury there. X-rays were done and x-rays were thought to show an injury at this level and the impression was that of a disruption of the left distal radioulnar joint for which*

> *he was provided with Futura splint and referred onto the fracture clinic.*"

59. Mr. Okoro was pressed by Mr. Branston on the account recorded by Mr. McCarthy as having been given by Mr. Okoro to triage. In particular Mr. Branston emphasised that Mr. Okoro had apparently complained that he had hit his hand against the wall at the police station, and it appeared that at the hospital that was the explanation which Mr. Okoro had given for the injury to his left wrist. Mr. Okoro said in cross-examination that he had told those at the hospital that he had hit his head on the wall, not his hand. He could not explain the use of the expression *"jumped out"* in paragraph 2.2 of Mr. McCarthy's report. Mr. Okoro told me that he had explained at the hospital that a police officer had jumped over the counter. It has to be said that, grammatically, the expression "*jumped out"* as used in paragraph 2.2 of Mr. McCarthy's report seems to make no sense. The account recorded did not seem to encompass the possibility of Mr. Okoro jumping out of anything.

60. In fact Mr. McCarthy had made an earlier report on behalf of Mr. Okoro. That earlier report was dated 8 April 2008. A copy was put in evidence. At paragraph 2.3 of the earlier report Mr. McCarthy wrote:-

> "*Unfortunately the casualty records are extremely difficult to read but on assessment he appeared to have discomfort over both wrists but in particular the left wrist, where it was noted that he had a prominence of the ulnar styloid. He also was noted to have some swelling around his left knee. X-rays were done of the left wrist and these are available to me and he did appear to have what appears to be a fracture of the ulnar styloid and distal radioulnar joint disruption and he was provided with Futura splint and referred to the fracture clinic.*"

61. Neither "*the triage note"* referred to at paragraph 2.2 of Mr. McCarthy's report dated 15 June 2010 nor "*the casualty records"* mentioned in paragraph 2.3 of his earlier report were produced in evidence. It was unclear whether "*the triage note"* was, or was included in, "*the casualty records*", but the context suggested that it was likely. If "*the triage note"* was, or was included in, "*the casualty records"*, the obvious question was whether "*the triage note"* was difficult to read at the time of the preparation of Mr. McCarthy's report dated 8 April 2008. If so, the supplementary question would be, had it become any less difficult to read by the time of the preparation of the report dated 15 June 2010. At any rate there seemed to be a serious question, given the responses of Mr. Okoro to the questions put to him about paragraph 2.2 of Mr. McCarthy's report dated 15 June 2010, whether Mr. McCarthy had interpreted correctly whatever was written in "*the triage note"*. It appeared that in at least one respect he was likely to have misread it, for at paragraph 2.3 of his report dated 8 April 2008 Mr. McCarthy interpreted the notes as indicating swelling around the left knee, when in fact, according to the report of Mr. McCullough to which I am about to come, the affected knee was the right. It was suggested to Mr. Okoro in cross-examination that he had concocted a "*story*" of injuries at the hands of the police, and that, because it was an entirely false story, he had told those at the hospital that the damaged knee was a different one from that which he contended at the trial had been affected. Given the apparent difficulty in interpreting the hospital notes that does not seem very likely.

62. What was particularly unclear about the report of Mr. McCullough, in that he appeared at different points in the report to express contradictory views on the point, was whether he concluded that Mr. Okoro had not sustained an injury to his left wrist prior to being released from custody on 18 October 2007, or that he had. A minor complication was that consistently throughout his report Mr. McCullough recorded the date of the arrest and detention of Mr. Okoro as 17, rather than 18, October 2007.

63. There was, I think, no dispute that Mr. Okoro had at some point injured his left wrist and, possibly, his right knee. Mr. McCullough examined Mr. Okoro on 2 August 2010. In his report at section 5 he recorded what he had found on examination:-

> "*I examined Mr. Okoro's wrists. There was no wasting of the forearm musculature; I measured the circumference of both forearms 21 cm proximal to the radial styloid; the measurement in each forearm was 31 cm.*
>
> *I examined the right wrist and noted no abnormality. There was a full range of movement of the wrist with dorsiflexion to 90º and palmar flexion to 80º. The distal radioulnar joint was not painful. There was full pronation and supination of the forearm. Hand movements were normal. There was a good power grip.*
>
> *I examined the left wrist and noted the prominence of the distal ulna. I was unable to reduce the distal radioulnar joint from its position of dorsal subluxation as this caused pain. Dorsiflexion of the left wrist was to 70º and palmar flexion to 40º. Pronation and supination of the forearm were full. There was a slightly weaker power grip in the left hand. Movements of the fingers were full.*
>
> *I examined the right knee and noted no effusion. There was no quadriceps wasting. The range of movement of the right knee was from 0 to 135º. There was tenderness over the lateral joint line with crepitus. I compared the right knee to the left knee and there was no difference other than for the lateral joint line tenderness and crepitus. The left knee was normal.*
>
> *I examined the lumbar spine and noted a normal erect posture. Forward flexion and lateral flexion to the right and left were all full. Extension was full but caused a stab of pain in the lumbar spine. There was no length discrepancy.*"

64. The next section of Mr. McCullough's report was concerned with what he considered could be seen from the Composite DVD, and, in particular the use which Mr. Okoro could be seen making of his left arm, wrist and hand. Essentially Mr. McCullough's conclusion, with which I concur, was that there was no indication that Mr. Okoro's use of his left arm, wrist or hand was impeded by pain or that the use made of that arm, wrist or hand was otherwise than normal. Thus this part of the report seemed to be pointing in the direction of Mr. Okoro not having damaged his left wrist either shortly before arriving at the police station, or at the police station itself. In section 7

of Mr. McCullough's report he dealt, briefly, with the evidence of Dr. Cash. That evidence, Mr. McCullough seemed to conclude, again pointed in the direction of no injury to Mr. Okoro's left wrist shortly before arrival at, or whilst detained at, Islington Police Station.

65. Mr. McCullough next considered the clinical history of Mr. Okoro, so far as it could be discerned from medical records or the reports of Mr. McCarthy. However, for present purposes it is appropriate to move to section 10 of Mr. McCullough's report, entitled, *Opinion re: Causation, Condition and Prognosis"*. That section included the following:-

> "*A significant force is required* [to] *cause a subluxation or dislocation of the normal distal radioulnar joint. The injury would usually follow a major twisting force to the forearm, or fall upon the arm, or can be associated with a fracture of the radial shaft (Galeazzi fracture-dislocation/subluxation). At the time of the injury severe pain would be felt in the left wrist and the pain would persist for several weeks following injury. The degree of pain suffered by the patient would be akin to that resulting from a fracture of the distal radius.*
>
> *The pertinent question in relation to this report is when did this injury occur. At the consultation I asked Mr. Okoro specifically if he had ever suffered an injury to his left wrist prior to the alleged accident on the 17th October 2007. He told me that he had never suffered an injury to the wrist or indeed had never had a problem with his left wrist prior to that date.*
>
> …
>
> *Could Mr. Okoro have sustained the injury on the 17th October 2007? He told me that when he was initially apprehended at the side of his car, handcuffs were applied to each wrist. The handcuff on the left wrist was painful; he told me that the handcuff pressed against the bony prominence on the ulnar side of the wrist. At consultation he pointed to the dorsal aspect of the distal radioulnar joint, which would suggest that the distal ulna was already prominent at the time that the handcuff was applied. I consider that the application of a handcuff could not cause a dislocation/subluxation of the distal radioulnar joint.*
>
> …
>
> *Following removal of the handcuff from the left wrist, Mr. Okoro is seen to be gesticulating with his left arm that militates against him having suffered a severe and acute injury to the left wrist. I consider therefore that the handcuff application to the left wrist did not cause an injury of any significance to the left wrist.*

Mr. Okoro was then involved in a fracas with a group of Police Officers who surround him. The soft tissue injury to his right wrist may have occurred as a result of the attempts to restrain him by holding and twisting the handcuff attached to his right wrist. His left arm was held at the forearm and wrist by another Police Officer and it is certainly possible that the left wrist could have sustained a significant twisting injury at that time. However, at consultation Mr. Okoro told me that his left wrist was not injured during the fracas.

CCTV immediately following the fracas shows Mr. Okoro to be moving his left arm quite normally; subsequent observations do not indicate that Mr. Okoro was suffering from acute pain in his left wrist. If he had suffered an acute injury, such as an acute subluxation/dislocation of the left distal radioulnar joint, then he would have been in significant pain and would not have been able to move his left arm; he would in fact have been cradling it to protect the injured part.

I consider therefore that Mr. Okoro suffered soft tissue injuries to both wrists involving the skin and subcutaneous tissues as a result of the application of the handcuffs, the right being worse than the left. I consider that he had a chronic dorsal subluxation of the distal radioulnar joint of the left wrist that had occurred prior to the incident on the 17th October 2007.

When I examined Mr. Okoro's wrists, I noted no wasting of the forearm musculature. The right wrist was normal and I consider that he has made a full recovery from the soft tissue injury sustained on the 17th October 2007. Mr. Okoro informs me that his left wrist is now painful whereas apparently he had suffered no pain from it prior to the material accident. I consider therefore that the incident has exacerbated a pre-existing problem i.e. a chronic dorsal subluxation of the distal radioulnar joint, which was essentially asymptomatic prior to the 17th October 2007. This injury could be considered as an acceleration injury as the chronic problem with the left distal radioulnar joint would on the balance of probabilities have become symptomatic at some point in time in the future had the injury not occurred. I consider that the symptoms from the left distal radioulnar joint have been accelerated by between two to five years.

Mr. Okoro also claims to have sustained an injury to his right knee and there is no doubt that his right knee may have been twisted during the fracas in the Police Station. He did complain of pain in his right knee when he was seen in the Accident and Emergency Department shortly thereafter and x-rays of the right knee were taken. I identified osteoarthritic change in the lateral compartment of the joint on the x-rays and there are clinical signs on examination that fit with this diagnosis. Again,

> *I consider that there has been an acceleration of a pre-existing condition and I consider that the symptoms of the left* [sic] *knee have been brought forward by approximately 12 months.*"

66. At the end one is left wondering what in fact was the opinion of Mr. McCullough on causation. His emphasis on the Composite DVD appearing to show Mr. Okoro using his left arm, wrist and hand normally appeared to suggest that he considered that Mr. Okoro had not suffered any injury to his left wrist prior to arrival at, or during his detention at, the police station. Coupled with his evidence as to the pain generated by a subluxation or dislocation of the distal radioulnar joint, the point seemed to lead to it being impossible that Mr. Okoro had suffered his injury to his left wrist until some time after he left the custody of the police. The point was possibly emphasised by the observation that, *"I consider that the application of a handcuff could not cause a dislocation/subluxation of the distal radioulnar joint"*. However, that rather depends on what Mr. McCullough meant by that comment. If he meant only that the closing of a handcuff round a wrist could not cause that damage, that may be so. On the other hand, if he was seeking to suggest that twisting an arm in order to force it into handcuffs could not produce that effect, it is difficult to reconcile with his evidence that, *"The injury would usually follow a major twisting force to the forearm"*, for it would seem that, at least in theory, such a force might be applied in the course of fitting handcuffs. Mr. McCullough then appeared to contemplate that, *"it is certainly possible that the left wrist could have sustained a significant twisting injury"* in the *"fracas"*. If so, and if what Mr. McCullough had said earlier about the *"severe pain"* caused by a subluxation or dislocation were correct, would one not expect to see evidence of such pain in the Composite DVD? As one does not, it seems that Mr. McCullough may have thought that *"severe pain"* was not a necessary concomitant of a subluxation or dislocation. However, as the passage about it being possible that the left wrist could have sustained a significant twisting injury was followed, in the next paragraph by further reference to the video evidence and the assertion that, *"If he had suffered an acute injury, such as an acute subluxation/dislocation of the left distal radioulnar joint, then he would have been in significant pain and would not have been able to move his left arm"*, it seems that Mr. McCullough, at this point, was saying, in effect, that although it was theoretically possible that the left wrist could have sustained a significant twisting injury in the *"fracas"*, actually Mr. Okoro did not sustain such an injury because of lack of evidence of pain. But how then does one get to the sentence two paragraphs further on that, *"I consider therefore that the incident has exacerbated a pre-existing problem i.e. a chronic dorsal subluxation of the distal radioulnar joint, which was essentially asymptomatic prior to the 17th October 2007"*? That expression of opinion seems to be consistent, and consistent only, with Mr. Okoro having sustained an injury to his left wrist on 18 October 2007 by reason of something (unexplained) having happened to a vulnerable wrist. Did this cause severe pain or not? Presumably not. If not, then a subluxation or dislocation of the distal radioulnar joint does not have to be associated with severe pain. If that is right, then the reasoning behind rejecting the possibility of a significant twisting in the *"fracas"* cannot be sustained, and the emphasis on what could be seen in the video evidence was inappropriate. Furthermore, if Mr. McCullough's view in fact was that an existing asymptomatic problem in the left wrist had been exacerbated, it is difficult to understand his apparent opinion that the joint would have become symptomatic within two to five years in any event. In what circumstances would this have

happened? Would it have occurred spontaneously, or as a result of some activity on the part of Mr. Okoro? And, if the latter, what activity performed in what sort of way?

67. It may be that the difficulty in understanding what the opinion of Mr. McCullough on causation was could have been resolved, had he been called to give oral evidence. However, as that course was not followed, it seems to me that I can derive nothing of value from the report of Mr. McCullough in relation to issues of causation.

68. It did not appear that there was any dispute as to the treatment which Mr. Okoro had in fact received in relation to his left wrist. That treatment was conveniently set out in the report of Mr. McCarthy dated 15 June 2010 in this way:-

> "*2.3 He was seen in the fracture clinic on the 24th October 2007. It was thought that he was suffering from an instability of the distal radioulnar joint and was admitted for MUA and K-wiring and an operative note from the 26th October 2007 suggested he came in with a suspected dislocated left distal radioulnar joint and underwent MUA and K-wiring of this joint.*
>
> *2.4 He was initially seen by me on the 30th April 2008, on which occasion none of the previous correspondence was available to me in typed form and therefore I was little confused* [sic] *as to the diagnosis.*
>
> *2.5 MRI scan had been arranged and I reviewed this and this confirmed the posterior subluxation of the distal radioulnar joint and intact triangular fibrocartilaginous complex. He reported that his wrist was a lot better and I could find little in the way of discomfort and I thought he had a good function in the wrist.*
>
> *2.6 I did not think he was a candidate for any further intervention.*
>
> *2.7 When reviewed again on the 31st October 2008, he reported persistent pain in the left wrist particularly with lifting and weightbearing activities and it was now felt that the distal ulna was a lot more prominent. He was complaining of some redness and stiffness following activity. He was noted to be tender around the distal radioulnar joint. He had discussion with Mr. Mbubaegbu and there was a suggestion that he might warrant an exploration and it was decided to delay any form of intervention.*
>
> *2.8 He was seen again on the 4th August 2009 by Mr. Dawish, a Locum, Consultant at which stage he was complaining of pain in the left wrist particularly with lifting and weightbearing activities. No firm decision was made with respect to his management.*

> *2.9 He was referred back again to the Homerton Hospital on the 15th October 2009 because of ongoing problems.*
>
> *2.10 He was then seen by me on the 4th December 2009 and I was of the view that he did not appear to have significant problems but had a very definite deformity at the level of the wrist and decided to bring him in for an arthroscopy in early 2010 to assess any evidence of any intraarticular damage.*
>
> *2.11 This operation was subsequently deferred on Mr. Okoro's decision and is due to take place in the coming weeks.*
>
> *2.12 This information is a little confusing and he certainly had a problem at the level of the distal radioulnar joint but the investigations to-date* [sic] *have not hinted at any significant problem within the wrist.*
>
> *2.13 On this basis the problem he presents with may well be a congenital variant rather than evidence of a traumatic incident.*
>
> *2.14 However in view of the fact that he claims that he had no problems prior to the alleged assault, it would be reasonable to suggest that the problems he has had since that time are a direct consequence of the injuries sustained while in police custody.*
>
> *2.15 However, we are far from clear in providing a meaningful diagnosis and this will be established once he has had an arthroscopy in the coming weeks.*
>
> *2.16 However, on balance I would expect that he will continue with problems in the wrist.*"

69. In his report Mr. McCullough reproduced paragraphs 2.12 to 2.15 inclusive of the report dated 15 June 2010 of Mr. McCarthy without comment. Presumably he agreed with those observations. If so, it seemed to be common ground between Mr. McCullough and Mr. McCarthy that, if Mr. Okoro had no problems with his left wrist before his arrest, the problems which he has had since are referable to the events of 18 October 2007. It also seemed to be common ground that it was uncertain, until an arthroscopy had been performed on the left wrist of Mr. Okoro, what exactly was the diagnosis, although Mr. Okoro undoubtedly had a problem at the level of the distal radioulnar joint. Mr. McCullough's examination indicated limitation on dorsiflexion and palmar flexion in the left wrist, as compared with the right, and slightly reduced power grip in the left hand.

70. Mr. Okoro was cross-examined about various medical records produced from time to time, in addition to the "*triage note*" which I have already mentioned.

71. One record was in the form of a letter dated 24 October 2007 produced by Mr. Ramaswamy Saravanan, an associate specialist in orthopaedics at Homerton Hospital,

and addressed to Mr. Okoro's general medical practitioner, Dr. Gupta. The letter was in these terms:-

> "*I reviewed this patient today. The patient has sustained injury to his left wrist five days ago when he tells me that he was handcuffed and when the fire crew tried to remove the handcuff, he sustained the above injury. He denies any other trauma. He was treated in the A & E with a future splint.*
>
> *On examination, the ulnar styloid appears prominent. There is diffuse tenderness felt over the distal radioulnar joint. Check x-ray confirms dislocated distal radioulnar joint.*
>
> *I have explained this to the patient and I have placed him on the list to have his distal radioulnar joint reduced under GA and k-wired this week.*"

72. Mr. Branston suggested to Mr. Okoro, in effect, that, having sustained injury to his left wrist in some unexplained manner subsequent to his release from police custody on 18 October 2007, Mr. Okoro then decided to attribute the injury to an event whilst he was detained, but by the time he saw Mr. Saravanan had not worked out the *"story"* in the way in which it was put at the trial. Consequently Mr. Okoro told Mr. Saravanan, suggested Mr. Branston, that the injury had been sustained when the handcuff was removed by the fire brigade. Mr. Okoro denied that.

73. I did not find the erroneous account recorded in the letter of Mr. Saravanan dated 24 October 2007 of much assistance. The account was plainly wrong. It was common ground that the injury was to the left wrist, whilst the fire brigade removed the handcuff from the right wrist. The issue to which the contents of the letter was relevant was whether Mr. Okoro had given Mr. Saravanan an inaccurate account, because he was making up his *"story"*, as Mr. Branston contended, or whether Mr. Saravanan misunderstood what he was told, and thus his letter reflected his misunderstanding. It is far from plain beyond argument that Mr. Saravanan must have understood correctly what he was told, and must have recorded that understanding correctly in his letter. Mr. Saravanan's interest in what he was told by Mr. Okoro concerning the circumstances in which he sustained injury to his left wrist was in fact limited to that information which might impact upon the making of a diagnosis. It seemed to me to be impossible, simply on the basis that the circumstances in which Mr. Okoro sustained injury as recorded in Mr. Saravanan's letter was wrong, to conclude that that must have been because Mr. Okoro had given Mr. Saravanan an untrue account. However, the contents of the letter did need to be taken into consideration along with other material, to which I am about to turn, which was relied on on behalf of the Commissioner as pointing to the evidence of Mr. Okoro as to the circumstances in which he sustained injury to his left wrist being unreliable.

74. The other material relied upon rather focused on the question whether, prior to 18 October 2007, Mr. Okoro had sustained injury to his left wrist.

75. A manuscript note on a medical card in the form of what is sometimes called a *"Lloyd-George card"*, of which a copy was put in evidence, included, beside the date 3 June 2005 a reference to *"assault"*, followed by words which cannot be deciphered

and then a list of symptoms, which appeared to indicate pain in the right shoulder, left wrist and right knee. No other information was recorded. It was thus unclear what precisely was thought to have been the cause of the pain in the left wrist apparently recorded. I have to say, *"apparently recorded"*, because the form of the note was perhaps capable of being interpreted in a way different from that in which I have interpreted it. In what follows I have put brackets where a circle appears in the original, but the note, after the word *"assault"* and the illegible words, read:-

> "*Pain (R) Shoulder*
>
> *(L) Wrist*
>
> *(R) Knee*"

76. Mr. Branston suggested to Mr. Okoro that that note showed that Mr. Okoro had sustained damage to his left wrist before 18 October 2007, but Mr. Okoro denied it. It is difficult to know what to make of the note without more. If what had happened was a subluxation or dislocation of the distal radioulnar joint one would have expected that to have been noted. If there had been any significant injury one would have expected the cause to have been noted. The fact that apparently all that was noted was pain suggested that the pain was minor, not least because it does not appear that any treatment was prescribed. Although Mr. Okoro denied that he had suffered any injury to his left wrist prior to 18 October 2007, it seemed entirely possible that the note was accurate, but recorded only an injury which was so minor that Mr. Okoro had forgotten about it.

77. The other medical record upon which Mr. Branston relied was no clearer. It was part of a computer record. On 19 January 2010, according to the note, Mr. Okoro had seen Dr. Julie Sharman to request a medical report for a tribunal hearing on 28 January 2010. The remainder of the note read:-

> "*Incident in 2006.24/7/06. Tussle in a restaurant and injured.*
> *Bitten on forehead. Left wrist injury.*"

78. No more details of the left wrist injury were given. No records of any diagnosis or treatment on 24 July 2006 were adduced in evidence. Mr. Okoro recalled the incident in his restaurant when he detained a customer who was causing trouble until the police arrived. He remembered being bitten in the face. However, he denied that he had sustained an injury to his left wrist on that occasion.

The Composite DVD and the Camera 11 DVD

79. It is appropriate now to return to the Composite DVD and the Camera 11 DVD.

80. I have already commented upon what can be seen on the arrival of Mr. Okoro, P.C. Watkins and P.C. Phillips at Islington Police Station. Mr. Okoro was still handcuffed. He was invited to sit on a bench, but declined to do so, saying that he wished to use the lavatory. He conducted a conversation with P.C. Watkins and P.C. Phillips in terms which seem to me to have been perfectly ordinary in terms of his actions and his tone of voice. This part of the action shown on the Composite DVD comes to an

end when Mr. Okoro, P.C. Watkins and P.C. Phillips are seen moving along a corridor, at about 19:35:24.

81. They arrive in front of the custody desk, behind which is Sergeant Butler.

82. At 19:35:55 P.C. Phillips removes the handcuff from Mr. Okoro's left hand. There then begins a number of attempts using different keys to release the right hand handcuff. Initially P.C. Phillips makes the attempt. P.C. Watkins has a go. During this time Mr. Okoro is having a perfectly normal discussion with Sergeant Butler. Essentially Mr. Okoro is explaining to Sergeant Butler, using an ordinary speaking voice and without any threatening gestures, his view of the circumstances in which he comes to be in the police station. He seems to take no notice of the attempts to remove the handcuff from his right hand. A third police officer becomes involved in the attempt to release the handcuffs. Things change at about 19:39:17 when Mr. Okoro complains, in a raised voice, *"You're hurting me"*. He has previously said that he wants his lawyer to come. P.C. Phillips at this stage is holding Mr. Okoro's left arm. One of the police officers, I think P.C. Phillips, then says, *"Let me take the handcuffs off"*. Sergeant Butler says that he wants the handcuffs taken off. Mr. Okoro says that he wants his lawyer to see the handcuffs on his wrist. By this stage it appears that four police officers are around Mr. Okoro, P.C. Phillips holding his left arm and the others round the right hand. At 19:40:08 Mr. Okoro says again, *"You're hurting me"*, again in a raised voice. A fifth officer arrives at 19:40:12. At 19:40: 28 Mr. Okoro cries, in a loud voice, *"Leave me alone"*. He pulls his left arm from the grip of P.C. Phillips. It is unclear from the angle of the camera whether any of the officers at Mr. Okoro's right side lose grip of Mr. Okoro at this point, but it would seem not. At this point Sergeant Butler stands up and begins to cross the desk. The Camera 11 DVD shows him raising his left knee to the desk, followed by his right foot on the desk. He appears to jump down onto the floor behind Mr. Okoro, and, as he does so, to put both of his hands on Mr. Okoro's shoulders, left hand on left shoulder, right hand on right shoulder. The Composite DVD shows Mr. Okoro being propelled forward immediately after Sergeant Butler lands, so that it would appear that Sergeant Butler was one of those propelling Mr. Okoro forwards. At 19:42:48 P.C. Phillips is seen helping Mr. Okoro remove his jacket from his left arm. By 19:43:49 Mr. Okoro is sitting on a bench in the custody area.

83. While the Composite DVD continues for a considerable time, all that can be seen which is relevant to the issues in this action is that which I have already noted, that Mr. Okoro seems throughout, from the time his left hand is released from handcuffs, to use the left arm, wrist and hand in an entirely normal manner.

The law

84. Before coming to my findings on the evidence it is appropriate to consider the law to which those findings are relevant.

85. A convenient starting point is the observation of Lord Atkin in his dissenting speech in *Liversidge v. Anderson* [1942] AC 206 at page 245 that:-

> *"a principle which again is one of the pillars of liberty … in English law* [is that] *every imprisonment is prima facie*

> *unlawful and that it is for a person directing imprisonment to justify his act.*"

86. That principle was referred to by Diplock LJ in *Dallison v. Caffrey* [1965] 1 QB 348 at page 370:-

> "*Since arrest involves trespass to the person and any trespass to the person is prima facie tortious, the onus lies on the arrestor to justify the trespass by establishing reasonable and probable cause for the arrest.*"

87. Both of these passages appeared in the submissions of Counsel for the plaintiff in *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, and were noted by Lord Steyn in his speech at page 296 F – H. Lord Steyn did not suggest that the principle was of historic interest only or had been superseded or modified by the more complicated world in which we now live. In my judgment the principle is sound and as in need of being scrupulously maintained as it has ever been.

88. In the present case the arrest of Mr. Okoro was sought to be justified by the powers to be found in *Police and Criminal Evidence Act 1984 s. 24* as amended. So far as presently material that section, as amended, is in these terms:-

> "*(2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without warrant anyone whom he has reasonable grounds to suspect of being guilty of it.*
>
> *(3) …*
>
> *(4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.*
>
> *(5) The reasons are –*
>
> *(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);*
>
> *(b) correspondingly as regards the person's address;*
>
> *(c) to prevent the person in question –*
>
> *(i) causing physical injury to himself or any other person;*
>
> *(ii) suffering personal injury;*
>
> *(iii) causing loss of or damage to property;*

(iv) committing an offence against public decency (subject to subsection (6)); or

(v) causing an unlawful obstruction of the highway;

(d) to protect a child or other vulnerable person from the person in question;

(e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question. "

89. In his written skeleton argument Mr. Branston set out the Commissioner's case as follows:-

> "*8. It is submitted that the apparent coincidence of C's identity with that of the man shown as being "wanted" gave PC Watkins reasonable grounds to suspect that C was guilty of fraud by false representation.*
>
> *9. It is further submitted that PC Watkins had reasonable grounds to believe that it was necessary to arrest C, a man shown as "wanted" on the Mobile Display Terminal ("MDT"), pursuant to s 24(5)(e) and/or (f) PACE and that the arrest was in all the circumstances lawful.*"

90. Mr. Branston also explained that the Commissioner's case as to false imprisonment was that the detention of Mr. Okoro for the period which he was detained was lawful as a consequence of the arrest. As to the injuries of which Mr. Okoro complained, at paragraph 14 of his written skeleton argument Mr. Branston submitted that, "*the evidence in support of each is either wholly lacking or so inherently weak or contradictory that C fails to establish that any were caused by the unlawful conduct of D's officers.*"

91. In the course of his oral submissions Mr. Branston reminded me of a passage in the speech of Lord Hope of Craighead in *O'Hara v. Chief Constable of the Royal Ulster Constabulary* at page 298 A – E. In that passage Lord Hope was considering the provisions of *Prevention of Terrorism (Temporary Provisions) Act 1984 s. 12(1),* but Mr. Branston submitted, rightly in my judgment, that the approach explained by Lord Hope to determining whether a police officer had reasonable grounds for suspecting an offence was equally applicable to the determination of the same issues under *Police and Criminal Evidence Act 1984 s. 24*:-

> "*My Lords, the test which section 12(1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an*

> *objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.*
>
> *This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances.*"

92. What, I think, one derives from that passage is, first, that a police officer exercising a power of arrest on the grounds that he or she reasonably believes that an offence has been committed and that he or she reasonably believes that the person arrested committed that offence, must actually suspect that an offence has been committed and actually suspect that the person arrested committed it. Second, the grounds upon which the police officer suspected that an offence had been committed and that the person arrested had committed it, must be objectively reasonable.

93. The same approach, as it seems to me, should be applied to the question which did not need to be considered in *O'Hara v. Chief Constable of the Royal Ulster Constabulary*, but which arises in the present case, namely whether the requirements of *Police and Criminal Evidence Act 1984 s. 24(4) and (5)* were satisfied. The test is, did the arresting officer actually believe that it was necessary to arrest the person in question for one of the reasons set out in *s. 24(5)*, and, if so, did he or she have reasonable grounds for that belief?

94. Mr. Branston relied upon two passages from the advice of the Privy Council, delivered by Lord Devlin, in *Hussien v. Chong Fook Kam* [1970] AC 942, at pages 948 and 949 as to what amounts to suspicion:-

> "*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove". Suspicion arises at or near the starting-point of an investigation of which the obtaining of prima proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage…*
>
> *There is another distinction between reasonable suspicion and prima facie proof. Prima proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in* McArdle v. Egan *(1934) 150 LT 412. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstance.*"

95. He also relied, in the same context, upon a passage from the speech of Lord Steyn in *O'Hara v. Chief Constable of the Royal Ulster Constabulary* at page 293 B – E:-

> "*Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough:* Hussien v. Chong Fook Kam *[1970] AC 942, 949. (2) Hearsay information may therefore afford a constable reasonable grounds to arrest. Such information may come from other officers:* Hussien's *case, ibid. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes his arrest. (4) The executive "discretion" to arrest or not, as Lord Diplock described it in* Mohammed-Holgate v. Duke *[1984] AC 437, 446, vests in the constable, who is engaged on the decision to arrest or not, and not in his superior officers.*"

96. In *O'Hara v. Chief Constable of the Royal Ulster Constabulary* Lord Steyn went on in his speech on page 293, at E – F:-

> "*Given the independent responsibility and accountability of a constable under a provision such as section 12(1) of the Act of 1984 it seems to follow that the mere fact that an arresting officer has been instructed by a superior officer to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion within the meaning of section 12(1). It*

> *is accepted, and rightly accepted, that a mere request to arrest without any further information by an equal ranking officer, or a junior officer, is incapable of amounting to reasonable grounds for the necessary suspicion.*"

97. The reason for these views is, I think, obvious: to be justified in making an arrest the arresting officer must himself or herself actually have information, from whatever source, which leads that officer to form, himself or herself, a suspicion that an offence has been committed and a suspicion that the person arrested committed it.

98. Some submissions on behalf of Mr. Okoro prompted Mr. Branston to draw to my attention some observations of Purchas LJ in an unreported decision of the Court of Appeal, *Castorina v. The Chief Constable of Surrey*, in which judgment was delivered on 10 June 1988:-

> "*With respect to the judge I agree with Mr. Wilson's submissions that, in concentration on what the officers might or might not have done by way of further inquiry before arrest, the judge's attention was deflected from the critical question, namely when they arrested her did they have reasonable cause for suspecting that the respondent was guilty of the offence? (See Holgate-Mohammed v. Duke (1984) AC 437). In that case the trial judge had found that the detective constable had had reasonable cause to suspect the plaintiff of having committed an arrestable offence but, because the constable had decided not to interview her under caution but to subject her to the greater pressure of arrest and detention so as to induce a confession, there had been a wrongful exercise of the power of arrest. From the speech of Lord Diplock, who delivered the leading speech, it is clear that the failure to interrogate before arrest did not impair the lawfulness of the arrest in the first instance under the powers of section 4(2) but that the exercise of those powers before interrogation in order to enhance the chances of obtaining a confession had to be tested against the principles laid down in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223. Their Lordships decided that in the circumstances of that case there had been no such breach of the Wednesbury principle.*
>
> *There is ample authority for the proposition that courses of inquiry which may or may not be taken by an investigating police officer before arrest are not relevant to the consideration whether, on the information available to him at the time of the arrest, he had reasonable cause for suspicion…*"

99. Another member of the Court involved in that decision was Sir Frederick Lawton. As it seems to me, these observations of Sir Frederick are helpful in the present context:-

> "*Suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which a court would adjudge to be reasonable. The facts may be within the arresting*

> *constable's own knowledge or have been reported to him. When there is an issue in a trial as to whether a constable had reasonable cause, his claim to have had knowledge or to have received reports on which he relied may be challenged. It is within this context that there may be an evidential issue as to what he believed to be the facts, but it will be for the court to adjudge what were the facts which made him suspect that the person he arrested was guilty of the offence which he was investigating.*"

100. The last authority to which my attention was drawn to which it is appropriate to refer was the decision of the Court of Appeal in *Hough v. The Chief Constable of the Staffordshire Constabulary* [2001] EWCA Civ 39. That was a case in which the information which prompted the arresting officer to arrest the claimant had been derived from the Police National Computer. A motor car had been stopped by officers in a police car as it appeared to have a damaged windscreen. After the motor car had been stopped a check of the Police National Computer had been undertaken. That had revealed this information:-

> "*Any sighting and description of the occupants only, no stop checks, do not approach, occupant may be armed with a firearm; information to Sergeant 1615 Woodruff at Crewe.*"

101. The police officers who had stopped the motor car summoned the assistance of armed police officers and meanwhile procrastinated, concentrating on aspects of the condition of the motor car. Once the armed officers arrived one of them arrested the front seat passenger. In the event no firearm was found and the arrested person was released. He made claims for wrongful arrest, assault and false imprisonment. The issue in the Court of Appeal was identified by Simon Brown LJ at paragraph 6 of his judgment, which was the only substantive judgment:-

> "*When grounds for an arrest are based upon an entry on the police national computer, is the test of reasonableness to be applied to the officer making the arrest or the officer who put the information on the computer?*"

102. The trial judge found that the arresting officer genuinely suspected that the arrested man was guilty of unlawful possession of a firearm.

103. Having considered the facts and the decision in *O'Hara v. Chief Constable of the Royal Ulster Constabulary*, Simon Brown LJ stated his conclusions:-

> "*16. True it is that the particular question under consideration in O'Hara was whether an order to arrest given by a superior officer was itself sufficient to afford the arresting officer a reasonable suspicion. It was the Chief Constable's (unsuccessful) contention that it was. The principle established, however, necessarily extends to encompass also a case like the present. The critical question to be asked in all cases is what is in the mind of the arresting officer: he can never be a "mere conduit" for someone else. It is for that reason insufficient for*

> *an arresting officer to rely solely upon an instruction to carry out the arrest. Conversely, however, where the arresting officer's suspicion is formed on the basis of a police national computer entry, that entry is likely to provide the necessary objective justification. After all, if, as the authorities clearly establish, information from an informer or member of the public can properly found suspicion sufficient for an arrest, why too should not an apparently responsible entry in the computer?*
>
> *17. But that is not to say that any computer entry will of itself necessarily justify an arrest. If there is no urgency in the situation and if "in the light of the whole surrounding circumstances" (to use Lord Hope's phrase) some further enquiry was clearly called for before suspicion could properly crystallise, then the entry alone would not suffice.*"

Findings

104. Against the background of the authorities I turn to consider my findings.

105. For the reasons which I have explained, as a matter of law it was for the Commissioner to justify the arrest of Mr. Okoro. It was accepted by Mr. Branston that that was so, and that, if the Commissioner failed to justify the arrest, it followed that the detention of Mr. Okoro in the period between the time of his arrest and the time of his release – approximately four hours – amounted to false imprisonment.

106. I am not persuaded on the evidence led before me that the Commissioner has discharged the burden upon him of justifying the arrest of Mr. Okoro.

107. The first problem which arises on the evidence is what P.C. Watkins actually suspected, if anything, at the time she arrested Mr. Okoro. Her evidence was that she arrested Mr. Okoro on the grounds that she suspected him of committing the offence of attempted fraud by false representation at the management offices of Canary Wharf. I do not accept that evidence. On her own account she was aware, prior to administering a breath test to Mr. Okoro, that Mr. Okoro was wanted for the offence of attempted fraud. Assuming that to be so, it is very difficult to understand why, having, so she said, obtained that information, on her return to where Mr. Okoro was standing with P.C. Phillips, she did not then and there arrest him. She did not do so. She chose, instead, to administer the breath test. Why? If Mr. Okoro had been arrested for attempted fraud, he was not going to be driving again for some time, so there was no urgency in administering a breath test. Instead, P.C. Watkins administered the breath test and only after it had been revealed that Mr. Okoro had not been driving with excess alcohol did she decide to arrest him on grounds that, according to her, were known to her before the breath test was administered.

108. In the context of what P.C. Watkins actually suspected, if anything, the next matter for consideration was what was actually shown on the screen when P.C. Watkins searched the Police National Computer. As I have explained, no copy of the screen-shot or a print-out, of any version of what she might have seen was put in evidence. There are positive reasons for doubting her account of what she said she saw. The

most obvious is that, as I have noted, there seems to have been somewhere on the Police National Computer at the time she made her search the information that the person giving the name Andrew Okoro and the date of birth 31 January 1967 had in fact been arrested on or before 20 July 2007 and had been admitted to police bail to which he had surrendered at least once and had had renewed at least once. It seems unlikely that the latter information, still available at the time when papers were assembled for some purpose at the beginning of 2009, was not available on 18 October 2007 or could not be accessed by P.C. Watkins. The second reason for doubting the account of P.C. Watkins is that she recorded the date of the alleged offence incorrectly in her Notebook. According to the Record, when charged by P.C. Rail from Limehouse Police Station on 18 October 2007 at Islington Police Station, the charge identified the date of the alleged offence as 19 July 2007. In her notebook P.C. Watkins wrote the date, which she could only, on her account, have obtained from the Police National Computer, as 17 September 2007. Whilst it might be said that she had simply transposed digits, that would not explain why P.C. Phillips, who on the account of both of them, obtained his information about the alleged attempted fraud from P.C. Watkins, wrote the date of the alleged offence in his Notebook as 1 July 2007. It may not be without significance that, according to the print-out concerning bail put in evidence, the last date to which the accused person using Mr. Okoro's name was bailed was 11 September 2007. If he had failed to appear on that date it might well be that a date 17 September 2007 appeared in whatever P.C. Watkins saw on the screen when she checked the Police National Computer, but in a completely different context.

109. If P.C. Watkins had impressed me as a frank and straightforward witness the features of the case which I have so far identified in this section of my judgment might have concerned me less. Unhappily I was not impressed by P.C. Watkins as a witness. It was plain, in my judgment, that she, Sergeant Butler, and, to a lesser extent P.C. Phillips at least embellished, or as the modern saying is, *"sexed up"*, their evidence in relation to matters susceptible of independent verification.

110. The first area in which this happened, and it was done principally by P.C. Watkins, related to the height and stature of Mr. Okoro. Simply from seeing Mr. Okoro in person at the trial and from seeing him on the Composite DVD and the Camera 11 DVD it was obvious that P.C. Watkins, in particular, had sought to describe him as considerably taller and larger than in fact he is and was on 18 October 2007. What was the purpose of this exaggeration? Presumably to present Mr. Okoro in a bad light and to have to hand more plausible justifications for the mishaps which subsequently befell Mr. Okoro, in particular the handcuffing of him.

111. The next matter which, as it seemed to me, was exaggerated quite unacceptably was the issue of whether Mr. Okoro was *"aggressive"*. As I have noted, Sergeant Butler described Mr. Okoro's demeanour in the Report as *"aggressive"*. Based on what could be seen in the Composite DVD and the Camera 11 DVD that description was not justified. The only point at which Mr. Okoro behaved in a way which could properly be described as in any way violent was at about 19.40 when he pulled his left arm from the grip of P.C. Phillips and he shouted out. However, his behaviour was in response to his protestations about being hurt during the unsuccessful attempts to remove the right hand handcuff being ignored. Apart from that episode, which I think was understandable, the most that could be said was that Mr. Okoro declined to sit

when he was asked to do so, and spoke firmly, but not rudely, to police officers, for example about his desire to visit the lavatory.

112. As I have said earlier in this judgment, what P.C. Phillips said in his witness statement about Mr. Okoro being *"somewhat uncooperative"*, and what Dr. Cash said about him being *"relaxed, orientated in time and space and co-operative"* when examined seemed to give a much fairer impression of the general behaviour of Mr. Okoro whilst at Islington Police Station than using the word *"aggressive"*. Rather unfortunately, given that his account in his witness statement seemed to be fair, in cross-examination P.C. Phillips expressed the view that in custody Mr. Okoro had been *"aggressive"*, shouting and refusing to sit down. While that evidence coincided with the evidence of P.C. Watkins and that of Sergeant Butler, it was divergent from P.C. Phillips's witness statement and what could be seen on the DVDs. However, P.C. Phillips did agree in cross-examination that Mr. Okoro had been co-operative from the time he had been stopped while he was being questioned, and that he had raised no objection to a breath test being administered. He said that he could not recall the exact sequence of events when Mr. Okoro was handcuffed. Certainly he did not, in his oral evidence, supply the deficiencies in his account of the arrest and handcuffing of Mr. Okoro, as compared with that of P.C. Watkins.

113. I do not accept that the evidence of P.C. Watkins as to how Mr. Okoro was said to have behaved in paragraphs 19 and 22 to 26 inclusive of her witness statement is accurate. I think that it was exaggerated to an extent that it gave a wholly unfair picture. In truth, as rather appeared from the absence of comment in the witness statement of P.C. Phillips, Mr. Okoro submitted to what had happened to him with resignation.

114. Other aspects of the evidence of P.C. Watkins which persuaded me that I could not accept her evidence on disputed issues, or those in relation to which the burden fell on the Commissioner, were what she said about not being satisfied with the address which Mr. Okoro had given and how she explained crying out at Islington Police Station, *"Watch out for his head"*. As I have pointed out, the fact that Mr. Okoro volunteered as the address at which he lived the same address as that which was the address at which the Car was registered as normally kept should have persuaded any fair-minded person that it was likely that the address volunteered was correct. That, according to her, P.C. Watkins formed the view that she was not satisfied that the address given was a correct address seems to be so far at variance from common sense as to be incapable of belief. While, in answer to a question from me, P.C. Watkins agreed that she had called out, *"Watch out for his head"* because she had seen Mr. Okoro being pushed towards a wall with his head down, as, indeed, could be seen in the Composite DVD, the fact that at paragraph 33 of her witness statement she had sought to explain her shout away, wholly implausibly as, *"simply a verbal notification to remind the officers involved in the struggle to watch out for the Claimant's head"* did not, in my judgment, encourage confidence in her evidence.

115. In the result, therefore, for the reasons which I have explained, I did not feel able to accept the evidence of P.C. Watkins as to what was actually in her mind at the time she arrested Mr. Okoro. It followed that the Commissioner had not discharged the burden upon him of justifying the arrest of Mr. Okoro. Consequently I find that the arrest was wrongful and the ensuing detention unlawful.

116. Although the evidence was not as straightforward as would have been ideal, I was satisfied that Mr. Okoro suffered the injury to his left wrist which, as an injury, was not in dispute, when the handcuffs were applied.

117. At that point those applying the handcuffs would have laid hold of Mr. Okoro's arms in order to fix the handcuffs, and would have turned them behind his back so as to put his arms and hands in what was called *"the rear stack position"*, that is to say, with one hand above the other, separated by the plate between the two rings which held the wrists.

118. Mr. Okoro did not complain, audibly, on the Composite DVD that he had sustained any injury to his left wrist. As I have noted, it could be seen from the Composite DVD that he seemed to use his left arm, wrist and hand normally throughout his time at Islington Police Station. All those are factors against my finding, certainly if, as Mr. McCullough at various points in his report suggested, an injury such as that Mr. Okoro suffered must inevitably have been extremely painful. However, as I have explained, it seemed that, ultimately, Mr. McCullough may have concluded that severe pain was not necessarily associated with such an injury.

119. Also against my finding was the fact that Dr. Cash examined Mr. Okoro's left wrist and did not detect subluxation or dislocation, although he did note swollen wrists.

120. As against these considerations, it was not in doubt that Mr. Okoro did in fact sustain a subluxation or dislocation of his left wrist, and presented himself in hospital with that condition on 23 or 24 October 2007. It was clear from the letter dated 24 October 2007 written by Mr. Saravanan to Dr. Gupta that on presenting himself to the hospital Mr. Okoro linked the injury to his wrist with being handcuffed, albeit it was recorded that the injury occurred when the fire brigade removed the handcuffs. However, tellingly, in my judgment, Sergeant Butler's explanation in cross-examination of why Mr. Okoro wished to see Dr. Cash was because he was complaining about most things, but his main complaint was the left wrist.

121. I have to say that I was wholly unpersuaded by the evidence that the handcuffing of Mr. Okoro was justified, even if, contrary to my finding, his arrest had been lawful. The application of handcuffs is an assault. Any resulting injury transforms it into a battery. While a constable making a lawful arrest may use reasonable force to carry out that arrest, there is no presumption that any degree of force must inevitably be used. An arrested person may accept the fact that he or she has been arrested and accompany the arresting officer to wherever the arresting officer wishes to take the arrested person without seeking to resist. If someone who is in the process of being arrested does resist that outcome, he or she is at risk of sufficient force to overcome his or her resistance being used. In the present case there was no evidence that Mr. Okoro actually sought to resist arrest. The evidence was that he was handcuffed before he had a chance to resist arrest, if he were otherwise minded to do so. The reasons for handcuffing Mr. Okoro given by P.C. Watkins and P.C. Phillips seemed to me to be totally insufficient to justify the course they took. Essentially the reasons were that Mr. Okoro was tall, had a *"large build"* and represented an *"unknown risk"*. P.C. Watkins accepted in cross-examination that Mr. Okoro had not, prior to being handcuffed, been violent in the sense of trying to punch her. In other words, he had not offered physical violence. The highest that P.C. Watkins or P.C. Phillips put it was that Mr. Okoro had been verbally aggressive, which seemed to mean little more

than that he argued with them and protested his innocence of the charge of attempted fraud.

122. However, I fear that, with the passage of time and, no doubt, dwelling upon the events of 18 October 2007, Mr. Okoro's recollection of events had become inaccurate in relation to a number of matters relevant to his claims.

123. I do not accept that P.C. Phillips mocked or taunted Mr. Okoro whilst Mr. Okoro was being carried in the back of the police van. While, in the respects which I have noted, the evidence of P.C. Phillips was inaccurate, he seemed to me to be a decent and professional police officer who would not have acted in the way Mr. Okoro alleged.

124. I do not accept that Mr. Okoro suffered pain in his left wrist, or started to cry immediately after the application of the handcuffs. Mr. Okoro did not cry, or shout, in pain other than at about 19:40 hours when attempts were being made to remove the handcuffs from his right hand. He did remove his left arm from the grip of P.C. Phillips at that time, so it may be that when he shouted out *"You're hurting me"*, it was the left wrist, rather than the right wrist which caused the pain, but I do not feel able to reach a conclusion on that point. When Mr. Okoro arrived at Islington Police Station he was not complaining of pain or crying, from what one could see on the Composite DVD.

125. No doubt being transported in a cage in the back of a police van over speed bumps whilst handcuffed is not comfortable, but I am not satisfied that P.C. Watkins drove deliberately at a speed calculated to make the journey more uncomfortable for Mr. Okoro.

126. I do accept that, on arrival at Islington Police Station, Mr. Okoro was refused permission to use the lavatory. For purely practical reasons that would not have been possible before at least one handcuff had been released. The issue of using the lavatory seemed, from the Composite DVD, to have been overtaken by the attempts to remove the handcuffs until the right hand handcuff had been removed by bolt cutters, following which Mr. Okoro was permitted to use the lavatory.

127. I am satisfied that Sergeant Butler made a reasonable and proportionate decision when he determined to move across the custody desk to assist other police officers after P.C. Phillips lost his grip on Mr. Okoro's left arm. I find that he did not jump onto Mr. Okoro, but rather that he place his hands one each on each of Mr. Okoro's shoulders after Sergeant Butler had landed on the floor on what was the far side of the custody desk from where he had started. I am not satisfied that Mr. Okoro sustained severe bruising to his back, legs, upper torso or arms in this incident, or at any other time during his detention at Islington Police Station. I am equally not satisfied that Mr. Okoro sustained any swelling to his head. It seemed to me from the Composite DVD that Mr. Okoro's head did not come into contact at any point with anything which would have caused it to swell. Certainly at no point could one see Mr. Okoro's forehead being banged on the wall of the custody area, still less that happening three to five times.

128. I am satisfied that Mr. Okoro sustained a relatively minor injury to his right knee in what Mr. McCullough described as the *"fracas"*.

129. It was not in dispute that Mr. Okoro had sustained some swelling to both his wrists as a result of the application of handcuffs.

130. I am not persuaded by the evidence of Mr. McCullough that the subluxation or dislocation of Mr. Okoro's left wrist was in the nature of an acceleration of an injury which he was going to suffer in any event at some point. The grounds for that surmise were not explained, nor were the circumstances in which it was thought likely that the injury would have occurred in any event. However, I do accept that the injury to the right knee was in the nature of causing previously asymptomatic osteo-arthritic changes to become symptomatic by accelerating the onset of such symptoms by about 12 months, notwithstanding that on the face of Mr. McCullough's report he expressed that view about the left knee.

Damages

131. In the result it is necessary to assess the damages to which Mr. Okoro is entitled by reason of his unlawful arrest and false imprisonment, the assault which the application of handcuffs amounted to, the subluxation or dislocation of the left wrist, and the minor injury to the right knee.

132. Mr. Branston drew to my attention that in *Thompson v. Commissioner of Police of the Metropolis* [1997] 2 All ER 762 Lord Woolf MR, giving the judgment of the Court of Appeal, had given this guidance as to the assessment of damages for wrongful arrest or imprisonment at page 774 H – J:-

> "*In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000….*"

133. In considering those figures Mr. Branston accepted that one needed to take account of the fall in the value of money since 1997. He suggested that, applying the guideline figures which I have quoted, Mr. Okoro would have been entitled to about £1,000 for 4 hours detention, and that adjusting that to take account of inflation would produce a figure of £1,462.44.

134. I am not sure quite how Mr. Branston calculated that, applying the guideline figures suggested by Lord Woolf, detention for four hours was worth about £1,000. The front-end loading suggested by Lord Woolf indicates to me that the figure should be rather higher. After all, the first £500 was supposed to relate to the first hour only. Thereafter there was to be a sliding scale, suggesting that the compensation in the earlier hours was at a higher level than the later hours.

135. Adjusting for inflation, it seems to me that the compensation which Mr. Okoro should receive for the arrest, the false imprisonment and the assault which the application of handcuffs amounted to, should be £2,000 at current values.

136. Mr. Branston referred me to a number of cases reported in *Kemp & Kemp* in relation to wrist injuries and knee injuries. I have also considered the *Guidelines for the assessment of General Damages in Personal Injury Cases*, 10th edition, produced by the Judicial Studies Board.

137. In assessing damages for the injuries to the left wrist and to the right knee, I proceed on the basis that any pre-existing condition in either was asymptomatic before 18 October 2007, and that the symptoms suffered by Mr. Okoro on and from that date are referable to what then happened.

138. There is a permanent degree of loss of function of the left wrist and also continuing pain, as recorded in the report of Mr. McCarthy dated 15 June 2010. The prognosis is uncertain, pending at least an arthroscopy yet to be performed, but, after initially seeming to make a good recovery following the operation on 26 October 2007, Mr. Okoro has been complaining of pain, especially on lifting or weightbearing, since about the end of October 2008. Doing the best I can I award Mr. Okoro a sum of £9,000 in respect of pain and suffering and loss of amenity in relation to the injury to the left wrist.

139. The injury to the right knee was relatively minor, although symptoms continued and were detected by Mr. McCullough on his examination. In respect of that injury I award damages for pain and suffering and loss of amenity in the sum of £2,000.

140. The total damages to which Mr. Okoro is entitled thus come to £13,000.

Pritchett -v- Boevey (1833) 1 Cr & M 775

BAYLEY, B. It seems to me that the amendment ought to be made as prayed. This is an action brought in substance against the inhabitants of Stamford. The plaintiff says that he has been injured, and that they are liable to him for the damage. The act of Parliament, 7 & 8 Geo. 4, c. 31, gives him, as he supposes, a remedy. He has attempted to sue the proper persons, so as to raise the question, whether he has a remedy under the act of Parliament? He has, however, mistaken the name of the district or place. It appears to me that we should be doing injustice, if we were to allow him to be concluded by such a mistake. If the record were to go uncorrected to trial, **[775]** justice would be defeated, merely because the advisers of the plaintiff have been guilty of a slip. There are instances, even in cases of penal actions, where the Courts have allowed amendments, and have given as their reason for such amendments, that the parties would be too late if the amendments were not allowed. Plaintiffs' names have been added and changed repeatedly; and since the late Bankrupt Act, we have had several recent instances where the names of the official assignees of bankrupts have been added to prevent a failure of justice. I think that the rule should be made absolute upon payment of costs, and the defendants having a fortnight's time to plead.

VAUGHAN, B. The 7 & 8 Geo. 4, c. 31, though penal in some respects, is highly remedial in others. I am of opinion, that the amendment should be allowed to let in the justice of the case.

The rest of the Court concurred, and the rule was made—

Absolute on payment of costs, the defendants having a fortnight's time to plead.

PRITCHET *v.* BOEVEY. Exch. of Pleas. 1833.—A., having been illegally arrested on mesne process, applied to the Court to be discharged. The rule was referred to a Judge at chambers, who ordered him to be discharged, and would have given him the costs of the rule if he would have undertaken to bring no action; but, as he refused to give such undertaking, nothing was ordered as to costs.—In an action of trespass and false imprisonment brought by A. for the arrest, it was held, first, that he was entitled to recover those costs as special damage if properly laid in his declaration; and, secondly, that, as the declaration only alleged that he had been forced and obliged to pay and had paid C., he could not recover the whole of the bill of costs of his attorney which he had not paid, though he was liable to pay them; but that he might recover so much of the bill of costs as consisted of money actually paid by the attorney, as that might be considered as money paid by him through his agent.—Semble, that under an averment that he had been forced and obliged to, and had become liable, &c., he might have recovered damages for such liability.

[S. C. 3 Tyr. 949; 2 L. J. Ex. 251.]

Trespass and false imprisonment for an illegal arrest by a sheriff's officer upon mesne process against the present plaintiff. The declaration alleged, by way of special **[776]** damage, that the plaintiff had been forced, and obliged to pay, and had paid, large sums of money in applying for and obtaining a discharge from the imprisonment. At the trial at the last Spring Assizes for the county of Gloucester, it appeared that the plaintiff, having been illegally arrested, had applied to the Court for his discharge. The rule was enlarged to be heard before a Judge at chambers; and the Judge, upon the hearing before him, ordered the plaintiff to be discharged from custody. The rule of Court called on the party, at whose suit he had been arrested, to shew cause why she should not pay the now plaintiff the costs of, and occasioned by the arrest, and his application to be discharged. The question of costs was discussed before the Judge at chambers; and he proposed to make an order for them, if the plaintiff would undertake not to bring any action for the arrest. This was not acceded to, and the order for the plaintiff's discharge was made without any mention of the costs. It was contended at the trial, that these costs should be added to the damages for the trespass. Two questions were reserved—first, whether such costs were recoverable at all? and, secondly, whether, without proof of the money having been paid by the plaintiff to his attorney, they could be recovered under the averment in the declaration, that "the plaintiff had been forced and obliged to pay, lay out, and expend, and had necessarily paid, laid out, and expended divers large

sums of money in and about &c., and in and about applying for a legal discharge and release from the said imprisonment?" The plaintiff had a verdict, with 1s. damages on the first count for the trespass, and 25l. damages on the second count for the false imprisonment, with leave to move to add to the verdict 102l. 1s., the amount of the costs incurred by the plaintiff on the arrest, and his application to be discharged.

Talfourd, Serjt., having obtained a rule accordingly, cause was now shewn by

[777] Ludlow, Serjt., and R. V. Richards.

Talfourd, Serjt., and Curwood, were heard in support of the rule.

BAYLEY, B. The facts of this case are, that a bailiff got into the house of the plaintiff wrongfully, as the house was wholly closed, and arrested him. This action is brought for that arrest. The plaintiff applied to the Court for his discharge out of custody, and that the now defendant should pay the costs of that application. This rule was referred to Mr. J. Gaselee at chambers, who made an order that the plaintiff should be discharged because the arrest was illegal; and stated, that, if the plaintiff would undertake not to bring an action, he would grant him the costs of the rule. The plaintiff refused to give the undertaking, and therefore the Judge made no order for the costs. Upon these facts two questions arise. First, is the defendant liable to pay the costs? Secondly, is the plaintiff entitled on this declaration to add them to the damages recovered in this action? The case of *Loton* v. *Devereux* (B. & Ad. 3) is relied on as an authority, that, though the plaintiff necessarily incurred costs, he is precluded from recovering them here. But that case is distinguishable from the present: that was a motion to set aside a judgment and execution for irregularity, and the Court made the rule absolute, but without costs. That was an express adjudication that it should be without costs. In this case the learned Judge came to no such conclusion; he does not say that the plaintiff shall be released without costs, but makes no adjudication as to costs, and therefore the jury had a right at the trial to take these costs into their consideration.

As to the second point, though upon a declaration properly framed, the plaintiff would have been entitled to recover these costs, yet there is this objection in the present **[778]** case; this declaration does not allege that the plaintiff became liable to pay these costs, but that he was forced to pay a large sum of money. The evidence is, that an attorney was employed; but is he paid? No. The plaintiff, then, cannot say that he was forced to pay, for it is only a debt which he may be hereafter forced to pay, but liable to contingencies, as if he be discharged by the bankrupt law; therefore, it is unreasonable that the plaintiff should recover what he may perhaps never pay. The bill of costs in question, of 102l., included money advanced for the plaintiff by the attorney, and charges for work, and labour, and fees. A person may say that he has been forced to pay that which a man, who is his agent, has been forced to pay for him; therefore, in respect of the money advanced for him, he is in the same situation as if he borrowed it to pay over. The agent has advanced it for his use; and therefore, the part of the 102l., which was money paid by the attorney to obtain the discharge, is money the plaintiff has been forced to pay, and he is entitled to recover so much. The bill must be sent to the Master to ascertain how much money has been so paid, that it may be added to the damages; the rest must not be added.

VAUGHAN, B. The Judge at chambers had jurisdiction not only over the costs of the rule, but of the costs in the cause, and he has made no adjudication on them. As to the allegation that the plaintiff has been forced to pay, it is a material allegation, and proof of actual payment is necessary to support such an allegation.

BOLLAND, B., concurred.

Rule absolute for adding to the damages recovered so much of the bill of costs as was paid out of pocket by the attorney, and discharged as to the rest.

[779] BROOKS *v.* BLANSHARD. Exch. of Pleas. 1833.—A. was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated.—A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river Wear, and A. became a candidate. B. wrote to C., introducing D. as a candidate, and C., having written to B., informing him that another person had succeeded in obtaining the appoint-

Rasu Maritima SA v Perusahaan Pertambangan [1978] QB 644

[COURT OF APPEAL]

RASU MARITIMA S.A. *v.* PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (GOVERNMENT OF THE REPUBLIC OF INDONESIA INTERVENING)

[1976 R. No. 3074]

1977 March 2, 3, 4, 7, 8, 9 — Lord Denning M.R. and Ott L.J.

Injunction — Interlocutory — Jurisdiction to grant — Disposal of defendants' assets—Defendants outside court's jurisdiction—Claim for breach of charterparty—Assets not subject matter of action within jurisdiction—Court's jurisdiction to restrain defendants removing assets—Exercise of discretion—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 45

The plaintiffs, a Liberian company, issued a writ against the defendants, an Indonesian state-owned company, claiming damages for breach and repudiation of a charterparty for the hire of an oil tanker. The plaintiffs then successfully applied ex parte for an interim injunction restraining the defendants, who were outside the jurisdiction, from removing assets in England. The assets were parts of a fertilizer plant to be built in Indonesia and their value as such was $12 million but their scrap value was only $350,000. On the plaintiffs' application to continue the injunction, the judge discharged it on the grounds that the plaintiffs would not be successful if they applied for summary judgment under R.S.C., Ord. 14; that the assets, not being money, were not the subject matter of the action; and that there was a serious issue whether the ownership in the goods had been transferred from the defendants to a department of the Indonesian Government.

On the plaintiffs' appeal: —

Held, dismissing the appeal, (1) that where a defendant was not within the jurisdiction but had assets in this country, the court had jurisdiction, under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, to grant an interim injunction to restrain the defendant from removing assets from the jurisdiction pending trial of the action; that that discretionary remedy applied both to money and goods and was to be exercised when it was just and convenient so to do (post, pp. 659F—660A, 664D).

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093, C.A. and *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509, C.A. applied.

Per curiam. The jurisdiction to grant an interim injunction to restrain a defendant from removing assets from the jurisdiction should not be limited to cases where the plaintiff could obtain judgment under R.S.C., Ord. 14 and (*per* Lord Denning M.R.) could be exercised when the plaintiff showed that he had a " good arguable case " (post, pp. 661F–G, 664F).

[Reported by Miss Eira Caryl-Thomas, Barrister-at-Law]

(2) That taking into consideration the character and circumstances surrounding the assets, that their scrap value was nominal and that their ownership was in question, the court should not exercise its discretion to grant relief (post, pp. 662H—663E, 664E–H).

Per Lord Denning M.R. There is no objection in principle to an order being made in respect of assets: in the expectation that this will compel the defendant, as a matter of business, to provide security (post, p. 662C–D).

The following cases are referred to in the judgments:

American Cyanamid Co. v. *Ethicon Ltd.* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).

Beddow v. *Beddow* (1878) 9 Ch.D. 89.

Blunt v. *Blunt* [1943] A.C. 517; [1943] 2 All E.R. 76, H.L.(E.).

Burmester v. *Burmester* [1913] P. 76.

De Beers Consolidated Mines Ltd. v. *United States* (1945) 325 U.S. 212.

Jagger v. *Jagger* [1926] P. 93, C.A.

Lister & Co. v. *Stubbs* (1890) 45 Ch.D. 1.

Mareva Compania Naviera S.A. v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509, C.A.

MBPXL Corporation v. *Intercontinental Banking Corporation Ltd.*, August 28, 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, C.A.

Miliangos v. *George Frank (Textiles) Ltd.* [1976] A.C. 443; [1975] 3 W.L.R. 758; [1975] 3 All E.R. 801, H.L.(E.).

Mills v. *Northern Railway of Buenos Ayres Co.* (1870) L.R. 5 Ch.App. 621.

Newton v. *Newton* (1885) 11 P.D. 11.

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

North London Railway Co. v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30, C.A.

Ownbey v. *Morgan* (1921) 256 U.S. 94.

Robinson v. *Pickering* (1881) 16 Ch.D. 660, C.A.

Scott v. *Scott* [1951] P. 193; [1950] 2 All E.R. 1154, C.A.

Vitkovice Horni a Hutni Tezirstvo v. *Korner* [1951] A.C. 869; [1951] 2 All E.R. 334, H.L.(E.).

Ward v. *James* [1966] 1 Q.B. 273; [1965] 2 W.L.R. 455; [1965] 1 All E.R. 563, C.A.

The following additional cases were cited in argument:

Felton v. *Callis* [1969] 1 Q.B. 200; [1968] 3 W.L.R. 951; [1968] 3 All E.R. 673.

Glider Standard Austria S.H. 1964, In re [1965] P. 463; [1965] 3 W.L.R. 568; [1965] 2 All E.R. 1022.

Gouriet v. *Union of Post Office Workers* [1977] Q.B. 729; [1977] 2 W.L.R. 310; [1977] 1 All E.R. 696, C.A.

Introductions Ltd. v. *National Provincial Bank Ltd.* [1970] Ch. 199; [1969] 2 W.L.R. 791; [1969] 1 All E.R. 887, C.A.

Trendtex Trading Corporation v. *Central Bank of Nigeria* [1977] Q.B. 529; [1977] 2 W.L.R. 356; [1977] 1 All E.R. 881, C.A.

Wright v. *Wright* [1954] 1 W.L.R. 534; [1954] 1 All E.R. 707.

Vavasseur v. *Krupp* (1878) 9 Ch.D. 351.

APPEAL from Kerr J.

A charterparty dated August 23, 1973, between the plaintiffs, Rasu Maritima S.A., and the defendants, the Indonesian National Oil Co., Perusahaan Pertambangan Minyak Dan Gas Bumi Negara known as "Pertamina," provided inter alia that the defendants should hire from the plaintiffs a giant tanker, the *Manhattan Duke*. The tanker was delivered to the defendants on February 2, 1976, but no payment was made for hire due under the charterparty, and on August 11, 1976, the plaintiffs issued a writ claiming damages from the defendants for breach and repudiation of the charterparty. On February 7, 1977, Kerr J. granted an interlocutory injunction restraining the defendants from removing assets which were then in the West Gladstone Dock, Liverpool, and which consisted of equipment ordered by the defendants from Swiss contractors to form part of a fertiliser plant which was to be constructed in Indonesia. On February 23, 1977, Kerr J. discharged the interlocutory injunction but continued it pending an appeal. An application by the Government of Indonesia to be entered on the writ as intervener was granted.

The plaintiffs appealed on the ground that the judge erred in principle in holding that it would not be proper to continue the injunction, in particular (1) the judge wrongly held that an injunction restraining the disposal of assets by a defendant should only be granted in circumstances where a plaintiff's case was sufficiently strong to entitle the plaintiff to summary judgment under Order 14; (2) the judge wrongly held that such an injunction should not be granted in relation to assets other than money; (3) the judge wrongly held that such an injunction should only be granted if there was clear evidence of assets within the jurisdiction; (4) the judge wrongly rejected the plaintiff's contention that the grant of such an injunction was a form of "saisie conservatoire" and that similar principles should govern the two remedies; (5) the judge should have held that having regard to—(i) the strength of the plaintiff's case, (ii) the size of the plaintiff's claim, (iii) the probable difficulties of executing judgment against the defendants in the absence of assets within the jurisdiction, (iv) the possibility of the existence of assets of the defendants within the jurisdiction, (v) the certainty that the assets would be removed from the jurisdiction if the injunction was not continued—that it was just and convenient for the injunction to continue.

The facts are stated in the judgment of Lord Denning M.R.

Nicholas Phillips and *Roger Buckley* for the plaintiffs. The plaintiffs concede that they could not obtain judgment under R.S.C., Ord. 14: nevertheless they have a good prima facie claim. They contend that if they are given judgment it is unlikely to be satisfied without security. The question of title is an arguable issue. There was a purported transfer to the Indonesian Government of the entire project (including liabilities) after the writ in the action was issued. The question then arises as to how far that could affect creditors in another country.

Before looking at the authorities it should be emphasised that changes were brought in by the Judicature Acts. The earliest relevant cases (which are all against the plaintiffs) are *Mills* v. *Northern Railway of Buenos Ayres Co.* (1870) L.R. 5 Ch.App. 621; *Beddow* v. *Beddow* (1878)

9 Ch.D. 89; *Robinson* v. *Pickering* (1881) 16 Ch.D. 660 and *North London Railway Co.* v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30. This spanned a period when the courts put equity into a strait-jacket, but over the last 30 years the courts have applied the principles of equity less rigidly.

In alimony cases there is the distinction that no right exists until the court order. In *Newton* v. *Newton* (1885) 11 P.D. 11 the judge felt constrained by the *North London Railway* case. In later cases the court also took the approach that it was fettered. In *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1 was cited (see *per* Cotton L.J. at p. 14). In the present case the plaintiffs are simply seeking to preserve the funds within the jurisdiction.

In *Burmester* v. *Burmester* [1913] P. 76 there was no vested legal right. *Jagger* v. *Jagger* [1926] P. 93 was in the same vein, and the judge had regard to powers to grant injunctions. Also in *Scott* v. *Scott* [1951] P. 193 the judge took the view that his hands were tied. By implication an injunction could be granted once an order had been made. *Felton* v. *Callis* [1969] 1 Q.B. 200, 208, 218, was an example of equity going further than it had been prepared to go before.

Those are the authorities against the plaintiffs, but the interlocutory injunction is the remedy of the court, and where there are assets within the jurisdiction, and a party impleaded who is subject to the jurisdiction, the court has jurisdiction to grant an interlocutory injunction and the only question is whether it is proper to do so having regard to legal principles. In *Spry, Equitable Remedies* (1971) at p. 302 the effect of the Judicature Acts is considered.

One is concerned with a rule of practice, and in *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 and *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 the court consciously extended the grant of interlocutory injunctions and so altered the rule of practice. The question is whether that can be justified in the light of authority. Initially equity grew with great elasticity. In *Spry* at p. 1, para. 2 the application of equitable principles in the first part of this century is considered, and a certain ossification is to be seen. Recently more elasticity has been shown. Equity should expand with social concepts. There is no reason here not to grant the remedy which was granted in the *Mareva* case. The plaintiffs assert a legal wrong, debts are owed and damages are claimed, and the plaintiffs seek an interlocutory injunction to preserve the status quo until judgment. If the old cases cannot be reconciled with the three recent cases, the court must decide between the conflicting decisions. No authorities were cited in *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 but at pp. 1094 and 1095 Lord Denning M.R. said it was the practice in Europe and it was time we had it here. *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 plainly departed from the view in *Lister & Co.* v. *Stubbs*, 45 Ch.D. 1. If it is a matter of practice the question is whether there are good grounds for taking the step. Situations were very different in the days before the Judicature

Acts. The need for the practice today is evidenced by how often it has been invoked since it was introduced. A

The plaintiffs have to overcome three hurdles: (1) Does the plaintiffs' case have to be so strong as to justify summary judgment under R.S.C., Ord. 14? If so the plaintiffs cannot succeed. The mischief that this remedy is designed to cure is the plaintiff who has a good claim which is liable to be defeated by the assets of the defendant being removed. The mischief exists whether it is an Order 14 case, or whether the defendant B can put up a good enough case to preclude Order 14, albeit the defence ultimately proves baseless. If in the meantime the assets may be draining away, relief should be granted. The principle in *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396 of balancing convenience applies. (2) Should the injunctive relief be restricted to money and like assets? There is no difference in principle between money and physical assets, but the C nature of the assets is a relevant factor when considering the balance of convenience. Similar procedure is applied in the case of physical assets on the Continent, and almost always the defendant can put up security to get release of the assets. (3) How clearly does one have to show that there are assets within the jurisdiction? On the Continent one has to show urgency to get relief. It is putting it too high to say that the plaintiff must prove beyond peradventure that the assets are there. If D the plaintiff can satisfy the court that he has good grounds for thinking that the defendant has property in the jurisdiction that he is about to remove, that is sufficient.

One comes back to the balance of convenience. Evidence has been obtained of what happens in Europe: questionnaires were sent to Holland, Belgium, France, Italy and Germany. It seems that initially the grant of an injunction is made readily, and counter-security is quite commonly E ordered. In *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] Q.B. 529 the question of harmonisation with the comparative law of other jurisdictions was considered. The experience in other jurisdictions is helpful, and similar remedies should be available throughout the Common Market. Further we have a parallel jurisdiction here with the arrest of a ship. F

The plaintiffs do not seek to challenge the separate legal status of the defendant and the Indonesian Government. On the question of sovereign immunity that government for this purpose should be treated in the same way as a holding or parent company making the same claim to the property. The trading arm of the Government was involved. It was decided by a majority in the *Trendtex* case that if a state is indulging in trading activity it is not covered by immunity. The property is within G the jurisdiction, and the difference between Pertamina and the Indonesian Government is a little artificial. If an injunction is granted against Pertamina, it should be able to decide what are its assets; there are grounds for believing that at least some of the property belongs to Pertamina. The sensible thing would be for security to be put up.

M. J. Mustill Q.C. and *Johan Steyn* for the defendants. There are H four stages of argument for the defendants. (1) The court is bound by the authorities to hold that it cannot grant an injunction to detain the assets of a person alleged to be a debtor before judgment. If there is a

case for having some such remedy the correct vehicle to achieve it is a statute. The significance of this case goes far beyond the present application. (2) If the court decides that it has power to grant such relief it should do so in the circumstances indicated by Kerr J. in the court below; no such circumstances existed here. *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 and *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 were concerned with totally different circumstances. (3) Alternatively if some other standard is required than the R.S.C., Ord. 14 standard as regards the strength of the plaintiff's case on the facts of the present case it is not strong enough. Here there is a prima facie case, but that is the wrong standard. (4) Even if the requirements for the exercise of the power are shown to exist, the court should not exercise its discretion in this particular case.

The plaintiffs submit that all they have to show is a prima facie case. *Mareva* and *Karageorgis* were not mere prima facie cases. The European experience should be approached with caution, and the argument is as to whether a full saisie preventative in the continental sense is part of the law of England. The injunction directed to enforcing the cause of action is part of the law of England and is the classic case of injunction. In *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396 an infringement of patent was threatened, and the court laid down tests for saying, "Do not do it." The act complained of was an essential part of the cause of action—what was sought was an injunction in the cause. The present injunction is not of that character, so that particular well-established remedy does not apply here, and the principles applicable to it do not apply here. The second remedy is under R.S.C., Ord. 24, r. 2 (1) (3). The purpose of that rule is that if there is property, part of the cause, an order may be made to detain it. An analogue of this rule is talked about in agency cases. The third remedy is under Order 14. The fourth remedy is an order in the nature of an execution made after judgment. If the plaintiffs' contentions are right, all those remedies are swept away and become unnecessary. If the European analogy is applied it must be done accurately, and that applies to defendants within the jurisdiction. The process cannot be taken half way. A half step towards harmonisation is worse than no step at all. If the plaintiffs are not contending for full saisie preventative the E.E.C. law does not help at all. There may be a powerful case for assimilation of law but the proper way to achieve this is by statute. Large-scale legal reform must be dealt with by mechanism which enables all issues to be resolved.

Assuming that there is a risk of abuse by a defendant such as in *Mareva* and *Karageorgis*, the right way to cure it is to have a methodical, systematic look at what others do and pick the best. Judges in the past have brought in innovations within the framework of existing law. The manifest justice of giving the ex parte injunction in *Karageorgis* was undoubted, but no authorities were cited. That was a proper exercise of judicial innovation. But the authorities say specifically that the courts cannot do it, and in those circumstances the remedy lies elsewhere. On their face the words of section 25 (8) of the Supreme Court of Judicature Act 1873 (repeated in section 45 of the Act of 1925) give the court a

jurisdiction, but the courts are bound by precedent. Textbooks have said that the courts will grant the remedy in exceptional cases (*Kerr on Injunctions*, 6th ed. (1927), p. 613; *Spry, Equitable Remedies*, p. 406; *Halsbury's Laws of England*, 3rd ed. vol. 21 (1957), p. 399).

In *Mareva* reliance was placed on the words of the statute, but that was specifically put and rejected in *Newton* v. *Newton*, 11 P.D. 11; *Robinson* v. *Pickering*, 16 Ch.D. 660, 661; *Scott* v. *Scott* [1951] P. 193; and *Wright* v. *Wright* [1954] 1 W.L.R. 534.

It was conceded that *Newton's* case was concerned with the removal of property overseas; in *Burmester* v. *Burmester* [1913] P. 76 the defendant was overseas and the property was here. In those cases the courts proceeded on the basis of general principles. No distinction was made on the basis that the right to alimony does not arise until it is ordered by the court. In *Mills* v. *Northern Railway of Buenos Ayres Co.*, L.R. 5 Ch.App. 621, 627, it was treated as an unquestionable proposition that a creditor cannot attach. There is a distinction between seizing assets the plaintiff alleges to be his, and assets that the plaintiff does not allege are his but are part of the defendant's assets: *Lister & Co.* v. *Stubbs*, 45 Ch.D. 1, 14.

All that *Karageorgis* decided was that in the circumstances of that case it would be right to grant the relief. In *Mareva* Lord Denning M.R. decided that there was power to grant an interlocutory injunction, but the other two members of the court reserved their position until the matter could be argued on both sides. The decision of the court did no more than say that they would continue the relief. There is no conflict of authorities in the Court of Appeal. A decision on an ex parte application is not authority, so the other authorities continue to bind, and the court is bound to dismiss this application. Had the full authorities been cited, *Karageorgis* and *Mareva* might have been decided differently. Even if there is a formal jurisdiction, based on the words of the statute, the court's right to use it is constrained by the cases.

Assuming that there is jurisdiction, the question arises as to the circumstances in which it should be exercised. The analogy of the arrest of a ship is not helpful because that derived from the means of enforcing an appearance, rather than getting security. It arose from a maritime lien, which is unique to ships and is attached to the res—a possessory claim against the ship itself. It extended beyond ships by statute to the wider right of sequestration.

A second analogy is the experience in the U.S.A., which is helpful because of the common law jurisdiction. There is no right of saisie conservatoire at common law in the U.S.A. The facts of *De Beers Consolidated Mines Ltd.* v. *United States* (1945) 325 U.S. 212 were strikingly analogous to the present case, but it was not a claim in debt, and no money judgment was going to be given. The judge was right to say that generally the procedure should be confined to money. Relief on goods which are not the subject-matter of the action is a question of security; it is not always easy to obtain and may be expensive. Pre-trial seizure is not allowed generally in the ordinary case of contract or tort. The Supreme Court said that if an injunction was not applicable, the question of security never arose. If it was wrong without security it was

wrong with security. Reliance is placed on *De Beers* for what was said on (1) security and (2) the application of statute.

The plaintiffs' account of the situation in Europe is accepted, but there is scope for argument as to what the rule on "saisie" should be.

In re Glider Standard Austria S.H. 1964 [1965] P. 463 related to planes, and it was said there that legislation was required.

The *Mareva* case [1975] 2 Lloyd's Rep. 509 was wrongly decided. If there is jurisdiction, it should be limited to that type of case. The nature of the assets must be considered as well as the strength of the plaintiff's case. Motive must also be considered, and whether assets are withdrawn in order to evade judgment. The evidence of title must be looked at. If the court holds that the jurisdiction does exist, two different problems arise here: did the property pass to the buyer, and who owns it now?

On the merits generally, the dates are important. If a contract is made intra vires but in breach of trust, and the third party knows, it is voidable: *Introductions Ltd.* v. *National Provincial Bank Ltd.* [1970] Ch. 169. It is bound to be proved by circumstantial evidence. The conclusion of this contract involved complex negotiations. There was no record of these major deals in respect of the 26 tankers, although there are detailed registers of other contracts. No brokers were employed and no competitive tenders were obtained. This case was not in the Order 14 bracket, and the answer to the question how far below that one could go depended on the court's view of the law.

On the question of discretion, the plant is not worth much if it is held up, but it is worth a great deal as part of a project. The provision of security is not immediately relevant. The judge's overall picture was correct.

Anthony Evans Q.C. and *Bernard Rix* for the intervener. The judge's reasoning made it unnecessary to decide: (1) ownership; (2) convenience.

The government has intervened as third party owner of the goods described in the injunction, having taken them over from Pertamina. The injunction refers specifically to goods which the Government claims. A government intervened in similar circumstances in *Vavasseur* v. *Krupp* (1878) 9 Ch.D. 351, 353 which was concerned with sovereign immunity, which the government is not claiming here, but it was said that the injunction could impede free dealing, and that that would happen here. This is a novel procedure, because in all cases of sovereign intervention the goods involved were the subject-matter of the action. The transfer here was a real and effective transfer of the project as a whole. None of the goods now belong to Pertamina. The consequences of an injunction would be to delay the tendering for completion.

Although aircraft would be a fertile field for the new *Mareva* jurisdiction—government-owned, very mobile, and almost inevitably having third party interests—it has never been suggested that aircraft are subject to the risk of arrest like a ship. [Reference was made to *McNair, The Law of the Air*, 1st ed. (1932), pp. 140, 144 and 147; 2nd ed. (1953) p. 241; 3rd ed. (1964), p. 319.] Section 1 of the Administration of Justice Act 1965 deals with the specific right to arrest of an aircraft in rem in respect of towage, pilotage and salvage. The 1947 Geneva Convention dealing with the registration of aircraft applies to the U.S. but not to

the U.K. Since 1933 there has been a Rome Convention *against* the precautionary arrest of aircraft (*Shawcross & Beaumont's Air Law*, 2nd ed. (1951), p. 590), but neither the U.S.A. nor the United Kingdom are parties to it, nor is France, Germany, Holland. Switzerland and Spain are parties to the Convention. A

Assuming that there is jurisdiction, an injunction should only be ordered in respect of specified assets of the defendant, because of the recognised need for the certainty of terms of an injunction, and the commercial difficulties which follow uncertainty: *Vavasseur* v. *Krupp*, 9 Ch.D. 351. B

An injunction should not be ordered where there is a serious issue as to the defendant's title to the assets which it is sought to attach. For practical reasons, the only solution in such a case would be to order that the preliminary issue as to title be decided forthwith. The phrase "just and convenient" was designed to exclude this situation. C

The principle in recent cases can be discerned from the features common to all: the money claimed should "appear to be due and owing"; there should be certain identified assets of the defendant; those assets should form a necessary part of the security for the payment of the judgment when given; that security should be imperilled by the risk of the removal of those assets from the jurisdiction. In those circumstances only should there arise any claim to equitable relief, consistent with the authorities. D

In contrast to *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396, the plaintiffs have no claim against the relevant assets. On the question of discretion, the goods would be more at risk in Germany. The courts should be slow to interfere.

Phillips in reply. The present case is stronger than *Gouriet* v. *Union of Post Office Workers* [1977] Q.B. 729 which supports the plaintiffs' application. E

Where there are conflicting decisions in the Court of Appeal the court not only may but must choose between them. There is, plainly, tremendous need for the *Mareva* type injunction. The seeds of foreign attachment in the U.S.A. started in London: *Ownbey* v. *Morgan* (1921) 256 U.S. 94, 104. F

Assuming the court is going to exercise the jurisdiction the question in deciding whether it should be limited to money and Order 14 cases is what is just and convenient.

In looking to Europe it should not be said that if total harmonisation is not possible some advance towards harmonisation should not be made.

The question of motive is irrelevant to the plaintiff as the injustice is just as great, whatever the motive. G

On the question whether assets may be attached, there must be a balance of convenience. The court should first decide whether there is jurisdiction to grant an injunction, then whether the plaintiffs' rights should be protected, and then the effect on the defendant should be considered. In *De Beers Consolidated Mines Ltd.* v. *United States*, 325 U.S. Rep. 212 the court was considering whether there was a jurisdiction. On the continent, and here in respect of ships, the release of chattels is bought by offering security. H

The highest hurdle in this case is the confusion about the title of these assets. English law governs the transfer of chattels here as well as Indonesian law, so the matter is still in doubt.

LORD DENNING M.R. This case, and others like it, are said to involve the huge sum of 1,000 million United States dollars. It has nothing to do with England. It arises out of events in the Far East. Its only connection with England is that there are goods lying in the West Gladstone Dock at Liverpool which are worth 12 million United States dollars. The owner of the goods wants to remove them to Hamburg. But a creditor applies to stop them from being taken out of the jurisdiction of the court. The application is made under a new procedure which was introduced by this court a year or two ago known as the *Mareva* procedure: see *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509.

The story starts in Indonesia. It is an archipelago of thousands of islands. It extends 3,000 miles across the South Pacific with a population of 130 million people. It became independent soon after the war. The first President was General Sukarno, but he fell and was replaced by President Soeharto. Second only to the President of Indonesia was the man who fills the pages of evidence in this case, General Ibnu Sutowo. I will call him, as everybody has, "the General." He was the man in charge of the commercial activities of the country. He did it in his capacity as the head of the state-owned company called, for short, Pertamina.

Everything dates from the discovery of oil there in 1960. Within a few years Indonesia became one of the major oil producing countries of the world. Big companies came in from the United States of America to exploit the oilfields. They paid a share of the proceeds to Pertamina. At first 60 per cent. to Pertamina, but now 85 per cent. These payments were made to Pertamina in United States dollars in New York. This was the main source of revenue for Pertamina. It made use of these sums to develop many activities in and for the benefit of Indonesia. These included the provision of a tanker fleet. It acquired not only vessels already in service but also those on the stocks or only on paper. Pertamina entered into huge commitments at the time when the tanker market was at high tide —at the very flood. There was unprecedented demand and universal confidence. It was on this tide from 1970 to 1973 that the General entered into the transactions that are in question in these proceedings. He did it all on his own on behalf of Pertamina.

The break came in October and November 1973. The oil producing countries put up the price of oil by four times. The oil using countries cut down their consumption. The tanker market fell to pieces. Charterers could not pay the hire. Ship owners re-took the vessels. Many were laid up out of work. Some debtors defaulted and went out of business. Others sought to re-negotiate their contracts. Amongst these was Pertamina. In the latter half of 1975 it entered into intensive negotiations to reduce the payments due under the contracts. The General took charge himself, but was afterwards replaced by two ministers of the government. The climax came in March 1976. The General was ousted from Pertamina and became an adventurer at large.

There was a huge trail of wreckage left behind. Not only the liabilities under charters but also incomplete construction work. Many ambitious projects had been commenced by the General, including a fertiliser plant. It was a by-product of oil because the fertiliser made use of ingredients from oil. This plant was ordered in 1973 by Pertamina from a Swiss company of contractors. It was to cost more than 150 million United States dollars. The plan was to use two ships called the *Mary Elizabeth* at Liverpool and the *Dominique* at Ghent and to convert them into a floating fertiliser plant. This meant fitting them with special equipment of all kinds: pumps, pipes, valves, motors, transformers, and distribution gear. Quite recently, however, this plan was altered. It was thought better to have the plant on dry land in Indonesia and not on the water. For this purpose the equipment is to be collected together in Hamburg and sent out from there to Indonesia. But much of it is in Liverpool at the West Gladstone Dock. There is some uncertainty as to whom it belongs. Some is said to belong to the contractors, some to Pertamina. But it is said that on December 13, 1976, it was transferred to the Government of Indonesia itself. The value of the equipment at Liverpool is said to be 12 million United States dollars at cost, but if sold for scrap it would only be $350,000.

Now the unpaid creditors of Pertamina seek to get something out of the wreck. Some of them have come to terms. But others have not. We are concerned with one creditor in particular, a man called Bruce Rappaport and his companies.

Bruce Rappaport is a character as colourful as the General himself. He is based in Geneva with an office overlooking the lake. His origins are not told to us, but he is said to be a lawyer now turned into a banker and shipping magnate. He has been closely associated with the General ever since 1966. He has been the middleman between the builders of ships like Sanko of Japan and the purchasers and charterers of them like Pertamina of Indonesia. He operates by means of a Swiss company, a Panamanian company, and companies registered in Liberia and other countries.

The General and Rappaport developed together a huge tanker fleet for Pertamina. This divided itself into two parts. In the first place, there was the domestic fleet for supplying the internal needs of Indonesia with its many islands. Between 1968 and 1972 the General and Rappaport provided 51 vessels in all for this domestic fleet—30 supply vessels and 21 domestic tankers. The charters were all signed on behalf of Pertamina by the General himself alone on his sole authority as head of Pertamina. This domestic fleet has kept in service all through the years. It has not been seriously affected by the collapse of the world tanker market. The charters have been honoured, as far as we know, by all concerned.

In the second place, there was an ocean tanker fleet for supplying the world at large beyond Indonesia. This project only began in 1970. The General in the name of Pertamina negotiated with Rappaport in the names of his various companies, and with other companies also. The General on behalf of Pertamina hire-purchased 23 big ocean tankers and two off-shore tank barges. He did it mostly through brokers in New York. The terms were unusual in that the vessels were time-chartered for

long terms of 10 or 11 years at a high rate of hire in United States dollars. Most of them were not strictly hire-purchase agreements, because Pertamina did not have an option to purchase. They were really credit sales in which the property was to pass to Pertamina when the last instalment was paid. Four of these vessels were owned by one of the Rappaport companies called Martropico and six of them by another called Rasu Maritima S.A. That is a Liberian company. The name "Rasu" is said to be an invented name derived from the two adventurers, RA for Rappaport and SU for Sutowo. Another vessel was owned by another Rappaport company.

It was this ocean tanker fleet which was affected by the collapse of the tanker market. There was little or no work for the giant tankers. Some were laid up. All were eating their heads off. The builders wanted the payments due from Rappaport. He wanted the payments due from Pertamina. The situation became so serious that late in 1975 Rappaport and the General met in New York. They were of course by this time bosom friends. Then and there the General showed that he was good at handwriting. At the request of Rappaport he signed 1,600 promissory notes, ready printed. They were for sums corresponding to the monthly sums due under the charters. He signed them all on behalf of Pertamina. Rappaport says, no doubt correctly, that these notes were to be used to reassure financial investors. The General says that they were spurious and obtained by fraud.

Rappaport also looked after his friend the General well. It is said that, when the General travelled in Europe, Rappaport provided him with a private jet for his personal use and paid all his expenses on business and pleasure. In addition, in April 1975, one of Rappaport's companies provided the General with a draft for 2½ million United States dollars payable to the General personally. He put it into his private account at the Chase Manhattan Bank. Rappaport says that it was for the purpose of an investment in an Indonesian bank. But the General says it was an interest-free unsecured personal loan of which he has repaid nothing.

It is said, too, that in 1974, when the tanker chartering market was in an extremely depressed state, the General committed Pertamina to obligations to buy tankers from Rappaport at a high price which was beyond all commercial prudence.

The present case concerns one of the giant tankers called the *Manhattan Duke*. The charterparty was on Shell-time No. 3 Form. It was entered into at the height of the market on August 23, 1973. It was between Rasu and Pertamina. It was signed by the General himself on behalf of Pertamina. The vessel was not then in existence. It was to be built in Japan, and was identified as Hull No. 253. The charterparty was to last for 10 years from delivery. The hire was to be a time charter equivalent of world scale 150. Payment was to be in U.S. dollars in New York. After payment of all the hire for 10 years the vessel was to become the property of Pertamina. The charterparty specially provided for the jurisdiction of the High Court of Justice in England, and English law was the proper law of the contract.

The vessel was duly built and named the *Manhattan Duke*. She was a

vessel of 80,000 tons. She was delivered to Pertamina on February 2, 1976, while the General was still in control, and duly signed for by officers of Pertamina. She completed one voyage on behalf of Pertamina, but in March 1976, as I have said, the General fell from power. Pertamina never paid any of the hire due under the charterparty. So on August 3, 1976, Rasu withdrew the vessel from the services of Pertamina in pursuance of a clause in the charter.

The English proceedings

Now for the English proceedings. On August 11, 1976, Rasu, the Liberian company, issued a writ in the High Court of Justice in England against Pertamina. The claim was for damages for breach and repudiation of the charterparty. The total amount came to 3,516,193.90 United States dollars—that is nearly £2 million sterling. A similar writ was issued in respect of a vessel called the *Oceanic Erin*. By its solicitors, Pertamina accepted service of the writs.

On November 3, 1976, Pertamina retorted by letters saying that they avoided the contracts. On November 29, 1976, Pertamina delivered points of defence. They alleged that, in executing the charterparties, Pertamina was acting beyond its lawful powers and without the sanction of the Government Supervisory Board. Also that the General, in executing them, was acting in breach of trust. In particular they alleged that he committed Pertamina to extortionate and unconscionable agreements, including these charterparties, in the expectation that he would receive personal rewards or favours from Rappaport and his associated companies.

In reply Rasu relied on the immense power wielded by the General personally on behalf of Pertamina over the years. They gave instances of many transactions which were accepted and ratified by Pertamina. They say that his authority was so great and known to so many—and never disputed—that Pertamina is estopped in law from disputing it. They deny that the General was acting in breach of trust, or that they knew it.

The New York proceedings

Now for the New York proceedings. In addition to those proceedings by Rasu in England, Martropoco, another Rappaport company, took proceedings in New York on the promissory notes already fallen due. The amount was over 6,000,000 United States dollars. Rappaport swore an affidavit saying that the notes were given as security for the payments of hire for the vessels. The General swore that the notes were spurious and were obtained by fraud. In reply Rappaport said that the General's statement " could well be attributable to his situation of serious danger."

Now for the attachment of assets. Rappaport has made efforts in various countries to attach the assets of Pertamina. He says that Pertamina has been busy getting rid of assets or putting them out of the reach of its creditors. For instance, arrangements have been made by which the payments by United States oil companies (which used to be made to the credit of Pertamina in New York) are now made to the Bank of Indonesia. Transactions in oil have been altered, he says, so that oil exported from Indonesia passes to the buyers on loading in Indonesia whilst imports of

refined products into Indonesia pass only on discharge in Indonesia. Likewise arrangements, he says, are being made for most of the assets outside Indonesia to be transferred from Pertamina to the Government of Indonesia itself.

In order to foil these attempts, Rappaport has sought in many countries to attach assets of Pertamina. In particular in the United States of America, France, Holland, Germany, Belgium, and also in Singapore. Not with much success as yet because the assets in those countries are not worth much. He did succeed in attaching two ships at Singapore, but he did not provide the counter-security required. So they were released.

Rappaport now seeks to get the courts of England to attach the goods in the docks at Liverpool. On February 7, 1977, Kerr J. granted an interim injunction restraining Pertamina from removing or taking any steps to remove any assets from the West Gladstone Dock at Liverpool. But on February 23, 1977, he discharged the interim injunction, leaving Pertamina free to remove the assets. Yet he continued it pending the appeal to this court. As the matter is urgent, we have heard it at once, and now give judgment.

The law

The case raises directly the correctness of two decisions recently given by this court. The first is *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 and the second is *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. Those were cases in which the owners of vessels had let them out on charters. The charterers had not paid their hire. They were out of the jurisdiction, but they had funds here in banks in London. As soon as the writs were issued, and before any judgment had been obtained, we granted ex parte interlocutory injunctions to restrain the defendants from removing any of their assets out of the jurisdiction. Were those cases within our jurisdiction or not to give such an injunction? That is the first point which Mr. Mustill has raised. He suggests that they were wrongly decided and this court had no jurisdiction in the matter.

Historical and comparative survey

In this connection, I would like first to give an historical and comparative survey as to this procedure of seizure of assets before trial or judgment. It is said that this new procedure was never known to the law of England. But that is not correct. In former times it was much used in the City of London by a process called foreign attachment. It was originally used so as to compel the defendant to appear and to give bail to attend: but it was extended to all cases when he was not within the jurisdiction. Under it, if the defendant was not to be found within the jurisdiction of the court, the plaintiff was enabled instantly, as soon as the plaint was issued, to attach any effects of the defendant, whether money or goods, to be found within the jurisdiction of the court. It was described in detail by Bohun in 1723 in his book on the customs of London, *Privilegia Londini* 3rd ed., pp. 253–289: but brought up to date by Pulling in 1842 in *The Laws, Customs, Usages and Regulations of the City and Port of London,*

2nd ed., pp. 187–192. He describes the origin and the reasons for it, and it is well worth noting. He says: A

> "This mode of proceeding, which seems to have prevailed at a very early period in London, as in other Roman provinces, was always considered extremely important to the citizens as a commercial people, who, having given credit to a trader, might be debarred of their remedy by his going out of the jurisdiction of their courts, though at the same time he might have left ample effects behind him in the hands of third parties. . . . This customary mode of proceeding still exists in other ancient cities and towns in England, as Bristol, Exeter, Lancaster, as well as in Scotland, and Jersey, and in most maritime towns on the continent of Europe. In France it is called saisie arret, and in Scotland it is termed arrestment . . . (t) Any kind of goods or money belonging to the defendant may be attached, whether locked up in boxes or not, (for the court may order them to be opened.) . . . This remedy by attachment is not confined to citizens or even residents within the city; it is a common process, open to any person when his debtor has property within the jurisdiction of the court." B C

So much for the customs of England. When our citizens of London and Bristol went out to the United States of America and settled there they took with them this process of foreign attachment. This was stated by the Supreme Court of the United States in *Ownbey* v. *Morgan* (1921) 256 U.S. 94 approving a leading authority, *Drake on Attachment*, which says: D

> "This custom . . . was doubtless known to our ancestors, when they sought a new home on the Western continent; and its essential principle, brought hither by them, has, in varied forms, become incorporated into the legal systems of all our states." E

This incorporation was first done by the judges but afterwards incorporated into the laws of the various states by legislative enactments, as in the case of the State of Delaware there considered. It was adopted throughout as a remedy for collecting debts due from non-resident or absconding debtors. F But it was not extended to cases where there was no debt due from the defendant but only a remedy in equity by way of an injunction: see *De Beers Consolidated Mines Ltd.* v. *United States* (1945) 325 U.S. 212.

In the extract which I have read from Pulling he says that the same process was available in most maritime towns on the continent of Europe. There it has survived most vigorously and is in force everywhere today. It G is called in France "saisie conservatoire." It is applied universally on the continent. It enables the seizure of assets so as to preserve them for the benefit of the creditor. Very often the debtor lodges security and gets the assets released.

Now that we have joined the common market, it would be appropriate that we should follow suit, at any rate in regard to defendants not within H the jurisdiction. By so doing we should be fulfilling one of the requirements of the Treaty of Rome. That is the harmonisation of the laws of the member countries.

The present law

Now for the present law. So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well-established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so. His proper remedy is to get judgment—under Order 14 if he can—and issue bankruptcy proceedings against the debtor. In those proceedings any fraudulent conveyance or preference—done to defeat creditors—can be set aside. There are statements of the highest authority to this effect. They start with Lord Hatherley L.C. in *Mills* v. *Northern Railway of Buenos Ayres Co.* (1870) L.R. 5 Ch.App. 621, 627–628. Then on to James L.J. in *Robinson* v. *Pickering* (1881) 16 Ch.D. 660, 661, who declared roundly: "You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property." This was followed by Cotton L.J. in *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1, 14, who said that such an order:

> "would be introducing an entirely new and wrong principle—which we ought not to do, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order."

Then there were cases between husband and wife such as *Newton* v. *Newton* (1885) 11 P.D. 11, where Sir James Hannen P. said, at p. 13: "... It is not competent for a court, merely quia timet, to restrain a respondent from dealing with his property," which was followed by Sir Samuel Evans P. in *Burmester* v. *Burmester* [1913] P. 76, 79. Then by Scrutton L.J. in *Jagger* v. *Jagger* [1926] P. 93, 102, who said:

> "I am not aware of any statutory or other power in the court to restrain a person from dealing with his property at a time when no order against him has been made."

That was approved by this court as recently as 1951 in *Scott* v. *Scott* [1951] P. 193.

None of those statements were made, however, in relation to a defendant who was out of the jurisdiction but had money or goods in this country. Save in *Burmester's* case, and there the point was not canvassed. I do not think they should be applied to cases where a defendant is out of the jurisdiction but has assets in this country. To those cases, at least, I think we should apply the principle which was applied by the customary courts in olden times and by the courts of the continent today. We should do it by means of the modern procedure of granting an interlocutory injunction. It is ready to hand in a statute of wide import. Parliament decreed in the Supreme Court of Judicature Act 1873, section 25 (8):

> "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient."

That was repeated in nearly the same words in section 45 of the Supreme Court of Judicature (Consolidation) Act 1925. Those words give to the court a wide discretion to grant an interlocutory injunction whenever it

appears to the court to be just or convenient. The statute was so interpreted by Sir George Jessel M.R. in *Beddow* v. *Beddow* (1878) 9 Ch.D. 89, 93. In 1883 this court in the *North London Railway Co.* v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30 made statements limiting the discretion. But later decisions have made it clear that, when a statute gives a discretion, the courts must not fetter it by rigid rules from which a judge is never at liberty to depart. It was so held by the House of Lords in *Blunt* v. *Blunt* [1943] A.C. 517 and followed by this court, sitting as a full court, in *Ward* v. *James* [1966] 1 Q.B. 273. In those cases the courts departed from a long line of previous opinions as to the way in which discretion should be exercised. In the one case in granting a divorce. In the other case in ordering trial by jury. I would venture to repeat what I said for the full court in *Ward* v. *James* as to the way in which discretion is to be exercised, at p. 295.

> " . . . the courts can lay down the considerations which should be borne in mind in exercising the discretion. . . . From time to time the considerations may change as public policy changes, and so the pattern of decision may change: this is all part of the evolutionary process."

The two cases of *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 and *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509 are part of the evolutionary process. This court was there presented with sets of facts which called aloud for the intervention of the court by injunction. Study those facts and you will see that it was both just and convenient that the courts should restrain the debtor from removing his funds from London. Unless an interlocutory injunction were granted, ex parte, the debtor could, and probably would, by a single telex or telegraphic message, deprive the shipowner of the money to which he was plainly entitled. So just and so convenient, indeed, is the procedure that it has been constantly invoked since in the commercial courts with the approval of all the judges and users of that court. Now, after full argument, I hold that those cases were rightly decided. And I would like to read here the words of Kerr J., the commercial judge who has had more experience than any other of this jurisdiction, in giving what he says are the practical reasons which justify this procedure:

> "A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date when he is served, all of which usually takes several weeks or even months. Secondly, it is only then that the plaintiff can apply for summary judgment under Order 14 with a view to levying execution on the defendant's assets here. Thirdly, however, on being apprised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a

judgment which appears irresistible on the evidence before the court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him. It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature. To exercise it on an ex parte basis in such cases presents little danger or inconvenience to the defendant. He is at liberty to apply to have the injunction discharged at any time on short notice."

I would endorse all those practical reasons given by the judge.

Mr. Mustill urged us not to introduce it here by decision of the judges but to wait for legislation by Parliament, so that the implications could be considered on a wider plane. That was the sort of submission which was urged upon the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443 about judgments in foreign currency. It was accepted by Lord Simon of Glaisdale, but the House rejected it. They upheld the new procedure there which we started. As there, so here. It is a field of law reform in which the judges can proceed step by step. They can try out a new procedure and see how it works. That is better than long drawn out discussions elsewhere.

The application of the new procedure

Now for the application of this new procedure. It must be noticed, however, that in those two cases the injunctions were only granted so as to hold the position until the defendants were heard. As it happened, they never did ask to be heard. No doubt because they had no defence. The cases were ones in which summary judgment would have been given under Order 14. But in the present case the defendants Pertamina have come in to be heard. They say that they have a good defence or, at any rate, a defence which is plainly arguable: and they say on that account no injunction should be granted. I would not myself limit the discretion of the court to cases so plain that the plaintiff can get judgment under Order 14. We have all had experience of summonses under Order 14. The defendant may put in an affidavit putting forward a specious defence sufficient to get him leave to defend, conditional or unconditional. But when the case actually comes to the court for trial, he throws his hand in. It is then seen that the affidavit was simply filed in order to gain time. So under this new procedure a defendant may put forward a specious defence, just so as to remove his assets from the jurisdiction. The weakness of the defence may not appear until later. So I would hold that an order restraining removal of assets can be made whenever the plaintiff can show that he has a "good arguable case." That is a test applied for service on a defendant out of the jurisdiction: see *Vitkovice Horni a Hutni Tezirstvo* v. *Korner* [1951] A.C. 869: and it is a good test in this procedure which is appropriate when defendants are out of the jurisdiction. It is also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

It must be noticed too that in those two cases the assets consisted of money in the hands of banks: whereas here it consists of goods lying at a

dock in Liverpool. Money at banks is a very good thing to attach. It can be identified precisely and attached as a rule without doing much damage to the defendant. But I would not limit the new procedure to money. Money can easily be changed into pictures, or diamonds, or stocks and shares or other things. The procedure should apply to goods also. Care should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill or will inflict on him great loss: for that may not be fully compensated for by the undertaking in damages. But nevertheless it can be done in appropriate cases. We have been told that a day or two ago Parker J. made an interlocutory injunction restraining the removal of a Boeing aircraft until a sum owing for fuel was paid. That was, no doubt, a very proper exercise of his discretion.

Another matter to be considered is the giving of security. On the continent of Europe (when goods are frequently seized under the procedure of "saisie conservatoire") it is commonplace for the defendant to put up security so as to obtain the release of the goods. We are familiar with it ourselves in the Admiralty jurisdiction where a ship is arrested and released on security being provided. I see no objection in principle to an order being made in respect of assets: in the expectation that this will compel the defendant, as a matter of business, to provide security. Mr. Mustill quoted the United States case of *De Beers Consolidated Mines Ltd.* v. *United States*, 325 U.S. 212 as stating objections to security. But I read those observations as confined to the special circumstances there of an action to secure equitable relief. In a case where the defendant is able to put up security, it may often be just and convenient to grant an injunction so as to see that he does it.

The application to this case

Such being the law, I come to the final question in this case. Is it just and convenient to grant an interlocutory injunction?

In considering this question, I would ask on all the evidence: what is the strength of the plaintiffs' case? Rappaport points to the charters signed by the General on behalf of Pertamina. They show, true, a prima facie liability on Pertamina. But this prima facie case is much shaken by the evidence now adduced on behalf of Pertamina. It shows these two men, the General and Rappaport, exercising immense power: the General over vast resources of oil: Rappaport over huge tanker fleets. Each operating single-handed without being answerable to anyone. Each signing deals in million of dollars—many hundreds of millions of dollars—without reporting back home for instructions or authority. A big question mark rests over these transactions. Were the obligations assumed by Pertamina fair and reasonable when considered against the state of the market at the time? Was Pertamina exposed to unfair and unconscionable obligations in the interests of these two, the General and Rappaport together? Those questions cannot be answered in the present state of the evidence. But they loom so large that they must be taken into account in considering whether discretion should be exercised or not. It was said by Lord Acton that "Power tends to corrupt, and absolute power corrupts absolutely." While the question remains unanswered, the situation is such that I do not

think it would be proper in this case for equity to intervene to assist one side or the other. I am tempted to say, "A plague on both your houses."

Apart from this, there is the nature of the goods sought to be attached. They are not money or assets which can be detained without much loss. They are parts of equipment needed for constructing a fertiliser plant in Indonesia. They are not to be removed from England so as to evade legal process. They are going to be removed to Hamburg where they will be just as much liable to seizure as in England, and probably more so, as the process is more understood and acceptable there.

Then there is the lack of certainty in the title to the goods. Some may belong to the contractors, some to Pertamina, and even that may have been transferred to the Government of Indonesia. If an injunction were to be granted, it ought to be specified with certainty the goods covered by it. This was not.

Lastly there is the value of the goods. If seized and sold as scrap they would only total $350,000. That is only a "drop in the ocean" compared to the immense claim which Rappaport is making. And security would only be for that sum. This amount is so trifling in the circumstances that it does not seem proper to interfere with the construction work on this fertiliser plant to secure it.

In all the circumstances, I think this is not a case in which an injunction should be granted to restrain the defendants in the use or disposal of the goods at Liverpool. I agree with the judge in the result and with much of what he said in this judgment. But I would not limit the jurisdiction in the way he did. I think the courts have a discretion, in advance of judgment, to issue an injunction to restrain the removal of assets—whether the defendant is within the jurisdiction or outside it. This discretion should not be fettered by rigid rules. It should be exercised when it appears to the court to be just and convenient, but in exercising it the court may find it helpful to follow the guidelines which we have sought to mark out.

I would dismiss the appeal accordingly.

ORR L.J. Lord Denning M.R. has summarised in some detail the facts of this case and I need not make further reference to those facts. Recent decisions of this court in relation to the matters at issue are to be found in *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093 and *Mareva Compania Naviera S.A.* v. *International Bulkcarriers Ltd.* [1975] 2 Lloyd's Rep. 509, both of which concerned funds held in London banks and were heard ex parte, and in both of which relief was granted, and also in *MBPXL Corporation* v. *Intercontinental Banking Corporation Ltd.*, Court of Appeal (Civil Division) Transcript No. 411 of 1975, an inter partes application heard in vacation on August 28, 1975, and not reported, in which Stephenson L.J. and Scarman L.J. refused relief on the ground that there was no evidence of the defendants possessing any movable assets within the jurisdiction, and both Lords Justices referred to the jurisdiction in question as involving an exceptional or very strong relief but expressed no doubt as to its availability in appropriate cases.

In the judgment now under appeal, Kerr J., rightly in my judgment, took the view that the plaintiffs were seeking to go much further in this

case than this court had gone in either the *Karageorgis* or *Mareva* cases and rejected the application on the grounds, first, that a plaintiff who cannot show that his prospects of success are strong enough to warrant the making of an Order 14 application is not entitled to be given security for his claim in advance; secondly, that he doubted whether the order sought by the plaintiffs should ever be made except in relation to money; and, finally that there was a serious issue whether or not ownership of the materials in question was still vested in the plaintiffs or had passed to the Department of Industry of the Government of Indonesia.

In the argument in this court we have been invited, on behalf of the plaintiffs, to move further towards the concept of "saisie conservatoire" which is applied by legislation in the United States of America and is also to be found in a number of European legal systems; and, on behalf of the defendants, we were invited to hold that the power in question does not exist; or alternatively, if it does exist, to confine it, and we were reminded in that connection of the statement made by Cotton L.J. in *Lister & Co.* v. *Stubbs*, 45 Ch.D. 1, to which Lord Denning M.R. has referred, and to a number of other passages in other cases to the same effect. The power, however, formerly contained in section 25 of the Judicature Act 1875 and now contained in section 45 of the Act of 1925 was referred to by Sir George Jessel M.R. in *Beddow* v. *Beddow* (1878) 9 Ch.D. 89, 93 as embracing the grant of an injunction "in any case where it would be right or just to do so," and in my judgment we would be wrong either to widen or narrow that test.

Whether it is right or just to exercise this particular jurisdiction must depend on all the circumstances of a given case and not, in my judgment, on any single factor. I agree with Kerr J. that one of the factors which may be taken into consideration is the apparent strength or weakness of the plaintiff's case for the purpose of Order 14 and another is the nature of the asset in respect of which the order is sought. But experience shows, and it should be borne in mind, that a claim which may not appear to be strong for the purposes of an Order 14 application may in the event prove to be very strong, and I have not been satisfied that the power to make such an order is to be restricted to cases in which the plaintiff is in a position to obtain an Order 14 injunction nor, in my judgment, is it to be limited to cases where the asset is money, though I consider that in cases where the asset is not money this jurisdiction should be exercised with particular care. I do not think, therefore, that the judge in the present case was bound to refuse the application for either of these reasons—his first and second reasons—but, in my judgment, his decision was right having regard to the character and circumstances of the assets here in question which consist of equipment specifically ordered by Pertamina for the purposes of a fertiliser manufacturing plant in Indonesia and have no more than a nominal scrap value (of some $350,000) to anyone other than Pertamina or the Indonesian Government, but to either of those is said to have a value of some $12 million, since without this equipment this plant would be useless. Further, there is reason to believe that the equipment in question may have been effectively transferred in December 1976 by Pertamina to the Indonesian Government's industry department. In

addition, a claim to ownership of much of the equipment has been made on behalf of I.P.I. Ltd., who also claim that if the equipment were required to remain in the West Gladstone Dock, where it now is, they would become liable for rent and other outgoings.

Finally, there is affidavit evidence from Mr. Peter Wilson, a director of the consulting engineers for the project, that substantial quantities of the equipment will have to be returned to the suppliers in Germany for further work to be done under their warranties and guarantees, in which event it will be open to the plaintiffs to apply for such relief as they may be able to obtain in Germany under the "saisie conservatoire" principle.

Taking into account all these factors applicable to the equipment itself, it is in my judgment impossible to say that this is a case in which it would be right or just to exercise the jurisdiction under section 45 of the Judicature Act; and, in agreement with the judgment delivered by Lord Denning M.R., I too would dismiss this appeal.

Appeal dismissed with costs in Court of Appeal and below including interveners' costs.
Injunction disharged.
Leave to appeal refused.

Solicitors: *Waltons & Morse; Ince & Co.; Markbys.*

[COURT OF APPEAL]

WILSON *v.* MAYNARD SHIPBUILDING CONSULTANTS A.B.

1977 Oct. 17, 18; Nov. 11 — Megaw, Bridge and Waller L.JJ.

Industrial Relations—Unfair dismissal—Excluded classes—Work outside Great Britain—Employee working both in Britain and abroad—Whether he "ordinarily works" outside Great Britain—Test to be applied—Trade Union and Labour Relations Act 1974 *(c. 52), Sch. 1, para. 9 (2)*

Law Reform—Whether necessary—Industrial relations—Unfair dismissal—Excluded classes—Construction of "ordinarily works"—Trade Union and Labour Relations Act 1974, *Sch. 1, para. 9 (2)*

In July 1973 the employee, a management consultant on engineering matters, entered into the employment of a Swedish shipbuilding company which was part of an international group of companies with offices in different countries. The contract contained no express term as to the place where the employee was to work; but it was an implied term of the contract that he was to work as required in any country in which the employer had contracts. Up to September 15, 1975,

Taylor -v- Chief Constable of Thames Valley Police [2004] 1 W.L.R 355

A

Court of Appeal

*Taylor *v* Chief Constable of Thames Valley Police

[2004] EWCA Civ 858

2004 June 10; July 6

B

Sir Andrew Morritt V-C, Clarke and Sedley LJJ

Arrest — Arrest without warrant — Validity — Reason given by arresting officer — Whether sufficient — Police and Criminal Evidence Act 1984 (c 60), s 28(3)

False imprisonment — Arrested person — Detention in police cell — Ten-year-old claimant arrested and detained in police cell — Whether delay in interviewing claimant amounting to excessive detention — Whether false imprisonment

C

In April 1998 the claimant, a boy of ten, was identified by the police from video tapes as having thrown stones towards a farmhouse during an anti-vivisection protest which he attended with his mother. At a subsequent protest several weeks later at the same location which he also attended with his mother, the claimant was arrested by a police officer who said "I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm". The claimant and his mother, who had not been arrested, were then taken to a police station. At 7.45 p m, after he had been processed by the custody sergeant, the claimant was placed in a detention room. The interview of the claimant in the presence of his mother began at 9.21 p m and ended at 9.53 p m. A formal caution was finally administered and the claimant was released at 11 p m. The claimant subsequently brought proceedings for, inter alia, false imprisonment on the grounds that the arrest had been unlawful and the period of detention was excessive and unreasonable in all the circumstances. The judge held that the words spoken to the claimant on arrest were not sufficient to effect a lawful arrest in the light of section 28(3) of the Police and Criminal Evidence Act 1984[1], and that in any case the period of time for which the claimant had been detained was of such length as to make an otherwise lawful detention unlawful. He accordingly allowed the claim and awarded the claimant damages in respect of a period of four hours' detention.

D

E

On appeal by the Chief Constable—

Held, allowing the appeal in part, (1) that the modern approach to the application of section 28(3) of the 1984 Act was to ask whether, having regard to all the circumstances of the case, the person arrested had been told in simple non-technical language that he could understand, the essential legal and factual grounds for his arrest; that the question whether or not the information given was adequate was to be assessed objectively having regard to the information which was reasonably available to the arresting officer; that the judge, in considering whether the arresting officer knew or should have been told by other officers that the claimant was suspected of throwing stones, had taken into account an irrelevant consideration and had thus erred in principle; that, in the circumstances and taking into account the fact that the claimant's mother was present, even though the claimant was only ten years of age, it was sufficient to have told him that he was being arrested for his part in the previous violent disorder and to have given the time and place; and that therefore the arrest had been lawful (post, paras 26, 30–31, 37, 38, 40–41, 56–57, 60, 61).

F

G

H

Fox, Campbell and Hartley v United Kingdom (1990) 13 EHRR 157 considered.

(2) That it was for the Chief Constable to prove that the detention of the claimant was lawful throughout its whole period; that the general test was whether the decision of the custody sergeant was unreasonable in the sense that no custody

[1] Police and Criminal Evidence Act 1984, s 28(3): see post, para 5.

sergeant applying common sense to the competing considerations before him could have continued to detain the suspect; that, in the circumstances, the judge had been entitled to find that the claimant had been detained for an excessive period between about 8.15 p m and 9.21 p m and had therefore been falsely imprisoned in respect of that period; and that, accordingly, the award of damages would be set aside and substituted by an appropriate award of damages in respect of one hour's wrongful detention, to be agreed by the parties (post, paras 42, 45, 53, 54, 55, 60, 61).

The following cases are referred to in the judgments:

Abbassy v Comr of Police of the Metropolis [1990] 1 WLR 385; [1990] 1 All ER 193, CA

Associated Provincial Picture Houses v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 581, CA

Christie v Leachinsky [1947] AC 573; [1947] 1 All ER 567, HL(E)

Clarke v Chief Constable of North Wales Police (unreported) 5 April 2000; Court of Appeal (Civil Division) Transcript No 568 of 2000, CA

Fox, Campbell and Hartley v United Kingdom (1990) 13 EHRR 157

Mercer v Chief Constable of the Lancashire Constabulary [1991] 1 WLR 367; [1991] 2 All ER 504, CA

Murphy v Oxford (unreported) 15 February 1985; Court of Appeal (Civil Division) Transcript No 56 of 1985, CA

Wilding v Chief Constable of Lancashire (unreported) 22 May 1995; Court of Appeal (Civil Division) Transcript No 574 of 1995, CA

Wilson v Chief Constable of the Lancashire Constabulary (unreported) 23 November 2000; Court of Appeal (Civil Division) Transcript No 1992, CA

Woods v Comr of Police of the Metropolis (unreported) 26 May 1995; Court of Appeal (Civil Division) Transcript No 588 of 1995, CA

No additional cases were cited in argument or referred to in the skeleton arguments.

APPEAL from Judge Catlin sitting at Reading County Court

By a claim form and particulars of claim dated 7 January 2002, and amended on 24 November 2002, the claimant, Daniel Taylor (a child proceeding by his mother and litigation friend CM Taylor), sought damages against the defendant, the Chief Constable of Thames Valley Police, for false imprisonment, assault and trespass to the person arising out of the claimant's detention at Newbury Police Station on 31 May 1998. On 12 December 2003 Judge Catlin, sitting at Reading County Court, gave judgment for the claimant and awarded him damages amounting to £1,500.

By an appellant's notice filed on 12 December 2003, the defendant appealed with permission granted by Scott Baker LJ on 10 March 2004 on the grounds, inter alia, that the judge had erred in finding (1) that the words found by the jury to have been spoken by the arresting officer when arresting the claimant were insufficient at law to effect that arrest and (2) that the claimant's detention was unreasonable and therefore he was falsely imprisoned.

The facts are set out in the judgment of Clarke LJ.

Edward Faulks QC and *Iain Daniels* for the Chief Constable.

Brian Langstaff QC and *Yvette Genn* for the claimant.

Cur adv vult

6 July. The following judgments were handed down.

CLARKE LJ

Introduction

1 This is an appeal by the Chief Constable of the Thames Valley Police against an order dated 12 December 2003 made by Judge Catlin in the Reading County Court in which he gave judgment for the claimant, Daniel Taylor, for damages in the sum of £1,500. The order was made after a trial in which it was said that the claimant had been arrested unlawfully and in which he claimed damages for trespass to the person, assault and false imprisonment. The trial lasted some five days and was in part before a jury. Some issues at the trial were determined by the jury and, by agreement, some were determined by the judge.

2 The action arose out of the arrest of the claimant on 31 May 1998. He was only ten years old at the time and was a small boy, being only about four feet nine inches tall. One of the issues at the trial was whether he was sufficiently informed of the reasons for his arrest by the arresting officer, PC McKenzie. The jury were asked to answer and in fact answered three questions. The questions and answers were as follows:

> "*Q*. Has the Chief Constable/defendant satisfied you that on 31 May 1998 PC McKenzie had formed a genuine suspicion herself that the claimant had committed the offence of violent disorder? *A*. Yes.
>
> "*Q*. What did PC McKenzie say to the claimant, if anything, when she arrested him? *A*. We believe that PC McKenzie said: 'I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm.'
>
> "*Q*. Has the claimant satisfied you that it was not reasonable and/or necessary to take hold of the claimant's arm to effect his arrest and detention? *A*. No."

3 It was initially agreed that the judge should decide four questions: (i) whether the words spoken to the claimant on arrest were sufficient lawfully to effect his arrest; (ii) whether PC McKenzie's genuine suspicion was reasonably held; (iii) whether PC McKenzie exercised her discretion in a manner which was reasonable in accordance with *Wednesbury* principles (see *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1 KB 223); and (iv) whether the period of time that the claimant was detained was of such length as to make an otherwise lawful detention unlawful.

4 The issue raised by question (ii) was abandoned on behalf of the claimant before the judge. The judge was thus asked to answer questions (i), (iii) and (iv). He answered questions (i) and (iv) in favour of the claimant and question (iii) in favour of the Chief Constable. The judge refused the Chief Constable's application for permission to appeal in respect of the answers to questions (i) and (iv) but permission was subsequently granted by Scott Baker LJ. The claimant does not challenge the answer to question (iii). The issues in this appeal are therefore whether the judge was entitled to reach the conclusions which he did on questions (i) and (iv).

5 Question (i) was whether the arrest was lawful in the light of section 28(3) of the Police and Criminal Evidence Act 1984 ("PACE"), which provides: "no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of or as soon as practicable after the arrest." It was common ground that the burden of proving that the arrest was lawful

was on the Chief Constable. The judge held that he had failed to discharge that burden. The question raised by the first issue in this appeal is whether he was entitled so to hold.

6 Question (iv) was whether, assuming the arrest was otherwise lawful, the period over which the claimant was detained was lawful. The judge held that it was not in respect of the period of about an hour between about 20.15 and 21.21 on 31 May 1998. The question raised by the second issue in the appeal is whether the judge was entitled so to hold. It only arises if the appeal on the first point succeeds.

7 I shall consider each of those issues separately but before doing so it is convenient to identify the relevant background facts, all or almost all of which are agreed or not in dispute.

The background facts

8 I take the facts in part from the account set out in the very helpful skeleton argument prepared by Miss Genn on behalf of the claimant. In 1998 Hillgrove Farm, Whitney in Oxfordshire was the site of anti-vivisection protests. On 18 April in that year the claimant and his mother came down from Liverpool where they lived and attended a demonstration at Hillgrove Farm. It was a substantial demonstration involving as many as a thousand people. It was also violent. Significant numbers of people were involved in the violence whom the police were anxious to identify from video tapes and still photographs of the events.

9 There were some 29 video cassettes and 26 albums of photographs. In order to identify those involved, a team of police officers known as spotters viewed the video tapes (and indeed stills taken from the tapes) and attended a further demonstration at Hillgrove Farm which took place on 31 May in order to see whether any of those identified on the tapes were present. The plan was to arrest those suspected of committing public order offences at the earlier demonstration. Some 106 people were identified as possible targets (and given a T number) one of whom proved to be the claimant, who was seen on one of the videos throwing a rock or rocks from an adjacent field in the direction of the farmhouse. He was T42. He was one of 28 people arrested on 31 May on suspicion of having committed offences on 18 April. A number of people were also arrested in connection with the demonstration on 31 May, although that demonstration was largely peaceful and there is no suggestion that the claimant committed an offence on that day.

10 Two of the police spotters were Sergeant Deacon and DC Lynch. Although both officers had been promoted to inspector by the time of the trial in 2003, I shall where appropriate refer to them by the ranks which they each had at the time. Sergeant Deacon had reduced the images to a manageable number and on 31 May he had with him a book or album of stills and photographs in order to aid the identification process. It was his role, having identified a particular suspect, to instruct a more junior officer or more junior officers to arrest the suspect. He identified T42 and instructed PC McKenzie to arrest him. She accordingly arrested the person pointed out to her as T42, who proved to be the claimant.

11 The arrest took place at 16.10. As already indicated, the jury found that when doing so PC McKenzie said "I am arresting you on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm". For reasons which are not the subject of any present complaint, and which may have been

connected with the size of the operation, it was not until 18.10 that the claimant arrived at Newbury Police Station in a police van. His mother had been and continued to be with him throughout. There was then a further delay, during which the claimant was obliged to remain in the van, and it was not until 19.09 that he was presented to the custody sergeant, who was Sergeant Davey, for processing. After processing, at 19.45 he was placed in a detention room. At 20.20 Mrs Taylor complained about the delay and also about the fact that the detention room was oppressive. He was subsequently interviewed in the presence of his mother, who it was eventually agreed could act as an appropriate adult. The interview began at 21.21. It was the period between about 20.15 and 21.21 that the judge held was excessive. The interview ended at 21.53. There was then some discussion about the possibility of a formal caution, to which the claimant agreed. As a result a formal caution was administered to him and he was finally released at 23.00.

The proceedings and trial

12 This action was begun some considerable time later and particulars of claim were served on 7 January 2002. In them it was alleged that the arrest was unlawful and, as indicated above, damages were claimed for false imprisonment, assault and trespass to the person. The basis of the claim was different from that which was ultimately argued before the judge in the light of the jury's findings of fact. In para 4(ii) it was alleged:

> "The claimant was not properly informed of the reasons for his arrest. PC McKenzie did state to the claimant's mother that the claimant had been arrested for a public order offence. However, this was said as the claimant was being taken to the police van and was not heard by the claimant. If anything was said to the claimant about the reasons for his arrest it was wholly unclear and not properly communicated to him. The claimant first understood the reason for his arrest when he arrived in the custody suite and was told he was suspected of violent disorder on 18 April 1998. His arrest was thereby unlawful and he was thereby unlawfully imprisoned."

13 As already indicated, the jury found that at the time of arrest PC McKenzie told the claimant that she was arresting him on suspicion of violent disorder on 18 April 1998 at Hillgrove Farm. It is perhaps an irony that, in the light of the jury's verdict rejecting the case advanced in the second and third sentences of para 4(ii), those words were and are said to be insufficient to inform the claimant of the grounds on which he was being arrested, whereas in the fourth sentence of para 4(ii) it was said that he first understood the reason for his arrest in the custody suite when he was told that he was suspected of violent disorder on 18 April. It is common ground that he was indeed given that information in the custody suite because there is a record to that effect in the custody record. The information was rather less than the jury found was given to him by PC McKenzie when he was arrested.

14 It is common ground that the above is no more than an incidental irony because it is agreed that the words used (viewed of course in their context) are either sufficient to satisfy section 28(3) of PACE or they are not. Thus both Mr Faulks and Mr Langstaff averred that the subjective state of mind of the claimant or indeed his mother was irrelevant to the

determination of that question, although (perhaps naturally) neither could resist referring to those parts of the evidence of actual understanding which he perceived to be of assistance to the result he was contending for.

15 At the outset of the five-day trial permission was sought on behalf of the claimant to amend the particulars of claim in two respects. The first alleged that PC McKenzie had not formed a genuine suspicion that the claimant had committed an offence and/or that she did not have reasonable grounds for such a suspicion. However, the first point was rejected by the jury and the second was abandoned and is no longer relevant. The second respect in which it was sought to amend the particulars of claim was to add a new para 4(iii), which is relevant to the second issue in the appeal, and is in these terms: "Further or in the alternative, even if the arrest is found to have been lawful (which is denied) the period over which the claimant was detained was excessive and unreasonable in all the circumstances." The Chief Constable did not resist the application for permission to amend and it was accordingly granted.

16 The claim for damages included claims for damages for trespass to the person and for assault. However, as I understand it, it is common ground that those claims would only succeed if the claim for damages for false imprisonment succeeded on the basis that the original arrest was unlawful. The judge awarded damages totalling £1,500. The award was made in these circumstances. After the judge had held that the arrest was unlawful, he heard argument on issue (iv), during which it was submitted on behalf of the claimant that even if the arrest was lawful, it was excessive to detain the claimant for as long as he was detained. As I read the judgment, it was in effect accepted that on that assumption the detention was lawful between 16.10 and 19.45 and between 21.21 and 23.00, but it was submitted that the interview should have started at 19.45 and that the detention was unlawfully prolonged in respect of the period between 19.45 and 21.15. The judge accepted that submission in part and held that the detention was unlawfully prolonged in respect of the period between about 20.15 and 21.21.

17 In the light of that decision the parties agreed the figure of £1,500 as damages, subject to the judge's approval because the claimant was (and is) a minor. Curiously, it appears from the discussions between the judge and counsel, of which we have seen a transcript, that the judge approved the figure on the basis that it was to cover four hours of false imprisonment, together with a trespass to the person consisting of lifting the claimant's shirt and an assault in the process of the arrest which were both at the lowest end of the spectrum. It is not absolutely clear but it appears that the four hours were arrived at by taking the three hours from the time of arrest at 16·10 to the time of arrival at the custody suite at 19.10 and adding the hour which the judge held to be excessive between about 20.15 and 21.21. The basis for excluding the period from 19.10 to 20.10 and 21.21 to 23.00 is not clear. The only basis that I can think of is that it was accepted in calculating the damages that the arrest was lawful during those periods because what was said in the custody suite (and alleged in para 4(ii) of the particulars of claim) was sufficient to inform the claimant of the grounds of his arrest within section 23(3) of PACE.

18 However, that approach would be inconsistent with what by the end of the trial was the central argument on liability, namely whether the words which the jury held to have been spoken by PC McKenzie were sufficient.

A Since no one seeks to reopen the damages and no one suggests that the judge was not entitled to reach the conclusion that he did on the basis of an inconsistency in the approach to damages, I refer to it only to explain what would otherwise be a curiosity (to put it no higher) and to observe that it is common ground that if the appeal fails the result will be that the award of damages in the sum of £1,500 stands, that if the appeal succeeds on both points the Chief Constable will not be liable at all so that the whole award of
B damages will be set aside and that if the appeal succeeds on the first point but fails on the second point the award of £1,500 will be set aside and replaced by an appropriate award of damages for excessive detention for the period of about an hour between 20.15 and 21.21. In that event the parties have not asked us to assess an appropriate figure but have said they that they hope to agree an appropriate figure.

C

Wrongful arrest?

19 I turn to the first question, namely whether the claimant was sufficiently informed of the grounds of his arrest. Section 28 of PACE provides so far as relevant:

> "(3) . . . no arrest is lawful unless the person arrested is informed of the
D ground for the arrest at the time of, or as soon as reasonably practicable after, the arrest.
>
> "(4) Where a person is arrested by a constable, subsection (3) applies regardless of whether the ground for the arrest is obvious."

20 Section 28 of PACE reflects the position at common law as stated in the leading case of *Christie v Leachinsky* [1947] AC 573. In a classic
E passage at pp 587–588, after referring to a number of cases, Viscount Simon summarised the position in a series of propositions:

> "(1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give
F a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is
G detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed. (5) The
H person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e g, by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or

complete code, but to indicate the general principles of our law on a very important matter." A

Those principles must now be read subject to section 28(4) of PACE but have been followed in a number of later cases.

21 The underlying rationale of that approach is that a person is entitled to know why he is being arrested. One of the reasons for that which is identified in the cases is that if he is told why he is being arrested he has the opportunity (for example) of giving an explanation of any misunderstanding or of calling attention to others for whom he might have been mistaken: see e g *Christie v Leachinsky* per Viscount Simon, at p 588, and per Lord Simonds, at pp 591 and 592. Lord Simonds emphasised, at p 593, that, as he put it, "the arrested man is entitled to be told what is the act for which he is arrested". B C

22 We were referred to a number of English cases in which those principles have been applied including (in chronological order) *Murphy v Oxford* (unreported) 15 February 1985; Court of Appeal (Civil Division) Transcript No 56 of 1985, *Abbassy v Comr of Police of the Metropolis* [1990] 1 WLR 385, *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367, *Wilson v Chief Constable of the Lancashire Constabulary* (unreported) 23 November 2000; Court of Appeal (Civil Division) Transcript No 1992 and *Clarke v Chief Constable of North Wales Police* (unreported) 5 April 2000; Court of Appeal (Civil Division) Transcript No 568 of 2000. It will be noted that many of those cases are unreported. That is no doubt because they do not add to the principles set out above but are simply applications of the principles to the facts of particular cases. D

23 The same is in my opinion true of the reported cases. The relevant principles remain those set out in *Christie v Leachinsky* [1947] AC 573. It seems to me that the best statement of those principles as articulated in more recent times is not to be found in an English case at all but in para 40 of the decision of the European Court of Human Rights in *Fox, Campbell and Hartley v United Kingdom* (1990) 13 EHRR 157, 170. The court was there of course considering, not section 28(3) of PACE, but article 5(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." E F

24 The court said, at p 170, para 40:

> "Paragraph (2) of article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This protection is an integral part of the scheme of protection afforded by article 5: by virtue of paragraph (2) any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph (4). Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features." G H

25 The wording of article 5(2) and of section 28(3) of PACE are not of course the same. Nor are the words used by the European Court of Human Rights the same either as those of Viscount Simon quoted at para 21 above or as those used in any of the other cases I have mentioned, but to my mind the principles expressed are essentially the same. It seems to me that this court was of the same view in *Wilson v Chief Constable of the Lancashire Constabulary* 23 November 2000, in spite of the apparently stricter words of article 5(2): see per Mance LJ, at para 27.

26 In the light of all the authorities I would hold that the modern approach to the application of section 28(3) is that set out in para 40 of the judgment in *Fox, Campbell and Hartley v United Kingdom* 13 EHRR 157, 170. The question is thus whether, having regard to all the circumstances of the particular case, the person arrested was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. In the light of the case law as it has developed I doubt whether it will in the future be necessary or desirable to consider the cases in any detail, or perhaps at all. It seems to me that in the vast majority of cases it will be sufficient to ask the question posed by the European Court of Human Rights.

27 I turn therefore to consider the answer to that question on the facts of this case. It is important to note that the arrested person must be told both the essential legal and the essential factual grounds for the arrest. The words spoken must therefore include some statement of the factual as well as some statement of the legal basis of the arrest. In this case it is said that PC McKenzie did not sufficiently inform the claimant of the factual basis of the arrest. It is accepted that she included some facts because she told him that he was being arrested on suspicion of violent disorder at a particular place, namely Hillgrove Farm, on a particular date, namely 18 April. The question before the judge was whether those words went far enough.

28 The judge recorded the argument advanced on behalf of the claimant that something more was reasonable, such as "You were throwing stones with others, damaging property, or hitting persons at the farm on the date in question". The judge in fact held that PC McKenzie should have gone further than she did by saying words such as "I am arresting you on suspicion of violent disorder by being involved with others in throwing stones towards the farmhouse at Hillgrove Farm on 18 April 1998". He observed that the arrest occurred six to seven weeks after the event and took place at a time when the claimant was not engaged in any form of unlawful behaviour. He held that the words used did not convey the circumstances of the particular offence for which the claimant was being arrested, that is "what act the arrested person [was] being arrested for", which he said was what was required by the authorities.

29 The process of reasoning which led the judge to that conclusion, which he expressed at the end of para 8 of his judgment, involved a consideration of the question whether it was reasonable for PC McKenzie to have been given the information that the claimant had been throwing stones or to have found it out for herself. He said:

> "6. A question to be answered is whether the officer, as I understand it from the authorities, acted reasonably in her efforts to communicate adequate words. The officer herself was told that the reason for arrest was because of the violent disorder at Hillgrove Farm on 18 April 1998.

She did not ask, nor was she told, of the nature of the claimant's involvement. There is no evidence either way as to whether Sergeant Deacon, who was the sergeant instructing PC McKenzie to effect the arrest, would have been able to tell PC McKenzie of the nature of the violent disorder alleged against the claimant. It is not in dispute that he had a photograph of the claimant, selected from a video, but whether he recalled or had a note of the claimant's involvement on 18 April is unknown. The jury would not have heard that evidence, and I have not heard that evidence either way. There is no doubt that he would have had a record somewhere of the video. Whether it was with him or not on the day of the arrest, 31 May, is unknown. But there is undoubtedly a video to which he had had access and still had access on 31 May, which would have shown the claimant's stone throwing activities, if that is a proper way to describe them, involving also other acts of stone throwing, missile throwing of others, causing serious damage to property, including a house and cars and a serious degree of violence on 18 April. That information was all available to him, but whether he had it with him at the time or whether he had it in his head, which he probably would have done because he had been studying the videos, and whether he would have recalled what the claimant was alleged to have done, we do not know.

"7. I have considered this matter very carefully, because of the nature of the claim, the nature of the difficulties which police officers have in dealing with these huge disturbances, of which this was one, and the need to look at the matter sensibly rather than be nit-picking about things. Having done so, in my judgment it would have been reasonable and not difficult, despite the scale of the operation, on the information I have, for the sergeant to have had a brief note—whether it be on the photograph of somewhere in his papers, or indeed in his mind—such as the note which appears at p 144 of the bundle. That is a note on a photograph, that as far as we are aware he did not have, but there seems to me no particular difficulty why some sort of brief note of that sort would, if necessary, have been of assistance to remind him of why this person needed to be arrested, not just because of general involvement in violent disorder, but because of the particular role that it is alleged that he played in it. That photograph bears the legend, 'Throwing missiles towards farmhouse', and it is something of that sort, it seems to me, which should have been easily available to the sergeant, and if available to him then available to the arresting officer. In my judgment, it would also have been reasonable for PC McKenzie to have been told more than just violent disorder with the date and the place. In my judgment, it was unreasonable of her not to ask or probably not to be told of more detail, not vast amounts of detail, but a little detail so that she could tell the claimant—whether it is a claimant of this age or older—in simple terms why they had been arrested. My understanding of section 28 and the authorities before it and since is that that is what the law requires, for good reason. People need to know why they are being arrested—not in technical terms, but in simple terms that an ordinary person is likely to understand. In other words, what had he done?

"8. So, in my judgment, it follows that she could have obtained that information, if she had asked for it, or she ought to have been able to obtain that information if she had asked for it, and if it was not available

A it was unreasonable for it not to be made available, and it was unreasonable for her not to ask for it."

30 As can be seen from that quotation the judge asked himself whether the police, that is Sergeant Deacon and PC McKenzie, acted reasonably and held that they did not, in that Sergeant Deacon did not tell PC McKenzie that the claimant had been throwing stones and PC McKenzie did not ask him. B However, for my part, I do not think that that was quite the right question. The question was simply whether the claimant was told the ground for his arrest, which required that he be told the essential legal and factual grounds for the arrest. As Woolf LJ put it in *Abbassy v Comr of Police of the Metropolis* [1990] 1 WLR 385, 392, the question whether or not the information given is adequate has to be assessed objectively having regard to the information which is reasonably available to the officer. The person C arrested is either told enough or he is not.

31 Thus the question here was whether, viewed objectively, the claimant was told enough. As I see it, the answer to that question is the same whether PC McKenzie knew that the claimant was suspected of throwing stones or not. How reasonably the police acted in communicating with one another seems to me to be irrelevant to the answer to the question. It follows D that, in my judgment, the judge took account of an irrelevant consideration in reaching the conclusion which he did and thus erred in principle. In any event, as Sedley LJ put it in *Clarke v Chief Constable of North Wales Police* 5 April 2000 at para 30, the question to be answered is a mixed question of law and fact and, moreover, is one in which, in the particular circumstances of this case, this court is in as good a position as the judge to decide.

32 In these circumstances, it seems to me that it is for this court to E consider for itself whether the words used satisfied the test. Mr Langstaff submits that they did not. He points to these circumstances. The offence of violent disorder is not entirely straightforward. Merely to tell the claimant that he was being arrested on suspicion of violent disorder told him nothing about the wrongful acts which were alleged against him, especially since he was a small boy of only ten years of age, even though he was accompanied by his mother. It would not obviously involve throwing stones. The events F complained of had taken place some weeks earlier. There was no criminality at the time of the arrest. The operation was preplanned and the police were in possession of detailed information which could easily have been given to the claimant at the time of the arrest.

33 There is undoubtedly some force in those submissions. It is correct that the offence of violent disorder is not entirely straightforward. The G Public Order Act 1986 provides, so far as relevant:

> "2(1) Where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons threatening unlawful violence is guilty of unlawful disorder."
>
> "6(2) A person is guilty of violent disorder . . . if he intends to use or H threaten violence or is aware that his conduct may be violent or threaten violence."
>
> "8 . . . 'violence' means any violent conduct, so that—(a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and (b) it is not restricted to conduct

causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short)."

Mr Langstaff submits that in these circumstances the claimant should have been told precisely what he was suspected of doing.

34 I see the force of that submission in a perfect world but this is not a perfect world. The offence of violent disorder is committed not just by one person but by at least three and in many cases, of which this was a prime example, by a large number of people together. As Mr Faulks submits, it is not practicable for the police to give each arrested person detailed particulars of the case against him. He submits that it was sufficient in this case, and will ordinarily be sufficient in cases of substantial disorder for the officer to tell the person being arrested that he is suspected of violent disorder at a particular demonstration at a particular time and place. In particular he submits here that there could have been no doubt in the claimant's mind that he was being arrested for the part that he played in violent disorder at the same place as he was arrested, namely Hillgrove Farm, some weeks earlier.

35 Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested. In some cases it will be necessary for the officer to give more facts than in others. So, for example, in *Murphy v Oxford* 15 February 1985 a person arrested for burglary was told that he was being arrested on suspicion of burglary in Newquay. As Sir John Donaldson MR put it, no mention was made either of the fact that the premises in Newquay were a hotel or of the date on which the offence was committed. The arrest was held to be unlawful.

36 By contrast, here the claimant was told that he was suspected of violent disorder at Hillgrove Farm on 18 April. To my mind the reference to Hillgrove Farm and to the date gave clear information to the claimant as to the event concerned. Hillgrove Farm was the place where the claimant and his mother were when he was arrested on 31 May. It was the same place as they had visited before on 18 April. It is true, as Mr Langstaff submits, that that was some six or seven weeks earlier, but the claimant had only been there once before when he had come with his mother on an anti-vivisection demonstration against the same person, namely the owner of the farm. There can have been no reasonable doubt in his mind as to when and where the events occurred which led to his arrest. Despite the interval of time, there can have been no scope for confusion as to the incident to which PC McKenzie was referring. In my opinion, that is true even though the claimant was only ten years of age. In this regard, it should be noted that the claimant's mother was present throughout.

37 The question seems to me to boil down to whether it was sufficient to tell the claimant that he was being arrested for violent disorder on the previous occasion. The two other suggested formulations identified above, namely that suggested to the judge by counsel and that suggested by the judge, seem to me to demonstrate the difficulty of providing greater particulars because they show the difficulty of deciding how far to go. The essence of the crime of violent disorder is that the accused is alleged to have taken part in using or threatening unlawful violence or encouraging others to do so. It seems to me that, provided the time and place of the disorder is

A indicated to the person arrested it should ordinarily be sufficient for the police simply to say, as PC McKenzie did, that the person concerned is being arrested on suspicion of violent disorder at a particular time and place.

38 Such a person is to my mind being told why he is being arrested, namely for taking part in the violent disorder on a particular occasion. In this case that was in my opinion the situation. Neither the claimant nor his mother could be expected to be in any doubt why he was being arrested. It B was for his part in the previous violent disorder. There was no need to specify the precise way in which he was said to be taking part. Whatever are the various ways in which violent disorder can be committed, "violent disorder" was a good description of what had happened on the previous occasion without more. Associated with its time and place, it permitted the claimant and his mother to respond, if either had wished, that the claimant C was not there or that he was doing nothing wrong. Equally it would have given enough information to take advice from a solicitor.

39 In these circumstances it does not seem to me to be surprising that the claimant's case was originally pleaded in para 4(ii) of the particulars of claim (quoted above) on the basis that he first understood the reason for his arrest at the police station when he was told he was suspected of violent disorder on 18 April. I express no view on what the state of mind of the D claimant or his mother in fact was because it seems to me to be irrelevant but that is precisely what PC McKenzie would reasonably have expected him to understand when she told him that he was suspected of violent disorder at Hillgrove Farm on 18 April.

40 In all these circumstances I would hold that PC McKenzie informed the claimant of the ground for the arrest within section 28(3) of PACE and of E the reasons for his arrest within article 5(2) of the Convention. In the words of para 40 of the judgment in *Fox, Campbell and Hartley v United Kingdom* 13 EHRR 157, 170 he was told both the essential legal and factual grounds for his arrest, namely that he was suspected of taking part in violent disorder at the same place on the occasion of the previous demonstration, which was on 18 April. I have considered whether this conclusion is inconsistent with the approach in any of the decided cases to which we were referred and I do F not think that it is. Each case depends on its own facts, so that there is little, if anything to be gained by this exercise: cf *Abbassy v Comr of Police of the Metropolis* [1990] 1 WLR 385 and *Clarke v Chief Constable of North Wales* 5 April 2000 on the one hand and the decision of the majority of this court in *Wilson v Chief Constable of the Lancashire Constabulary* 23 November 2000 on the other. I would hold that on the facts of this case the words used G were sufficient and that the arrest was lawful.

41 It follows that the Chief Constable was not liable for false imprisonment for the whole period and was not liable for trespass or assault. I would therefore allow the appeal on this point and set aside the award of damages of £1,500.

Excessive detention?

H

42 As explained above, the judge held that the claimant was detained for an excessive period of about an hour between about 20.15 and 21.21. It was common ground that it was for the Chief Constable to justify the whole period of detention. As Lord Donaldson of Lymington MR colourfully put it in *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR

367, 373, the Chief Constable must prove that the detention was lawful minute by minute and hour by hour. Here the judge held that he had failed to do so in respect of that period. He held in short that the delay between those times was only to be explained by the absence of the interviewing officer and that the Chief Constable failed to explain why no interviewing officer was available by 20.15. He held that it was, as he put it in para 5 of his second judgment, unexplained in any terms as to reasonableness.

43 Mr Faulks submits that that conclusion is unjustified and that it is a reasonable inference that no time was wasted and that any delay is to be explained by the exigencies of policing on that afternoon and evening, given the large number of suspects who had to be processed. He submits first that the claimant's case should be put in context and in particular that account should be taken of the difficulties faced by the Chief Constable given that no application was made to amend the claim to allege excessive detention until the first day of the trial. It is certainly true that the Chief Constable was likely to have been put in difficulties by the late amendment because, through no fault of his own, Inspector Lynch's notebook was no longer available and he was the key witness in this part of the case. However, the application for permission to amend was not opposed on behalf of the Chief Constable on the ground that it could no longer be fairly tried and/or that he would be irremediably prejudiced if it were granted. In these circumstances the judge was bound to consider the issue and, having regard to the fact that the burden of proof was on the Chief Constable, was bound to ask himself whether he had discharged it.

44 The relevant principles are set out in paras 1.1 and 1.1A of Code C issued under PACE (Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers):

> "1.1. All persons in custody must be dealt with expeditiously, and released as soon as the need for detention has ceased to apply.
>
> "1.1A. A custody officer is required to perform the functions specified in this code as soon as is practicable. A custody officer shall not be in breach of this code in the event of delay provided that the delay is justifiable and that every reasonable step is taken to prevent unnecessary delay. The custody record shall indicate where a delay has occurred and the reason why. (See note 1H)."

Note 1H is in these terms:

> "Para 1.1A is intended to cover the kinds of delays which may occur in the processing of detained persons because, for example, a large number of suspects are brought into the police station simultaneously to be placed in custody, or interview rooms are all being used, or where there are difficulties in contacting an appropriate adult or interpreter."

45 The principles were considered in two unreported cases decided in this court by Nourse, Beldam and Kennedy LJJ on 22 and 26 May 1995. They were *Wilding v Chief Constable of Lancashire* and *Woods v Comr of Police of the Metropolis* respectively. In both cases the court asked itself whether the circumstances were such that the decision of the custody sergeant was unreasonable in the sense that no custody sergeant, applying common sense to the competing considerations before him, could have continued to detain the suspect.

A **46** In many cases that is likely to be the sole question, although in the present case the position is slightly more complicated. The custody sergeant, Sergeant Davey, explained that he was faced with a number of considerations, which included his entirely proper doubts as to whether Mrs Taylor should be allowed to act as an appropriate adult. Para 1C of Code C provides:

B "A person, including a parent or guardian, should not be an appropriate adult if he is suspected of involvement in the offence in question, is the victim, is a witness, is involved in the investigation or has received admissions prior to attending to act as the appropriate adult. If the parent of a juvenile is estranged from the juvenile, he should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to his presence."

C **47** Mrs Taylor had been present at the demonstration on 18 April and was at the very least likely to have been a witness to what occurred. So Sergeant Davey's concern was whether Mrs Taylor should be treated as an appropriate adult was justified and he spent some time trying to find someone else to act in that capacity. Sergeant Davey was also concerned about the claimant having legal advice and it appears that at one stage D Mrs Taylor said that her son would like the assistance of a solicitor.

48 However, Mr Langstaff submits that neither of those concerns was the cause of the delay which the judge held to have been unjustifiable. He relies upon the evidence of Sergeant Davey both in his statement and orally at the trial. Thus in his statement he said: "My intention was to ensure that I complied with PACE and to expedite Daniel's release from custody as soon as possible, but I first had to wait for an interview team to interview Daniel." E Mr Langstaff submits that in these circumstances it is clear that on Sergeant Davey's evidence the delay was caused, not by concern about whether the claimant's mother should be treated as an appropriate adult or by the need to wait for a solicitor, but by having to wait for an interview team to be assembled. Mr Langstaff correctly observes that, when the interview team had been assembled and was ready to start the interview, no delay was F caused for want of an appropriate adult or for want of a solicitor. The note in the custody record for 21.10 records that the interview team was now in a position to interview the claimant, that they were all happy to have Mrs Taylor as an appropriate adult and that, no doubt as a result of his mother's advice, the claimant was happy to be interviewed without the presence of a solicitor.

49 Sergeant Davey's evidence is summarised in his statement as follows:

G "Any delay in processing Daniel was subject to the investigating/interviewing team attending for the purpose of the interview. My understanding was that they were currently busy processing/interviewing other detainees but they were aware that Daniel was their next priority."

H Thus, on a fair view of Sergeant Davey's evidence as a whole, although he had been concerned in the two respects to which I have referred, he put any delay down to having to wait for an interview team. His evidence is to be contrasted with that of Inspector Lynch.

50 Unlike Sergeant Davey, who had the benefit of the custody record, Inspector Lynch had no contemporary document of his own from which to

refresh his memory. However, he said in evidence that once the demonstration had finished and everyone had left he had to try and find where the various people who had been arrested had been taken. He went back to Newbury Police Station where the claimant had been taken. He said that since he was only ten he was a priority. He spoke to DC Hunter and briefed him so that he would be ready to conduct the interview, since it was DC Hunter and not DC Lynch who was to interview (and in fact interviewed) the claimant, albeit with DC Lynch present. He said that, once the claimant had been booked into custody and dealt with by the custody suite and was ready for interview, then they went down and interviewed him.

51 In cross-examination he said in effect that the interviewing team were not responsible for any delay and in answer to a question from the judge as to when he reached Newbury he said:

> "I don't have that in my statement. I think I've the time in my statement that we started the interview, but effectively from the time I got there we were waiting for him to be interviewed. That is my recollection of it, not that he was waiting for us."

When he was pressed on the cause of the delay, especially in the light of the evidence of the custody sergeant and the contents of the custody record, he said that he did not recollect being the cause of any delay but that it was five years ago.

52 In the light of that evidence the judge was in my opinion entitled to hold that the delay between about 20.15 and 21.21, when the interview began, "is only explained by the absence of the interviewing officer". That conclusion is justified by the custody record and the evidence of Sergeant Davey. The judge was I think somewhat critical of Sergeant Davey for not pressing the interviewing officers harder but, for my part, I do not think that it would be fair to Sergeant Davey to criticize him on the evidence available.

53 As I read the judge's judgment, the reason why he held that the claimant was detained for an excessive period between about 20.15 and 21.21 (and thus that the Chief Constable was liable for false imprisonment in respect of that period) was that the police were unable to explain the reason for the delay in having an interview team ready to interview the claimant until then. Given the fact that Inspector Lynch was unable to account for the delay, I have reached the conclusion that there is no proper basis upon which this court could hold that the judge was not entitled to reach the conclusion which he did. I recognise that the reason why Inspector Lynch was not able to explain the delay (which he could not in any event recall) may well have been the absence of his notebook and the passage of time since 1998 but the fact remains that the burden of proof was on the Chief Constable and the judge was entitled to hold that he had failed to discharge it.

54 It follows that I would hold that the judge was entitled to hold that the claimant was entitled to damages for wrongful detention and thus false imprisonment for about an hour.

Conclusions

55 For the reasons set out above, I would hold that the judge was wrong to hold that the initial arrest was not lawful and that it is the duty of this court to allow the appeal on the first question. By contrast, I would hold

that the judge was entitled to hold that the Chief Constable was liable for damages for false imprisonment in respect of the period of about an hour. It follows that I would set aside the award of damages of £1,500, which it was agreed covered false imprisonment for some four hours and both trespass to the person and assault, both of which depended upon the lawfulness of the arrest. I would substitute an appropriate award of damages in respect of one hour's wrongful detention. The parties have said that they will try to agree the quantum of such damages, although the final figure will have to be approved by the court because the claimant is still a minor.

SEDLEY LJ

56 I agree.

57 For the future, as Clarke LJ indicates, it should not be necessary in wrongful arrest cases to refer to more law than is contained in section 28(3) and (4) of PACE, article 5(2) of the Convention and para 40 of the decision in *Fox, Campbell and Hartley v United Kingdom* 13 EHRR 157, 170.

58 The practical reasons historically given by our courts for the requirement which is reflected in article 5(2) have a good deal to do with giving the suspect an immediate opportunity of explanation or self-exculpation. With PACE procedures which for good reason discourage dialogue before interview, this is less important than perhaps it once was. The real underpinning of the Convention right is the simple one of respect for the dignity of the individual: if the state is taking away your liberty, you are entitled to know why.

59 In this light, what matters is whether the legal test was met by telling this ten-year-old boy that he was being arrested "on suspicion of violent disorder" at a named time and place. While the sufficiency of the words in no way depends on what is known to the arresting officer, it must in some measure depend on who is being arrested; so that, at least in a country which treats ten-year-olds as criminally responsible, attention needs to be given to whether words of arrest which would be adequate for an adult are sufficient when arresting a child.

60 Approaching the first question in this light, I agree with Clarke LJ that the words "violent disorder" are both legally and factually an adequate description of the material offence. This will not always be so: the legal names of some crimes are not self-explanatory. And, though not without some hesitation, I agree that they are words which would convey to a ten-year-old enough of what the offence involved to meet the purpose of PACE and the Convention. The claimant's evidence that he did not in fact grasp what he was alleged to have done cannot be influential here. The question of sufficiency has to be answered objectively; but one aspect of objectivity is the circumstances of the arrest, and these have to include who it is that is being arrested.

SIR ANDREW MORRITT V-C

61 I also agree that the appeal should be disposed of on the basis set out in para 55 of the judgment of Clarke LJ for the reasons given by him.

Appeal allowed in part.

Solicitors: Barlow Lyde Gilbert; Irwin Mitchell, Sheffield.

CMT

Third Chandris Corp v Unimarine SA [1979] Q.B. 645

apply to the grant of mandatory injunctions even where such an application is made inter partes.

For those reasons, in addition to those which Megaw L.J. has given, I think that in principle—and we are only dealing with principle here—there is a cause of action available to this plaintiff. With great respect to the experienced judge who decided otherwise, I think that he reached the wrong conclusion. I would allow the appeal, and allow the matter to go to trial.

Appeal allowed with costs.
Leave to appeal refused.

Solicitors: *Nicholas Warren; L. Richards, Director of Administration, Kirklees Metropolitan Borough Council.*

E. M. W.

[COURT OF APPEAL]

THIRD CHANDRIS SHIPPING CORPORATION *v.* UNIMARINE S.A.

AGGELIKAI PTERA COMPANIA MARITIMA S.A. *v.* SAME

WESTERN SEALANES CORPORATION *v.* SAME

1979 May 9, 10 — Mustill J.

1979 May 14, 15, 16, 17; 24 — Lord Denning M.R., Lawton and Cumming-Bruce L.JJ.

Injunction—Interlocutory—Mareva injunction—Large scale foreign charterers with overdrawn London bank account — London arbitration clause in charterparties — Owners' apprehension concerning payments due—Court's jurisdiction to grant Mareva injunction—Principles and procedure for grant of injunction—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 45 (1) [1]

Ships' Names—Genie—Angelic Wings—Pythia

The respective owners of three vessels, the *Genie*, the *Angelic Wings* and the *Pythia*, had chartered them to Panamanian charterers, one of a big family-owned trans-national group of companies, under charterparties which provided for arbitration in London. The three owners had substantial claims against the charterers for sums alleged to be due under the charterparties. On April 25, 1979, the owners of the *Genie*, who had received no reply to a letter of January

[1] Supreme Court of Judicature (Consolidation) Act 1925, s. 45: "(1) The High Court may grant . . . an injunction . . . by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do."

31, 1979, requesting prompt settlement of their claim and had learned that the charterers had a bank account at the London branch of a Luxembourg bank, obtained ex parte a *Mareva* injunction restraining the charterers from removing assets, including moneys in their London bank account, out of the jurisdiction save as to sums in excess of that claimed; and leave was also given to issue and serve a writ on the charterers in Panama. Two days later the owners of the *Angelic Wings* and the *Pythia*, whose solicitors had learned of the injunction granted to the owners of the *Genie*, obtained similar *Mareva* injunctions to prevent an apprehended removal by the charterers out of the jurisdiction of assets available to meet the claims against them. The charterers applied to discharge all three injunctions, claiming that they had good defences to the claims, that they were one of the largest charterers of ships in the world and that if a series of such injunctions were granted against them they might cease to use England as a base for their operations. Mustill J. refused to discharge the injunctions.

On appeals by the charterers, who filed evidence from their bankers of their ability, despite a current overdraft pending monthly freight payments, to meet their business liabilities but gave no evidence by any of their directors or officers as to their assets:—

Held, dismissing the appeals, (1) that the High Court had jurisdiction under section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 to grant a *Mareva* injunction as an interlocutory order in appropriate cases where it appeared that a debt, which was or was likely to be the subject of proceedings in England, was owing and there was a real risk of the debtor removing assets from within the jurisdiction so as to defeat the debt (post, pp. 666G—667C, G–H, 671B–D, 673C–D).

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093, C.A.; *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, C.A. and *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina)* [1978] Q.B. 644, C.A. applied.

Siskina (Owners of cargo lately laden on board) v. *Distos Compania Naviera S.A.* [1979] A.C. 210, H.L.(E.) considered.

(2) That the existence of their London bank account was evidence that the charterers had assets within the jurisdiction and, since the affidavit evidence showed that the owners had a genuine cause of action against the charterers and reasonably feared difficulty in being paid if they succeeded in their claims, and the charterers who were a foreign corporation had disclosed no evidence of the existence or location of any specific assets, the injunctions should be maintained (post, pp. 669G—670A, 672E—673C, F–G).

Per curiam. The mere fact that a defendant who has assets within the jurisdiction is a foreigner or a foreign corporation does not by itself justify granting a *Mareva* injunction (post, pp. 669A, 671G, 673G–H).

Observations on procedure on applications for *Mareva* injunctions (post, pp. 668F—669D, 671G—672C).

Per Lord Denning M.R. There is jurisdiction to grant a *Mareva* injunction even though the defendant may be served here (post, p. 667F).

Decision of Mustill J. (post, p. 648) affirmed.

The following cases are referred to in the judgments in the Court of Appeal:

Anton Piller KG v. *Manufacturing Processes Ltd.* [1976] Ch. 55; [1976] 2 W.L.R. 162; [1976] 1 All E.R. 779, C.A.

Chartered Bank v. *Daklouche*, March 16, 1979; Court of Appeal (Civil Division) Transcript No. 308 of 1979, C.A.

Mareva Compania Naviera S.A. v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, C.A.

MBPXL Corporation v. *Intercontinental Banking Corporation Ltd.*, August 28, 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, C.A.

Negocios Del Mar S.A. v. *Doric Shipping Corporation S.A.* (*The Assios*) [1979] 1 Lloyd's Rep. 331, C.A.

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

Rasu Maritima S.A. v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*Government of the Republic of Indonesia intervening*) (*Pertamina*) [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.

Siskina (*Owners of cargo lately laden on board*) v. *Distos Compania Naviera S.A.* [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.).

The following additional cases were cited in argument in the Court of Appeal:

American Cyanamid Co. v. *Ethicon Ltd.* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).

Cretanor Maritime Co. Ltd. v. *Irish Marine Management Ltd.* (*The Cretan Harmony*) [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164, C.A.

Etablissement Esefka International Anstalt v. *Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445, C.A.

Rena K, The [1979] Q.B. 377; [1978] 3 W.L.R. 431; [1977] 1 All E.R. 397; [1978] 1 Lloyd's Rep. 545.

The following cases are referred to in the judgment of Mustill J.:

Cretanor Maritime Co. Ltd. v. *Irish Marine Management Ltd.* (*The Cretan Harmony*) [1978] 1 W.L.R. 966; [1978] 3 All E.R. 164; [1978] 1 Lloyd's Rep. 425, C.A.

Mareva Compania Naviera S.A. v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, C.A.

MBPXL Corporation v. *Intercontinental Banking Corporation Ltd.*, August 28, 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, C.A.

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093; [1975] 3 All E.R. 282, C.A.

Rasu Maritima S.A. v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*Government of the Republic of Indonesia intervening*) (*Pertamina*) [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.

SUMMONSES

On April 25, 1979, the plaintiffs, Third Chandris Shipping Corporation, owners of the *Genie*, were granted ex parte by Mustill J. an injunction

against the defendants, Unimarine S.A., charterers of the *Genie*, restraining the latter from removing from the jurisdiction or otherwise disposing of any of their assets including any moneys forming an account in their name standing at the Bank of Credit and Commerce International S.A., 100, Leadenhall Street, London, E.C.3, save in so far as the sum exceeded U.S. $91,087.25. The plaintiffs were also granted leave to issue and serve notice of writ on the defendants in Panama.

On April 27, 1979, the plaintiffs, Diamlemos Shipping Agencies Ltd. of Piraeus, owners of the *Angelic Wings*, were granted ex parte by Parker J. a similar injunction against the defendants, as the charterers of the *Angelic Wings*, and it was ordered that if the defendants paid $220,000 into a separate identified bank account within the jurisdiction the injunction should have effect only in relation to such account. On May 4, 1979, Lloyd J. ordered that the name of the plaintiffs be amended to *Aggelikai Ptera Compania Maritima S.A.*

By writ of December 29, 1978, the plaintiffs, Western Sealanes Corporation, owners of the *Pythia*, claimed damages and an injunction against the defendant charterers, Unimarine S.A. On April 27, 1979, Parker J. granted the plaintiffs ex parte an injunction restraining the defendants from removing any of their assets outside the jurisdiction or parting with such assets within the jurisdiction provided that the order was not to apply to assets in excess of US $750,000.

By summonses of April 30, 1979, the defendant charterers applied for orders that the injunction granted by Mustill J. on April 25 and the injunctions granted by Parker J. on April 27 be discharged and that all further proceedings in the actions be stayed pursuant to section 1 (1) of the Arbitration Act 1975.

The summonses were heard in chambers on May 9, 1979, and Mustill J. read the following judgment on May 10.

MUSTILL J. Some two weeks ago the three plaintiffs, who are the owners respectively of the vessels *Pythia*, *Angelic Wings*, and *Genie*, sought ex parte injunctions against the defendant charterers, Unimarine S.A. These injunctions were duly granted. The wording of the orders then made was not precisely the same in each case. The order obtained by Third Chandris Shipping Corporation in the case of the *Genie* may be taken as typical. It reads:

> "It is ordered and directed that the defendants by their officers, agents or servants or otherwise be restrained and an injunction is hereby granted restraining them from removing from the jurisdiction or otherwise disposing of any of their assets, including and in particular any moneys forming an account in the name of the defendants standing at the Bank of Credit and Commerce International S.A., 100 Leadenhall Street, London, E.C.3, save in so far as the sum exceeds U.S. $91,087.25."

The defendants now apply for the injunctions to be discharged. These orders are in a form which has become familiar in recent years. Such orders have become known as *Mareva* injunctions. Their history briefly is as follows.

A For many years it has been the practice in certain countries abroad for a person claiming to be a creditor and seeking to enforce his debt to obtain an order in advance of judgment whereby designated assets of the debtor are seized by the court and retained for the purpose of ensuring satisfaction of any judgment which the creditor may ultimately obtain. Until recently, the English courts have not sought to exercise a similar jurisdiction except in the case of an arrest pursuant to an B Admiralty action in rem, a procedure which is not strictly comparable to "saisie preventative," since it serves to found jurisdiction for an action as well as to secure the payment of a judgment. In 1975 there was an alteration in the practice of the English courts marked by the decision of the Court of Appeal in *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093. There the plaintiff had chartered a ship to the defendants, from whom a large sum was claimed as hire. There was a strong C prima facie case that hire was due. The charterers could not be traced. But there was apparently evidence that they had funds at banks in London. Pursuant to an ex parte application, the Court of Appeal granted an injunction restraining the charterers from disposing of or removing from the jurisdiction any of the assets which were within the jurisdiction. The power to grant this relief was founded on section D 45 of the Supreme Court of Judicature (Consolidation) Act 1925. One month later a very similar case came before the Court of Appeal, *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. That was again dealt with ex parte, but on this occasion reference was made to several reported cases. After discussing the authorities Lord Denning M.R. concluded that the jurisdiction to grant relief did indeed exist and that it would be appropriate E to grant relief. The other two members of the court were also in favour of granting relief, on grounds rather more narrow. Both these cases were decided ex parte. Although the judgments in each case invited the defendants to come in and challenge the judgment it appears that neither of them did so. It was not until August 1975 in *MBPXL Corporation* v. *Intercontinental Banking Corporation*, August 28, 1975, F Court of Appeal (Civil Division) Transcript No. 411 of 1975, that there is any recorded instance of opposition by a defendant to the granting of a *Mareva* injunction. At first instance the judge refused to grant an injunction on the ground that there was no serious issue to try and that the claim would fail. The Court of Appeal also refused relief, but on different grounds. In essence the court held that *Mareva* relief (which Stevenson L.J. described as "an exceptional remedy" and G Scarman L.J. as "very strong indeed") should only be granted on clear evidence that the defendant had movable assets situate within the jurisdiction. Only if that was proved did the question arise whether it was just and equitable that the removal of the assets be restrained.

As a result of these decisions the *Mareva* injunction was recognised H as fulfilling a useful role albeit within a limited field. Where a creditor had a claim against a foreign debtor which was not disputed or was not capable of serious dispute, it frequently happened that his only practical prospect of obtaining payment was to obtain execution against

an asset known to be situate within the jurisdiction. For this purpose even proceedings under R.S.C., Ord. 14 were too slow. In the interval between the service and hearing of the summons, and by the time judgment was given, the debtor would have taken the opportunity to remove the assets. The *Mareva* injunction performed a valuable service in enabling the creditor to detain the asset during the relatively short interval which elapsed before he obtained a judgment either in default of appearance or under Order 14. It was to cases of this nature that *Mareva* relief was mainly if not exclusively applied during the 18 months which elapsed before the decision of the Court of Appeal in *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*Government of the Republic of Indonesia intervening*) (*Pertamina*) [1978] Q.B. 644. This decision arose in the course of an extremely complex action in which the plaintiffs claimed very large sums indeed. The plaintiffs obtained an ex parte injunction restraining the removal of certain goods destined for incorporation into a chemical plant. Pursuant to an application by the defendants Kerr J. discharged the injunction. This decision was upheld by the Court of Appeal but on rather different grounds. In particular, the court held that (1) there was jurisdiction to give relief under section 45 of the Act of 1925. The court therefore endorsed after argument the correctness of the views previously expressed in ex parte proceedings during 1975. (2) The granting of relief should not be confined to cases strong enough for a judgment under R.S.C., Ord. 14. The plaintiffs need only show a good arguable case. (3) The procedure could properly be used to restrain a removable asset other than money although the jurisdiction should be exercised with particular care. (4) Relief should be granted whenever it is just to do so. Precise rules cannot be laid down for its exercise.

Since the court ultimately decided that the discretion to exercise the remedy should not be granted in the particular circumstances of the case, many of the observations put forward are in theory obiter dicta, but they have always been regarded as authoritative statements of principle, and they have governed the exercise of the discretion in all subsequent cases. The *Pertamina* case gave a new dimension to the *Mareva* injunction. The use of the remedy greatly increased. Far from being exceptional, it has now become commonplace. At present, applications are being made at the rate of about 20 per month. Almost all are granted. Applications to discharge the injunctions are very rare, whether because the order is not regarded as producing substantial injustice or because it is cheaper and less trouble to lift the injunction by providing bank guarantees rather than by proceedings in court, is impossible to say. A very simple procedure has now been evolved. The plaintiff's affidavit to lead the application usually sets out the nature of the claim; states that the defendant is abroad; and asserts that, if the plaintiff is successful in the action, the judgment will be unsatisfied if the injunction is refused. Sometimes, but not always, the plaintiff is able to identify specific balances among the accounts, and gives reasons for his assertion that the judgment will go unsatisfied.

This summary procedure was followed to obtain the three orders with which these applications are concerned. The matter has now

become much more complicated. More than 20 affidavits have been produced, raising many questions of fact, law and comment. I shall deal only with those issues which appear directly material to these three applications in the light of the principles laid down in decided cases and the practices which have sprung from them. For this purpose I shall assume, as counsel for the defendants accepted for purposes of argument, that the three plaintiffs have a good arguable case on the merits of their claims sufficient to satisfy the tests laid down in the *Pertamina* case; although counsel reserved the right to argue in a higher court that this was not in principle sufficient to justify the grant of an injunction.

The matters discussed in argument before me may be conveniently divided into two groups: those which deal with the jurisdiction to grant an injunction, and those which bear on the question whether the jurisdiction should in the present circumstances be granted. This division is made for the purposes of convenience alone. In reality the two categories overlap. As regards the first category, one must begin by asking whether there is sufficient evidence that there are assets available within the jurisdiction. That the existence of such evidence is a precondition for the exercise of the *Mareva* jurisdiction, is made plain by the judgments in the *MBPXL* case, August 28, 1975, Court of Appeal (Civil Division) Transcript No. 411 of 1975. I do not however believe that these judgments can be read as requiring the plaintiff to produce concrete proof of precisely what assets are present within the jurisdiction. Nor does the *Pertamina* case [1978] Q.B. 644 support this view of the law. To require such a standard of proof would be to put *Mareva* relief out of reach in most cases. Since the defendant is ex hypothesi a somewhat elusive character it will usually be impracticable to establish exactly what assets he has available. All that can reasonably be asked, where moneys are the subject matter of the attachment, is that a prima facie case is made out inferring that such moneys exist and where they may be found. For this purpose the plaintiff need, in my view, do no more than point to the existence of a bank account. The reason for this inference is that the existence of a bank account denotes the existence of funds. This inference is in practice always drawn at this stage if ex parte relief is sought and I would in the ordinary course have been prepared to draw it in the present case.

The matter was however complicated by a rather surprising development. At a late stage of the argument Mr. Howard (who argued the matter very forcefully for the defendants) asserted that the defendants' bank account in fact contained no funds at the time the injunctions were granted, but was instead in a position of overdraft. It seemed to me that this assertion raised a serious issue which went to the heart of the present dispute. I therefore invited further argument upon it. The *MBPXL* case is authority binding on this court that the plaintiff must demonstrate the existence of assets within the jurisdiction if *Mareva* relief is to be granted. If the only assets whose existence is asserted by the plaintiffs consists of a credit balance; and if in fact it is shown that no such balance exists, the requirements of the *MBPXL* case are not satisfied. It is true that, as Buckley L.J. pointed out in the *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd. (The*

Cretan Harmony) [1978] 1 W.L.R. 966, 973, a *Mareva* order in the form currently adopted gives the injunction an ambulatory effect, so that it attaches to whatever assets there may be or may hereafter come to be within the jurisdiction. Whether a *Mareva* order having this effect was within the contemplation of the Court of Appeal in the cases cited seems debatable, and it is possible that the bounds of the jurisdiction have been unintentionally enlarged. Be that as it may, I cannot see anything in those cases which would justify the grant of an injunction restraining removal of assets from the jurisdiction at a time where there is nothing to remove. The *MBPXL* case is strong authority for the contrary view, and the fact that assets may, in the ordinary courses of business, be expected to come within the jurisdiction at a later date scarcely seems to justify the exercise of this power. Furthermore if the *Mareva* powers are to be assimilated to those of a foreign court in granting "saisie preventative" or similar relief I would require to see convincing evidence that a foreign court would grant relief at a time when there was no asset presently within the jurisdiction available for seisure. I can only say that no such evidence has come to my notice.

For these reasons I was at first inclined to hold that the injunctions should on this ground be discharged. I have however been persuaded that this course would be premature. Throughout all the affidavits filed on behalf of the defendants advancing reasons why the grant of *Mareva* relief is unsound or unfair, there is no mention of the fact that the account around which this dispute has revolved was in overdraft at the relevant time. Naturally Mr. Howard has repeated his instructions as he received them. I do not however regard this as sufficient. I believe that on an issue of this nature a defendant who wishes to take the point that there is nothing in his bank account to which the injunction could attach ought to say so; and also, in a case such as the present, to explain why the facts to which he has referred were not brought to the attention of the court at an earlier date. Possibly such an affidavit will be forthcoming in the future. For the moment I propose to follow the existing practice by assuming that the presence of an account is sufficient proof of the existence of assets to satisfy the terms laid down in the *MBPXL* case.

The next group of arguments was directed to the requirements that the assets may be moved from the jurisdiction and that if they are so removed the judgment will be unsatisfied. That some assumptions on these lines underlie the grant of *Mareva* relief is in my view quite clear from all the cases previously mentioned. But what standard of proof is required? Mr. Howard argues that the plaintiff must show a likelihood that his claim will prove fruitless if an injunction is refused. If likelihood involves the idea of "more likely than not," I consider that the level is pitched too high. In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require. How does he prove such a danger? Prima facie by demonstrating that the asset is present, that it is movable and that the defendant is abroad. Of course this always leaves the possibility that the defendant can point to facts which demonstrate he is someone who can be relied upon to meet

his obligations. Conversely, the plaintiff may be able to give concrete instances of events which put the defendant's reliability specifically in doubt. The *Karageorgis* [1975] 1 W.L.R. 1093 and *Mareva* [1975] 2 Lloyd's Rep. 509 cases may well have fallen into this latter category, but in most instances evidence of this kind is likely to be inconclusive and if the *Mareva* jurisdiction is to be given the wide measure of availability contemplated by the Court of Appeal in the *Pertamina* case [1978] Q.B. 644 some adverse inference will have to be drawn from the very fact that the defendant is abroad. This is how the *Pertamina* case has rightly or wrongly been understood when applications for ex parte relief have been under consideration. For these reasons I conclude that the plaintiffs have demonstrated the existence of jurisdiction to grant *Mareva* relief in the circumstances of the present case.

I now turn to the question whether it is just that such relief should in fact be given.

It is convenient to deal first with a point of importance raised on behalf of the defendants. They maintain that the blocking of a bank account is more serious, at least in cases such as their own, than the detention of a physical asset. In essence they maintain that the reported cases underestimate the consequences of the application of *Mareva* relief to funds in a bank account. In my view there is force in what the defendants say. The whole point of the *Mareva* jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction. This entails that the defendant finds that his bank account has been blocked before he has any idea of what is going to happen. This may have extremely serious consequences. Cheques or bills drawn on the account may be presented at a time when adequate funds are available to meet them, and may yet be dishonoured because the injunction inhibits the bank in making payment. Moreover the very secrecy of the procedure deprives the defendant of the opportunity to make a timely alternative arrangement for presentment or payment abroad. The dishonour of the defendants' paper may have disastrous consequences; and all this in a situation where the plaintiff has shown no more than an arguable case. An undertaking by the plaintiff for damages may not always be a sufficient indemnity for the loss the defendant may suffer. Again the blocking of an account may have very serious consequences for a defendant who is dependent on cash flow for his commercial survival. The case of a charterer provides an example. On a rising market the free use of his bank account is of crucial importance. Late payment of hire may lead to the loss of a charter. It is of no consolation to say that he can apply to have the ex parte injunction discharged, for by the time his application is heard the damage may have been done. These problems are not limited to the case where a block is placed on a bank account. The jurisdiction is frequently invoked in cases where the fund consists of a specific item: for example, the proceeds of a claim on hull underwriters. This may be locked up for years whilst a court or arbitrator decides whether the plaintiff's good arguable case is in fact sound. In the meantime the defendant may have been forced out of business

by an inability to employ his principal asset. These are powerful arguments, but there are considerations the other way. The incidence of applications to discharge *Mareva* injunctions is remarkably small, which is some indication that potential hardships do not in fact materialise. This may be due, as previously stated, to the fact that the defendants have been willing to lift the injunctions by providing guarantees rather than by recourse to the courts. It is true also that the provision of guarantees may be more expensive and difficult than is often believed. Nevertheless there have not so far been any clear signs that the *Mareva* injunction jurisdiction has proved a source of real hardship. It is also worth mentioning that jurisdictions of a similar kind have existed for many years in other countries. It is hazardous to draw analogies for procedures adopted abroad without knowing precisely how they are operated in practice, but I have heard no evidence to suggest that the freezing of bank accounts has given rise to notorious difficulties in other jurisdictions. I mention these matters because they were urged in argument before me. I do not however regard them as an appropriate basis for deciding the present dispute. It is quite clear from the judgments of the Court of Appeal in the cases previously referred to that the court regarded a bank balance as an appropriate subject for *Mareva* relief. This line has been followed by the judges of the Commercial Court in scores of subsequent cases. Any departure from this established practice is in my view a matter for an appellate court. The only consideration material to the present case is whether the defendants have shown that there is something special about their own circumstances which makes the application of the practice inapposite. In my view there is not. It is true that a company engaged in large scale chartering may be unusually vulnerable to *Mareva* injunctions, but this is no more than a by-product of the fact that such a charterer engages in large numbers of transactions in a field which tends to attract disputes. Furthermore, the defendants do not in fact say that they have suffered the extreme hardship which might in the abstract be envisaged. Charters have not been cancelled. Bills have not been dishonoured. Cherished prospects have not been abandoned. At worst the defendants have been led to anticipate so much inconvenience as to contemplate moving their operations elsewhere. This may be regrettable but it does not justify the court in conferring on them the kind of immunity from present and future *Mareva* relief which appears to be the real aim of their present application.

I now turn to the question whether it is appropriate in the light of all the evidence to maintain a prima facie inference of a danger that a judgment or award will go unsatisfied if an injunction is refused. There are undoubtedly ways in which the defendants may rebut the evidence. They may point to the existence of valuable tangible assets abroad in places where English judgments or awards can be enforced. The defendants have not sought to do this, which is not surprising since their particular type of business does not require an investment in property, equipment or other assets. The defendants can also seek to rebut the presumption by producing a balance sheet, which shows large cash or investment balances; or a profit and loss account, demonstrating a consistently profitable business; all with a view to showing that it will

not be necessary or worth his while for him to default on an adverse judgment. The defendants, a Panamanian company, have not done this in the present case. All that they do is to assert that they are in a large way of business and have never defaulted on awards in the past. This may be true, but there are materials in the affidavits of Mr. Long and Mr. Swann which suggest that the defendants have in recent months been slow to honour their obligations. It would be quite wrong to find on this evidence, and I do not find, that the defendants are in imminent danger of collapse. Proof of such a danger cannot be a prerequisite of the granting of *Mareva* relief, for, if it were, the remedy would scarcely ever be available. What I do say is that the affidavit evidence taken as a whole does not suffice to displace the presumption derived from the fact that the plaintiffs are a foreign company, that there is a risk of an adverse judgment going unsatisfied. On the decisions of the Court of Appeal as interpreted by the recent practice at first instance, this is enough to carry the right of *Mareva* relief.

I have now dealt with the principal arguments advanced on behalf of the defendants. Various points were also made in relation to the particular circumstances of the individual cases. I will not discuss these in detail. I will merely say that I see nothing in those circumstances to suggest that justice demands the refusal of relief, given that the plaintiffs are now willing to provide security for their undertaking for damages. In essence the defendants' submissions amount to a critique of the *Mareva* jurisdiction as currently administered. I accept that in theory the exercise of a *Mareva* injunction may in certain cases involve the risk of injustice to the defendant. This is inherent in the summary nature of the process. Perhaps the remedy is now being too freely granted, but Mr. Howard has not been able to suggest any modification to the existing practice which would reduce the risk to the defendant without at the same time imposing on the plaintiff requirements as to proof which would put at risk the practical benefits envisaged by the court when this new procedure was devised. This being so, I consider that in conformity with what I believe to be the current practice, I should maintain the injunctions, and the defendants' applications are accordingly dismissed.

Order accordingly.

INTERLOCUTORY APPEALS from Mustill J.

The defendant charterers appealed. The grounds of appeal in each case were that Mustill J. erred in law in holding that he had jurisdiction to grant an injunction or alternatively erred in principle in the exercise of his discretion in maintaining the injunction.

The facts are stated in the judgment of Lord Denning M.R.

Nicholas Phillips Q.C. and *M. N. Howard* for the defendant charterers. The three plaintiffs have obtained ex parte *Mareva* injunctions against the charterers who are outside the jurisdiction. The charterers are members of the Gulf Shipping Group and one of the largest charterers in the world. They like to settle by arbitration in London and have never

failed to honour an arbitration award. They take grave exception to these *Mareva* injunctions which should only be granted in exceptional circumstances where the defendants are likely to flee the country. The exception has now become the rule. The present practice in the grant of such injunctions is unwarranted, undesirable, contrary to the original formulation of the principle and a matter for genuine concern.

The appeals raise an important issue of principle. The injunctions should not have been ordered because (1) the charterers were acting bona fide in resisting the owners' claims, (2) there are no reasonable grounds for anticipating that the charterers will not honour the awards against them, (3) the plaintiffs cannot establish the existence of assets within the jurisdiction (the charterers' London bank account is in overdraft), (4) the form of the injunction is unreasonably wide.

The following questions of principle arise. Should the application for a *Mareva* injunction specify particulars of assets within the jurisdiction? How far is it relevant to consider the strength of the plaintiff's case? Compare the position on an application for security for costs. How far should inquiry be made as to whether the defendants will withdraw assets within the jurisdiction to avoid judgments or orders against them? Can an injunction be granted when it is anticipated that assets will be received within the jurisdiction?

[LAWTON L.J. referred to R.S.C., Ord. 41, r. 5 (2), "An affidavit . . . in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof."]

It is important that, where application is made for a *Mareva* injunction, particulars should be given but that practice is not followed in the Commercial Court. A *Mareva* injunction is an exceptional remedy interfering with legal rights and it should only be granted where there is a real risk of assets being withdrawn from the jurisdiction so as to defeat a debt. The present case is an extension of the previous practice.

Nippon Yusen Kaisha v. *Karageorgis* [1975] 1 W.L.R. 1093 was a classic case of where justice called for such an injunction. *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, 510, emphasised the two elements: a strong claim "that the debt is due and owing" and "a danger that the debtor may dispose of his assets so as to defeat it." In *MBPXL Corporation* v. *Intercontinental Banking Corporation Ltd.*, August 28, 1975; Court of Appeal (Civil Jurisdiction) Transcript No. 411 of 1975, an injunction which was stated to be an exceptional remedy was not granted. It is always important to show how the injunction bites. The court should not be asked to do something in vain and should not grant this very powerful remedy unless there is a real prospect of there being assets within the jurisdiction. It is no part of the charterers' case that they have assets in this country.

In *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina)* [1978] Q.B. 644, 657–661, Lord Denning M.R. gave a survey of the law and said at p. 660 that the *Nippon Yusen Kaisha* case [1975] 1 W.L.R. 1093 and the *Mareva Compania Naviera* case [1975] 2 Lloyd's Rep. 509 were cases where the facts "called aloud for the

intervention of the court by injunction;" and the court taking into account the charterer of the assets did not grant an injunction. There are significant differences between foreign attachment, a form of garnishment, and a *Mareva* injunction. The jurisdiction is not fettered by any rule of thumb. The strength of the plaintiff's case is a very strong factor.

In *Siskina* (*Owners of cargo lately laden on board*) v. *Distos Compania Naviera S.A.* [1979] A.C. 210, the reasoning of Kerr J. at pp. 215–224 was approved by the House of Lords. Lord Diplock's words at pp. 253–256 strike at the root of the *Mareva* injunction, although he did not pronounce on the validity of such injunctions. The court " has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right " enforceable by final judgment (p. 256). Lord Hailsham of St. Marylebone at p. 261 made it plain that the House was in " no way casting doubt on the validity of the new practice " in the grant of *Mareva* injunctions which " have proved extremely popular."

It is no part of the charterers' submissions that the *Mareva* jurisdiction does not exist. The question is: what are its proper limits?

[CUMMING-BRUCE L.J. Is it necessary (1) to prove the existence of assets? (2) to show a threat that the judgment will not be satisfied?]

Since *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396, 407, one starts with the proposition " that there is a serious question to be tried." One has to look at the consequences of granting an injunction. A foreign defendant has the right to remove his assets.

[LAWTON L.J. It was not argued in the *Siskina* case [1979] A.C. 210 that there was no jurisdiction to grant a *Mareva* injunction.

It goes back to Lord Denning M.R.'s judgment in the *Pertamina* [1978] Q.B. 644, 657, and his reference to the usages and customs of the City of London. The Court of Appeal has been told twice in the last two years (*Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435 and the *Siskina* case) that section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925 should not be applied too broadly.]

The words " just or convenient " in section 45 (1) of the Act of 1925 imply the real threat of an injunction. *Pulling's City and Port of London Laws, Customs, etc.*, 2nd ed. (1844), pp. 187, 188, deals with foreign attachment, but there are many differences between foreign attachment and the *Mareva* injunction. [Reference was made to *Herzog, Civil Procedure in France*, Smit ed. (1967), pp. 235–237, on saisie conservatoire and at pp. 575–577 on the two phases of saisie-arrêt; and also to *Walker, Principles of Scottish Private Law*, 2nd ed. (1975), pp. 163–164, on arrestment of moveables.]

It would be very hard to find any one in the City who would not say that the *Mareva* injunction does not serve a very useful purpose. In *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.* [1978] 1 W.L.R. 966, 973, Buckley L.J. contemplated the injunction catching future goods, " the injunction . . . must be capable of having an ambulatory effect. . . ." As to the power of the court to grant *Mareva* injunctions under section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, see *The Rena K* [1979] Q.B. 377, 407–410, where Brandon J. held that cargo owners would be entitled to a *Mareva* injunction in a case going to arbitration. See also section 12 (6) (*e*) (*f*) (*g*) (*h*) of the Arbitration

Act 1950 (*Russell on Arbitration*, 18th ed. (1970), p. 436). Mustill J., who has had great experience of these injunctions, was very much influenced by the practice of courts of first instance. But he put it too high when he said, ante p. 652H, that prima facie the case for an injunction rests on "demonstrating that the asset is present, that it is moveable and that the defendant is abroad" and, at p. 655B–C, "that there is a risk of an adverse judgment going unsatisfied."

The nub of the case turns on a question of principle: is the *Mareva* injunction an exceptional remedy to be used when it is really necessary? or does it apply to all foreign defendants who cannot prove that they will satisfy a judgment or award against them. This is the first case in which the question of the full extent of the *Mareva* principle is being brought before the court so that it can be ascertained.

There ought to have been some real evidence of danger of the defendants removing assets from the jurisdiction. Section 6201 et seq. of the Civil Practice Law and Rules of New York State permit a plaintiff to bring an ex parte application at the commencement of the action for an order of attachment of defendants' assets, bank accounts found within the jurisdiction of the state, if (1) the defendant is an individual non-resident or foreign corporation, i.e., organised outside the state and not doing business within the jurisdiction, or (2) if there is evidence that a defendant who is domiciled in New York is about to remove his assets from the jurisdiction or there is evidence of his intention to defraud creditors by assigning, encumbering his property, or (3) if there is evidence that the domiciliary defendant is evading personal service, then the court could permit attachment to give in rem jurisdiction: in support of the plaintiff's ex parte application, an affidavit is annexed to prove likelihood of success of his cause of action and that there are sufficient grounds to support an attachment order and that his claim exceeds all counterclaims and set offs. So the New York position is like that in the old City of London and the *Mareva* principle is recognised.

The defendant charterers like to arbitrate in Britain and it is hard that they should have to submit to these injunctions. Justice requires that anyone seeking a *Mareva* injunction should satisfy the court that there really is a danger of assets being removed.

In the 18 months before the *Pertamina* [1978] Q.B. 644 the remedy was used but only in circumstances where there was evidence of risk. In each case all the material facts known to plaintiffs, including the facts of risk, should be put before the court.

It is difficult to apply the *American Cyanamid* case [1975] A.C. 396 to a *Mareva* situation, but what should go into the balance is the degree of danger of the defendants defaulting. The arrest of a ship is a special situation: it not only gives security but founds jurisdiction. The defendants should not be subject to an ambulatory injunction. There has been an abuse of the *Mareva* principle. The facts do not support such an injunction.

Roger Buckley Q.C. and *Simon Gault* for the plaintiff owners of the *Pythia*. If the basic jurisdiction to grant a *Mareva* injunction is to be challenged it must be in the House of Lords. The foundation of the

jurisdiction is section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925. That has been accepted in several cases following the *Pertamina* [1978] Q.B. 644 where it was argued, at p. 651B, that "the *Mareva* case was wrongly decided" and the authorities were cited and examined. The jurisdiction has been said to be based on R.S.C., Ord. 11.

[LORD DENNING M.R. Lord Hailsham of St. Marylebone in *Siskina (Owners of cargo lately laden on board)* v. *Distos Compania Naviera S.A.* [1979] A.C. 210 pointed out that it might apply to the domestic jurisdiction.]

[LAWTON L.J. It is the duty of counsel to take jurisdiction points and if they do not do so for the court to take them.]

All that Lord Diplock was saying at p. 256 in the *Siskina* case (where he referred to *North London Railway Co.* v. *Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 39–40) is that you cannot use section 45 of Act of 1925 to obtain an interlocutory injunction unless there is some claim for substantive relief on which jurisdiction can be founded. That was the one point which was in issue in the *Siskina*. Here there is a substantive claim which founds jurisdiction.

Assuming that there is jurisdiction, how is it to be defined? The jurisdiction can be exercised in two ways. (a) If there is a foreign defendant with assets here, it can reasonably appear to the court "to be just or convenient" to order security: compare the arrest cases. This way overcomes problems of standard or burden of proof; and a *Mareva* injunction will not be regarded as a stigma any more than is arrest in arrest cases. A reputable defendant will ensure that a bill is not dishonoured. International corporations can move assets around very quickly. *Mareva* injunctions work in the Commercial Court. They are widely in use on the continent and in America where, broadly speaking, a very similar jurisdiction exists: see the *Pertamina* [1978] Q.B. 644, 660.

(b) The alternative way is to say that there has to be some evidence of a risk of the assets disappearing. Once this requirement is introduced, one asks: what evidence? No rigid rules should be laid down to fetter the exercise of the discretion of the judge: see *per* Lord Denning M.R. in the *Pertamina* [1978] Q.B. 644, 663. This is a discretionary remedy and the court should not specify too strongly what the affidavits should say. It is essentially a matter for the discretion of the commercial judge.

[LAWTON L.J. Remedies like certiorari can be abused. *Mareva* injunctions should not be automatic.]

The discretion of the court can be exercised to deal with each individual case. While the plaintiff should state in his supporting affidavit what he knows of the credit and standing of the defendant, he may know nothing at all. He may not be able to get any evidence. He must show an objective risk and not a subjective anxiety; and he should show how the dispute arose.

The practice of the Commercial Court agrees with the former way (a): see *The Rena K* [1979] Q.B. 377, 407. There is no reason for a defendant to be offended by a *Mareva* injunction which represents commercial practice here and abroad.

As to (b), there are reasons of urgency and other reasons why a plaintiff may not be able to obtain evidence of uncreditworthiness. The

judge's exercise of his discretion should not be fettered. It should be sufficient to state that inquiries have been made without giving their source. A

[LAWTON L.J. referred to R.S.C., Ord. 41, r. 5 (2).]

This is not an English corporation and there are no records here.

Proposition (a) is not unfair because defendants can at once come in and get the injunction discharged. The balance of convenience is very much in favour of continuing the present practice. The affidavit evidence regarding the extent of the foreign practice shows that its exercise is not B a matter of stigma. The *MBPXL Corporation* case, August 28, 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975, shows the emphasis which was there placed on the plaintiff having a strong case: it does not deal with assets coming into the country in the future.

Equity does nothing in vain; and no injunction will be granted if there is no chance of there being anything on which it will take effect. But the C charterers pay the hire into a named bank account and it is no answer to a *Mareva* injunction to say that a bank account is overdrawn.

It is suggested that the defendant charterers are a thoroughly trustworthy company, but there is no independent evidence as to this. They are part of a large family organisation. It may be that they are entirely creditworthy, but there is no evidence as to that. No assets have been D proved. This is an attempt to get immunity from an injunction because they are a special case. In such circumstances the onus must be on the defendants to adduce evidence to support such a contention. It may be that the plaintiffs' affidavits on the ex parte application were too bald, but that was a result of the practice in the Commercial Court. There is ample material now on which the court can adjudicate; and there is a risk of the defendants not being able to meet their obligations. The *Mareva* E injunction applies to arbitration as well as court cases.

The *American Cyanamid* case [1975] A.C. 396 directs the court not to go closely into the merits of the case and shows that rigid rules should not be laid down in cases concerned with the exercise of discretion.

The *Mareva* injunction fulfils a very useful purpose. In the present case under the guise of an attack upon principle an attack is being made F on the exercise of the judge's discretion. The method of exercising the jurisdiction outline in (*a*) is supported by *The Rena K* [1979] Q.B. 377. If that be right (b) is unnecessary. But in any event, rigid rules should not be laid down. All the circumstances including those under which the claim arose should be considered. There are difficulties in giving evidence as to possible likelihood of creditworthiness. There may be reasons for a bald statement. A great deal of evidence may be confidential G and cannot be disclosed. In such a case perhaps the affidavit should be by a solicitor. The evidence here is appropriate for the continuation of the injunctions.

Michael Collins for the plaintiff owners of the *Angelic Wings* adopted the argument for the owners of the *Pythia* and referred to *Etablissement Esefka International Anstalt* v. *Central Bank of Nigeria* [1979] 1 Lloyd's H Rep. 445 and to section 13 (2) of the State Immunity Act 1978 which provides that no interlocutory injunction can be obtained against a state body. There is a good arguable case for the amount the plaintiffs claim.

[Reference was made to the Salvage Association's survey of August 9, 1978, on the *Angelic Wings*.]

Richard Aikens for the plaintiff owners of the *Genie* also adopted the argument for the owners of the *Pythia*. The owners are part of the *Chandris* group of companies, a large, well known, reputable group of shipping companies. The application for a *Mareva* injunction was in accordance with the established practice in the Commercial Court, the form of which came into operation after the *Pertamina* [1978] Q.B. 644. The owners received no reply to their letter of January 31, 1979, asking for prompt settlement of the outstanding hire and did not apply for the injunction until the writ was issued, six months after the expiration of the time charter. There are a limited number of circumstances in which deductions can be made from time charter hire payable in advance [see *Federal Commerce & Navigation Co. Ltd.* v. *Molena Alpha Inc.* [1978] Q.B. 927].

Phillips Q.C. in reply. A decision of principle has to be made between two alternatives: (1) a *Mareva* injunction should be granted whenever there is a foreign defendant with assets here—that accords with the existing practice; (2) there must be shown to be some danger of default. There should not be automatic *Mareva* injunctions against foreign defendants because that infringes a defendant's legal rights. Hardship may be caused to defendants if assets have to be tied up for a long time. The relief should only be granted where it is just. While a *Mareva* type of relief exists in almost every country, there is no uniformity as to the circumstances in which it will be granted. Guidelines should not be laid down on scanty evidence as to the practice in other jurisdictions. It should be left to the discretion of judges.

It is admitted that there is a mischief, the defendant who seeks to evade his responsibilities, that is why the basis of the *Mareva* injunction is not being challenged in this court. The question is whether the mischief is so great that the court gives an injunction against every foreign defendant. English law should be slow to fetter English rights unless justice demands it. A deponent to an affidavit can give facts: companies do not collapse without warning.

The fact that these injunctions are regularly granted without trouble may be material but it cannot be decisive. The practice is being challenged because the defendants are being prejudiced. There should be full and frank disclosure on the plaintiffs' part of the ex parte stage. The *Mareva* injunction should only be granted where there is a real danger (risk) of default on the defendants' part. The fact that a defendant is a foreigner is not of itself a good ground for inferring the existence of a risk. Such an injunction should only be granted if there are reasonable grounds for believing there are assets here, for "Equity, like Nature does nothing in vain." Injunctions should not be granted in terms that have an ambulatory effect. The injunction should have some limitation upon it, so that bona fide traders are not driven away.

In the present case the ex parte applications were not properly substantiated by affidavits. If the plaintiffs did not believe that there was a risk of default, then their motive was not a proper one. There may be

two kinds of default: (1) deliberate default, akin to fraud; (2) where the defendants get into financial difficulties. *Mareva* injunctions come into the first category. There is no reason to believe that the defendants will default on these claims. It is unreasonable to subject the defendants to these injunctions unless a *Mareva* injunction is to be granted automatically against every foreign defendant. The discretion should be exercised against the granting of injunctions here.

Cur. adv. vult

May 24. The following judgments were read.

LORD DENNING M.R. The first case concerns the motor vessel *Genie*. She is a Liberian vessel owned by one of the companies of the big Chandris group. It is called the Third Chandris Shipping Corporation. In April 1978 those owners (the plaintiffs) time-chartered the vessel to a company which is one of another big group called the Gulf Shipping Group. These charterers were Unimarine S.A. of Panama. The time charter was made in London. It was for a trip at the rate of $3,600 a day. It was on the New York Produce Exchange form, but in the arbitration clause "New York" was crossed out and "London" inserted. So it was governed by English law. The trip took 159 days and three hours, and she was redelivered on October 2, 1978. The charterers did not prepare a voyage account, as they should have done. So the owners did so. They reckoned that the charterers owed $91,087.25 for hire outstanding, but this might be reduced (on vouchers being produced by the charterers) to $48,291.97 owing to the owners. On January 31, 1979, the owners wrote to Gulf Chartering Ltd., the charterers' agents, asking for prompt settlement. There was no reply to this letter. So on April 25, 1979, the shipowners issued a writ for the full $91,087.25: and applied for leave to serve notice of it in Panama: and also for a *Mareva* injunction. In an affidavit of that date in support a solicitor of Clyde & Co. in the City of London said:

> "I am advised by the plaintiffs' Protection and Indemnity Club that they have made inquiries which have revealed that the defendants have a bank account at the Bank of Credit and Commerce, 100, Leadenhall Street.
>
> "It is my belief that the plaintiffs have a good cause of action against the defendants, and I fear that should the plaintiffs obtain a judgment against the defendants in this action, such judgment may well remain unsatisfied unless security for the claim is provided by the defendants."

On that same day, April 25, 1979, Mustill J. granted a *Mareva* injunction restraining the defendants:

> "from removing from the jurisdiction . . . any of their assets, including and in particular any moneys forming an account in the name of the defendants . . . at the Bank of Credit and Commerce International S.A., 100, Leadenhall Street, London, E.C.3, save in so far as the sum exceeds U.S. $91,087.25."

The Angelic Wings

On getting this injunction, Clyde & Co. had occasion—in another context—to tell another firm of City solicitors, Ince & Co., about it. Now Ince & Co. happened to be acting for the owners of a vessel called *Angelic Wings*. She is a Greek vessel and was owned by the Diamlemos Shipping Agencies Ltd. of Piraeus. In September 1977 by a charter made in London she had been time-chartered to Unimarine S.A. This charter was also on a New York Produce Exchange form and provided for arbitration in London.

She was redelivered at the end of November 1977, but there were several disputes which had been referred to arbitration in London. In particular, the vessel had grounded at a port in Indonesia and had to have substantial repairs done in Hamburg. The owners made a claim for breach of the safe port warranty amounting to $170,000. The charterers claimed deductions for slow steaming. The arbitration was still pending when Clyde & Co. told Ince & Co. about the *Mareva* injunction in the *Genie*. Ince & Co. immediately were on the alert. They thought they ought to get a *Mareva* injunction for the *Angelic Wings*. They decided to do it by way of an originating summons under section 12 (6) of the Arbitration Act 1950. On April 27, 1979, they applied to Parker J. In the affidavit in support the solicitors, Ince & Co., said:

> "Diamlemos are very concerned that they have no security for their claims against Unimarine which total approximately $200,000 as set out above. This concern has been heightened by doubts about the solvency of Unimarine and by the fact that Mustill J. apparently granted a *Mareva* injunction against Unimarine on April 25, 1979, notice of which was given to Messrs. Ince & Co. by telex from Messrs. Clyde & Co. It would, therefore, appear that unless restrained, Unimarine may seek to remove their assets from the jurisdiction so far as they exceed the amount caught by the order of Mustill J."

On April 27, 1979, Parker J. granted a *Mareva* injunction save as to any excess over $220,000, together with leave to serve the originating summons out of the jurisdiction. Later there was substituted for Diamlemos a company called Aggelikai Ptera Compania Maritima S.A. (second plaintiffs).

The Pythia

Now Ince & Co. at this time was also acting for the owners of a Greek vessel called the *Pythia*. The owners were a Liberian corporation called Western Sealanes Corporation (third plaintiffs). In September 1978 they had time-chartered the *Pythia* to Unimarine S.A. for a trip to the Persian Gulf. It was again on the New York Produce Exchange form and provided for arbitration in London. On November 2, 1978, while proceeding up river to Khorramshahr, she was in a serious collision with a Russian vessel: in consequence she had to return to her lightering anchorage to discharge her cargo. There was a dispute about

the cost of discharge. The owners made a claim against the charterers: and on November 15, 1978, Ince & Co. applied to Donaldson J. for a *Mareva* injunction. The judge granted it. But it was released by agreement between the parties in January 1979. There remained, however, a large sum claimed by the owners amounting to $750,000. In April 1979, when Ince & Co. heard about the *Mareva* injunction in the *Genie*, they again were on the alert about the *Pythia*. So, on April 27, 1979, they applied to Parker J. for a *Mareva* injunction in regard to the $750,000. The affidavit in support said:

> " . . . the defendants are resident out of the jurisdiction but have assets within the jurisdiction. The plaintiffs are concerned that the defendants may remove their assets out of the jurisdiction before a judgment in this action could be enforced."

The judge on April 27, 1979, granted a *Mareva* injunction " provided that this order shall not apply to assets in excess of U.S. $750,000."

The applications to discharge

On receiving these injunctions, Unimarine S.A. were very upset. Their London agents were a company called Gulf Chartering and Marine Services Ltd. Their manager, Mr. Ash, immediately went to their solicitors, Lloyd Denby Neal. They applied to discharge the *Mareva* injunctions in respect of all three vessels. These applications were supported by affidavits in which they said they had good defences to the claims made against them. They also said that, if an award went against them in any arbitration, there was no doubt at all that Unimarine S.A. would honour it. I will quote a few sentences from the manager's affidavit:

> " Unimarine have, as will appear, very extensive commitments, and the freezing of the bank account effectively paralyses the whole of their operations in this country . . .
>
> " Unimarine are a corporation which concerns itself exclusively with the chartering of ships for the carriage of goods. They are in fact one of the largest charterers of ships in the world. I have examined the figures which show that from 1971 to date well over 1,000 ships were chartered by Unimarine S.A. I calculate that this represents a total tonnage of several million tons. There are about 100 ships on charter to Unimarine S.A.
>
> " These figures reflect the enormous volume of business done by Unimarine in recent years.
>
> " . . . in the event of a whole series of injunctions of this type being obtained and upheld there will not be any incentive on Unimarine to continue to use this country as a base for its operations. . . ."

The decision of Mustill J.

The applications to discharge were heard by Mustill J. on May 10, 1979. He refused to discharge the injunctions. His reasoning is so valuable that I hope many will read it.

The assets of Unimarine S.A.

Before us further evidence was adduced. There was, in particular, a letter from the bankers of Unimarine, saying that the account was sometimes in overdraft. Written on April 9, 1979, from their London office, their Luxembourg branch said:

> "We write to confirm that Unimarine S.A. are one of our most valued customers and have been so since 1972. We have no doubt that they would be in a position to meet liabilities arising, in the normal course of business, for arbitration awards against them as operators of time charter tonnage.
>
> "We have been asked to reveal in this letter the present state of their account with us as at Friday, April 27, 1979, to date. During this period of time, having overall regard to their trade patterns, they have been in overdraft with us. Naturally, as valued customers, this is quite acceptable to us, as the income from freight in any one month is very substantial."

That letter tells nothing of the assets of Unimarine S.A. Unimarine S.A. gave no other evidence of any assets anywhere. No director or officer of the company gave any evidence. Ince & Co. made inquiries of their correspondent lawyers in Panama. It showed that Unimarine S.A. was engaged only in off-shore operations and had no property in Panama. It had no obligation to file statements, returns, or other financial information with the local authorities in Panama; nor to keep its books in the Republic of Panama. Consequently it was not possible to determine its financial status.

It is further pointed out that, unlike most large chartering organisations, Unimarine S.A. are not members of the Baltic Exchange. So the informal procedure (by posting in the Exchange) is not available to enforce an award.

The Gulf Shipping Group

There was, however, further information given to us about the Gulf Shipping Group, to which Unimarine S.A. belong. It was contained in an article in an American paper called "Business & Energy International." It is an account given to the press by Mr. Abbas K. Gokal, the chairman of the group. It is a fascinating story of private enterprise. His home is in Karachi, Pakistan. He and his two brothers left the Middle East nine years ago to establish themselves internationally. He is now the head of an enormous trans-national enterprise (said to be among the world's 250 largest groups). He commutes between his home outside London and Geneva. The group consists of hundreds of companies involved in shipping, trading, construction, industry and manufacture. Quoting his very words, the American paper says:

> "The group is very, very privately held. It is family-owned to a substantial degree, and we're a very close-knit family. That's how we like to keep it. Ownership today is a matter of confidence and discretion which most people value and appreciate."

The article in the newspaper goes on to describe the shipping activities of the group. It says:

> "The Gokal group-owned, -managed, or -chartered fleet under operation totals about 200 vessels . . . 'Very often people question us' Gokal said, 'asking about the average age of our fleet or the total deadweight tonnage that we own. People are far too impressed by these statistics, rather than by the facts behind them. We like to look at each unit as an economic deal, and it is certainly no secret that we have bought large numbers of second hand ships over the past few years. . . .'"

The whole article is very laudatory of Mr. Gokal and his group. On his own showing, he is a very rich man. He says:

> "I enjoy business. I think that after you make your first million, after your group has made its first hundred million, it is really a matter of interest in business."

But he did not make an affidavit in this case to disclose the assets of Unimarine S.A.

The law

It is just four years ago now since we introduced here the procedure known as *Mareva* injunctions. All the other legal systems of the world have a similar procedure. It is called in the civil law saisie conservatoire. It has been welcomed in the City of London and has proved extremely beneficial. It enables a creditor in a proper case to stop his debtor from parting with his assets pending trial. Two years ago, the House of Lords had this procedure under their close consideration. It was in *Siskina (Owners of Cargo lately laden on board)* v. *Distos Compania Naviera S.A.* [1979] A.C. 210. If the House had any doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it. Impressed with the unanimity of his colleagues, Lord Hailsham of St. Marylebone said, at p. 261:

> "Since the House is no way casting doubt on the validity of the new practice by its decision in the instant appeal, I do not wish in any way to do so myself. . . ."

The only reservations made by their Lordships were as to restrictions to be put upon it or the modifications to be made upon it. It was Lord Diplock who at p. 254 referred to "restrictions" and Lord Hailsham who referred at p. 261 to possible need "to be modified." So I take it as established that the High Court has jurisdiction to grant a *Mareva* injunction in appropriate cases: and that it does so by virtue of the power conferred on it by Parliament in 1873, when it first established the High Court of Justice. It amended the previous law by expressly declaring in section 25 (8) of the Supreme Court of Judicature Act 1873:

A "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made."

This provision was re-enacted in 1925 in substantially the same words in section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925.

B In the *Siskina* case [1979] A.C. 210 the House placed this restriction upon the procedure. It applies only in the case of an "interlocutory order." In order to obtain a *Mareva* injunction there has to be in existence a substantive cause of action on which the plaintiff is suing or about to sue in the High Court in England or is enforcing or about to enforce by arbitration in England. The procedure was, therefore, not C available in the *Siskina* case. In that case the bills of lading contained a clause giving exclusive jurisdiction to the courts of Genoa. The cargo was arrested in rem in Cyprus. There was no jurisdiction in England at all over the substantive claim.

The House left open the position of a plaintiff making a claim against an English-based defendant. Lord Hailsham of St. Marylebone said significantly, at p. 261:

D "Either the position of a plaintiff making a claim against an English-based defendant will have to be altered or the principle of the *Mareva* cases will have to be modified."

In the recent case of *Chartered Bank* v. *Daklouche* (unreported), March 16, 1979; Court of Appeal (Civil Division) Transcript No. 308 of 1979, E we did apply the *Mareva* injunction to an English-based defendant. A wife came from Abu Dhabi in the Persian Gulf to England. She bought a large house in Hampshire, and had £70,000 in a bank in England in her own name. Mocatta J. granted a *Mareva* injunction, and this court affirmed it. I said:

F "The law should be that there is jurisdiction to grant a *Mareva* injunction even though the defendant may be served here. If he makes a fleeting visit, or if there is a danger that he may abscond, or that the assets or moneys may disappear and be taken out of the reach of the creditors, a *Mareva* injunction can be granted. Here is this £70,000 lying in a bank in England, which can be removed at the stroke of a pen from England outside the reach of the creditors."

G

The exercise of the discretion

Accepting that the jurisdiction is available, the question arises: In what circumstances should it be exercised? In *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, 510, I said:

H "If it appears that the debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

In *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina)* [1978] 1 Q.B. 644, 661, I ventured to extend this to a case where the plaintiff can show that he has a "good arguable case," adding, at p. 662:

> "In a case where the defendant is able to put up security, it may often be just and convenient to grant an injunction so as to see that he does it."

In the present case Mustill J. explained the practice since that time. He said, ante, p. 650F–H:

> "The *Pertamina* case gave a new dimension to the *Mareva* injunction. The use of the remedy greatly increased. Far from being exceptional, it has now become commonplace. At present, applications are being made at the rate of about 20 per month. Almost all are granted. Applications to discharge the injunctions are very rare, whether because the order is not regarded as producing substantial injustice or because it is cheaper and less trouble to lift the injunction by providing bank guarantees rather than by proceedings in court, is impossible to say. A very simple procedure has now been evolved. The plaintiff's affidavit for an application usually sets out the nature of the claim and states that the defendant is abroad and asserts that, if the plaintiff is successful in the action, the judgment will be unsatisfied if the injunction is refused."

It was in pursuance of that practice that Mustill J. refused to discharge the injunction here.

The guidelines

Much as I am in favour of the *Mareva* injunction, it must not be stretched too far lest it be endangered. In endeavouring to set out some guidelines, I have had recourse to the practice of many other countries which have been put before us. They have been most helpful. These are the points which those who apply for it should bear in mind:

(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know: see *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A. (The Assios)* [1979] 1 Lloyd's Rep. 331.

(ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

(iii) The plaintiff should give some grounds for believing that the defendant has assets here. I think that this requirement was put too high in *MBPXL Corporation* v. *Intercontinental Banking Corporation Ltd.* August 28, 1975; Court of Appeal (Civil Division) Transcript No. 411 of 1975. In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not.

(iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a *Mareva* injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it—where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire Cat. In such cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a *Mareva* injunction granted against them. The giving of security for a debt is a small price to pay for the convenience of such a registration. Security would certainly be required in New York. So also it may be in London. Other grounds may be shown for believing there is a risk. But some such should be shown.

(v) The plaintiff must, of course, give an undertaking in damages—in case he fails in his claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security: and the injunction only granted on it being given, or undertaken to be given.

In setting out those guidelines, I hope we shall do nothing to reduce the efficacy of the present practice. In it speed is of the essence. Ex parte is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite. It is rather like the new injunction in Chancery, the *Anton Piller* injunction (*Anton Piller KG* v. *Manufacturing Processes Ltd.* [1976] Ch. 55), which has proved equally beneficial. That must be done speedily ex parte before the incriminating material is removed. So here in *Mareva* injunctions before the assets are removed. The solicitors of the City of London can, I believe, continue their present practice so long as they do it with due regard to their responsibilities: and so long as the judges exercise a wise discretion so as to see that the procedure is not abused.

Applying the guidelines

In the present case the affidavits seem to have proceeded on the simple ground that the owners had a good cause of action against the charterers; that the charterers were a corporation registered in Panama; and that the solicitors feared that, should the owners obtain a judgment or award against the charterers, it might remain unsatisfied unless security were provided. That was very brief. It would have been better for more details to be given. But the commercial court judges did not ask for more. They thought it sufficient. In the circumstances I would not interfere with their discretion. Further, when the position was tested on the

application to discharge the injunction, it is a remarkable thing that the charterers, whilst asserting their own standing and solidity, never supported it by the evidence of any director or officer of the company, or by any balance sheet or statement of account, or by anything tangible at all. It was on those grounds that Mustill J. refused to discharge the injunctions. I agree with his decision, and would dismiss the appeals.

LAWTON L.J. Before the coming of the electric telegraph, the railways and steamships, foreign debtors who wished to flee the realm and take their assets with them in order to avoid paying their just debts must have found doing so far from easy. Travel overland was slow and once the coast was reached there might be long waits because of the vagaries of wind. Even so, local courts in commercial centres such as the City of London, Bristol, Exeter and Lancaster exercised a special jurisdiction over foreign merchants who had left the realm and were sued for debt. Any goods they had left behind could be seized: see *Pulling's City & Port of London Laws, Customs, etc.*, 2nd ed. (1844), p. 188. Other jurisdictions outside England and Wales exercised the same kind of powers. Many still do; and for the owners of ships one of the most important is New York since many time charters are made on the form of charterparty approved by the New York Produce Exchange. Those relating to the *Genie* and the *Pythia* were made on such forms, save that arbitration in London was substituted for New York: see clause 17.

Nowadays defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience together with the development of world wide banking and swift communications. By a few words spoken into a radio telephone or tapped out on a telex machine bank balances can be transferred from one country to another and within seconds can come to rest in a bank which is untraceable or, even if known, such balances cannot be reached by any effective legal process.

Honest commercial men operating on the world's exchanges have to learn to spot those who are likely to be defaulters. They have no difficulty in doing so when there is a known record of default. If they trade with such a defaulter, any losses they sustain are the result of their own foolishness. The difficult cases are first and most commonly those which arise when the other party to a contract meets unexpected trouble for himself after he has entered into it, such as when there is a fall in the market, and, secondly, when there is something akin to a long term fraud by the build up of confidence to be followed by default. The experienced operators often sense what is likely to happen. There may be rumours around the exchange. When there are, the mischievous and malicious have to be separated from the well-founded. There may be tardiness in settling accounts or a change in the trading pattern, or even in a life style. It is considerations such as these which cause businessmen to issue writs rather than wait for payment. Sensible commercial men do not issue writs merely because a dispute has arisen with someone, whether he be British or a foreigner, who is known to be good for the

debt and who is likely to meet his obligations if any dispute is decided against him.

Once a writ is issued, a debtor who intends to default will do what he can to avoid having to meet his obligations. The British defaulter may try to dissipate his assets; he may succeed to some extent but retribution in the form of either bankruptcy or liquidation will probably come about one day. Until recently the prospects for the defaulting foreigner were much better. A telephone call or telex message could within seconds of the service of a writ, or knowledge that a writ had been issued, put all liquid assets out of the reach of the creditor. It was these considerations which led this court to exercise the jurisdiction given by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 to issue ex parte injunctions whenever it was just or convenient so to do, the cause of action itself being triable within the jurisdiction. The first of the reported cases, *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093, was one in which there was good reason for thinking that the defendants, if unsuccessful as they probably would be, would default in payment. The next reported case, *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, which has given a name to this kind of relief, was another one in which there was evidence from which it was reasonable to infer, first, that the plaintiffs had a strong case against the defendants and, secondly, that the latter were likely to default if judgment was given against them. The evidence of these factors seems to have been the reason why this court granted the relief for which the plaintiffs asked. In the *Pertamina* case [1978] 1 Q.B. 644 this court was not asked to consider whether there was evidence showing that assets within the jurisdiction were likely to be put beyond the reach of a successful creditor. It was concerned with broader questions of jurisdiction.

These appeals, however, are concerned with evidence. In all three cases the charterers say that there is no evidence whatever that there is any danger of their removing out of the jurisdiction such assets, if any, as they may have within it and that the present practice of the Commercial Court in granting *Mareva* injunctions against any defendant who happens to be a foreigner or a foreign corporation is wrong.

The present practice of the Commercial Court, as recorded in Mustill J.'s judgment, goes further than what this court contemplated in the first two reported cases. The mere fact that a defendant having assets within the jurisdiction of the Commercial Court is a foreigner or a foreign corporation cannot, in my judgment, by itself justify the granting of a *Mareva* injunction. There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction. For commercial men, when assessing risks, there is no commercial equivalent of the Criminal Records Office or *Ruff's Guide to the Turf*. What they have to do is to find out all they can about the party with whom they are dealing, including origins, business domicile, length of time in business, assets and the like; and they will probably be wary of the appearances of wealth which are not backed up by known assets. In

my judgment the Commercial Court should approve applications for *Mareva* injunctions in the same way. Its judges have special experience of commercial cases and they can be expected to identify likely debt dodgers as well as, probably better than, most businessmen. They should not expect to be given proof of previous defaults or specific incidents of commercial malpractice. Further they should remember that affidavits asserting belief in, or the fear of, likely default have no probative value unless the sources and grounds thereof are set out: see R.S.C., Ord. 41, r. 5 (2). In my judgment an affidavit in support of a *Mareva* injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what inquiries have been made about the defendant's business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default. Default is most unlikely if the defendant is a long established, well known foreign corporation or is known to have substantial assets in countries where English judgments can easily be enforced either under the Foreign Judgments (Reciprocal Enforcement) Act 1933 or otherwise. But if nothing can be found out about the defendant, that by itself may be enough to justify a *Mareva* injunction.

The affidavits used by all three owners in support of their ex parte applications for *Mareva* injunctions did not, in my judgment, give sufficient information to enable the commercial judge to exercise his discretion; but by the time Mustill J. had to consider whether the injunctions should be discharged and even more so when the cases got to this court there was enough evidence to enable decisions to be made on the merits.

What this evidence came to was this. The charterers, Unimarine, presented themselves to the court through counsel as a large, prosperous corporation connected with even larger corporations. But what lies behind this image? They are registered as a corporation in Panama but they have no assets there. They have a large number of ships on charter, a substantial number of which are long time-charters. These charters may be profitable; but they may be commercial millstones round Unimarine's neck. There is no evidence of the existence or location of any specific assets. There is no evidence of the nature of the connection which they say they have with larger corporations. None of the deponents who have sworn affidavits on their behalf is one of their officers. Fairly recently they have been tardy in meeting an arbitration award; and in the case of the *Genie*, for no apparent reason, they have failed to pay a sum of £48,000. In my judgment on this evidence all three owners reasonably feared difficulty in getting paid if they succeeded in obtaining awards in their disputes with the charterers. Their fears may be groundless. The charterers could have shown both Mustill J. and this court that they were so by producing more solid evidence. For their own reasons they have chosen not to do so. In my judgment the charterers have presented an image of themselves made up of words, not of facts.

The only evidence which the owners produced of the existence of assets within the jurisdiction was that the charterers had an account with an English branch of a Luxembourg bank. The charterers claim, and their bankers support them in this, that when the *Mareva* injunction was granted this account was overdrawn. They submitted that without proof of assets within the jurisdiction a *Mareva* injunction should not be granted. I agree; but it does not follow that the existence of an overdraft establishes that there are no assets within the jurisdiction. Large overdrafts, such as commercial undertakings have, are almost always secured in some way. The collateral security may represent substantial assets. The charterers' evidence makes no reference to the existence or absence of collateral security. This omission leads me to conclude that the existence of the bank account, albeit in overdraft, is some evidence of assets within the jurisdiction.

I would dismiss the appeals.

CUMMING-BRUCE L.J. I agree with both judgments. The appeal raises for decision three questions. (1) Did the evidence sufficiently show the existence of assets in the jurisdiction so as to make it appropriate to exercise the discretion to be exercised under section 45 (1) of the Supreme Court of Judicature (Consolidation) Act 1925? (2) Did the evidence before Mustill J. show the existence of a real risk that the judgments or awards would not in each case be satisfied as a result of the transfer by the charterers of their assets within the jurisdiction to a place outside the jurisdiction where enforcement would be difficult or impracticable? (3) Was the injunction in the form in which it was upheld in so wide a form that it was unreasonably embarrassing to the defendants?

On the first of those questions I agree with Lord Denning M.R. and Lawton L.J. that the existence of a bank account within the jurisdiction may in the appropriate case be sufficient evidence of assets.

The evidence before Mustill J. was supplemented in this court by admission of evidence exhibited to an affidavit sworn on behalf of the charterers, being a letter from the London branch of the Luxembourg bank with which the charterers have an account. This letter disclosed that between April 27, 1979, and May 9, 1979, the charterers' account was in overdraft. But it added that this was quite acceptable to the bank as the income from freight in any one month is very substantial. That is quite sufficient evidence of the existence of assets which are credited to the charterers' London account in the course of every month. The letter maintains a discreet silence on the amount of such credits and on the security if any for the borrowing facilities.

On the second question, the facts justified the refusal of the judge to discharge the injunction, though in my view he expressed the principle too widely. I would not hold that it is enough for a plaintiff simply to show that the defendant is a foreign defendant. There must be evidence of some facts leading to an inference that the assets within the jurisdiction may well be removed.

Relevant facts in these cases were the characteristics of the foreign corporation, so organised as to prevent anyone discovering anything

about its capacity to pay its debts. This, as the judge appreciated, distinguished it from the foreign trading corporations of whom particulars are available in the country where they are registered.

As to the third question, I am not satisfied that it has been shown on the evidence that the charterers will suffer any embarrassment in their business of which they can properly complain as a consequence of the form of the injunctions.

I would dismiss the appeals.

Appeals dismissed with costs.
Leave to appeal refused.

Solicitors: *Lloyd Denby Neal; Clyde & Co.; Ince & Co.*

A. H. B.

REGINA *v.* COLCHESTER STIPENDIARY MAGISTRATE
Ex parte BECK AND OTHERS

1978 Dec. 18, 19

Lord Widgery C.J.,
Kilner Brown and Robert Goff JJ.

Justices—Committal proceedings—Evidence—Prosecution statements read by magistrate prior to commencement of committal proceedings—Validity of practice—Whether contrary to natural justice—Magistrates' Courts Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 4 (3) [1]*—Magistrates' Courts Rules* 1968 (*S.I.* 1968 *No.* 1920), *r.* 58 (2) [2]

The applicants were charged with a number of offences and, during committal proceedings, the examining magistrate stated that he had been supplied with documents relating to the case a week before the hearing began, and that he had read certain papers in advance. The documents included matters highly prejudicial to the applicants. Their counsel asked the magistrate to discharge himself, but he refused to do so and in due course committed the applicants for trial. They applied for orders of certiorari to quash the orders for committal.

On the question whether the magistrate reading the documents before the committal proceedings was in breach of the Magistrates' Courts Act 1952, the Magistrates' Courts Rules 1968 and the rules of natural justice:—

Held, dismissing the applications, (1) that the perusal by the stipendiary magistrate of copies of the prosecution

[Reported by SUSAN DENNY, Barrister-at-Law]

[1] Magistrates' Courts Act 1952, s. 4 (3): see post, p. 682C.
[2] Magistrates' Courts Rules 1968, r. 58 (2): see post, p. 684B.

Walter -v- Alltools (1944) 61 T.L.R. 39 CA

the local government, and having been accused of an offence as such public servant, section 197 of the Code of Criminal Procedure precluded any Court from taking cognizance of the offence without the previous sanction of the Government having power to order his removal. They accordingly dismissed the complaint and quashed the order of the district magistrate. In that case Mr. Gauba had petitioned the Court. The prohibition contained in section 197 is against action by any Court, and in these circumstances the decision of the High Court was accepted, and its order is not the subject of any appeal.

The action of the police in investigating Saleh's charges is a different matter. The position in, and time at, which a Court is required to take cognizance of the matter has not yet been reached, and the only question arising on this part of the case, or discussed before their Lordships, is whether the Court, which in its inherent jurisdiction under section 561A of the Code of Criminal Procedure has power to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise secure the ends of justice, is in the present case justified in using its powers to quash the police investigation. The High Court decided that it was entitled to quash the proceedings and prohibit the investigation. Their grounds appear to have been that similar charges were levelled against the respondent four years earlier. Some of these charges, they said, were then actively disproved and the rest held to be unfounded in an inquiry held as a consequence of the application to remove the respondent from his post of receiver of the property. In those and in these proceedings, as the High Court point out, Saleh accused himself of having been a party to a corrupt conspiracy to defeat the ends of justice. The Judges appear to have made a careful examination of the previous record, to have come to the conclusion that Saleh's evidence was unacceptable, and to have searched the records of the police investigation until it was stopped, to see if any information beyond that contained in the earlier proceedings was forthcoming. In the result they found none.

All this may be good ground for a rejection of Saleh's accusation and a dismissal of any prosecution launched on his information, if such a prosecution ultimately takes place, and if the Court is then satisfied that no crime has been established. But that stage has not been reached. It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded on the same or similar allegations. Moreover, the police investigation was stopped, and it cannot be said with certainty that no more information could be obtained. But even if it were not, it is the duty of a criminal Court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision which is not binding on it.

In their Lordships' opinion, however, the more serious aspect of the case is to be found in the resultant interference by the Court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under section 491 of the Code of Criminal Procedure to give directions in the nature of *habeas corpus*. In such a case as the present, however, the Court's functions begin when a charge is preferred before it, and not until then. It has sometimes been thought that section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved, and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Code of Criminal Procedure, and that no inherent power had survived the passing of that Act.

No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation, and for this reason Mr. Justice Newsam may well have decided rightly in *M. M. S. T. Chidambaram v. Shanmugam Pillai* ([1938] A.I.R. Mad. 129). But that is not this case. In the present case the police have under sections 154 and 156 of the Code of Criminal Procedure a statutory right to investigate a cognizable offence without requiring the sanction of the Court, and to that extent the case resembles *Chhatrapat Singh Dugar v. Kharag Singh Lackmiram* (I.L.R. 44 C. 535), in which as the High Court has pointed out, their Lordships' Board expressed the view that to dismiss an application on the ground that it would be an abuse of the powers of the Court might be to act on treacherous grounds. Of course, in the present case, as in the petition brought by Mr. Gauba, no prosecution is possible unless the necessary sanction under section 197 of the Code of Criminal Procedure has first been obtained. But that stage, like the stage at which the Court may legitimately intervene, has not, in their Lordships' opinion, yet been reached. The question so far is one of investigation, not prosecution.

In accordance with their view their Lordships will humbly advise his Majesty that the appeal should be allowed, the decree and order of the High Court quashed, and the investigation permitted to proceed.

[Solicitors—Solicitor, India Office; Messrs. Speechly, Mumford and Craig.]

Court of Appeal.
(MacKinnon and Lawrence, L.JJ., and Cassels, J.)
1944.
Oct. 25.

WALTER v. ALLTOOLS, LIMITED.*

Damages—False imprisonment—Facts in aggravation or mitigation of damages after date of tort—Right of Judge to consider in assessing damages.

In an action for damages for false imprisonment the trial Judge is entitled, in assessing the damages, to take into consideration as aggravating the damage any evidence showing or tending to show that the defendant was persevering in the charge which he originally made in bringing about the false imprisonment, and, similarly, in reduction of damages, to consider any evidence given by the defendant showing or tending to show that he had withdrawn or had apologized for the charge on which the false imprisonment proceeded.

The Court dismissed the appeal of the defendants, Alltools, Limited, of Harlequin Avenue, Brentford, Essex, from the judgment of Mr. Justice Stable awarding the plaintiff, Mr. J. A. Walter, of Eton Avenue, Heston, Middlesex, £100 damages for false imprisonment. The defendants did not appeal on the question of liability, but alleged that Mr.

* Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law.

Justice Stable, in assessing the damages, had given weight to considerations which should not have been regarded.

The facts, so far as material to this report, were as follows : The plaintiff was employed in a factory belonging to the defendants. On September 3, 1943, he was going home from work carrying a pot of paint which he had purchased for his own use when he was stopped in the road by security officers in the defendants' service and requested to proceed to the factory for the purpose of seeing the head security officer. Mr. Justice Stable found that the plaintiff was kept against his will in the head security officer's room for two and a half hours while investigations were being made. The result of the inquiry held was entirely to exonerate the plaintiff from any suspicion. The plaintiff subsequently brought an action for false imprisonment against the defendants.

Mr. Justice Stable held that the plaintiff had been falsely imprisoned and, dealing with the question of damages, said that in the circumstances, bearing in mind that, apart from the fact that the plaintiff had been deprived of his liberty for two and a half hours, the inquiry had been carried out with tact and courtesy, he should only have been inclined to award a small sum. He was of opinion, however, that he was entitled to take into account the facts (1) that the defendants had never expressed any regret to the plaintiff; (2) that they had never notified the plaintiff's fellow-employees that his character had been vindicated; and (3) that on September 15, 1943, the defendants' solicitor, in a letter to the plaintiff's solicitor, wrote : " It is clear that you have not been fully instructed in this matter. An inquiry was made of your client and he volunteered to return to the factory while inquiries were being made. He was never detained against his will, and in view of the circumstances under which he is alleged to have obtained the paint, I think you will agree that inquiry was necessary and justified." Taking those matters into consideration, Mr. Justice Stable awarded the plaintiff £100 damages.

Mr. G. O. Slade, K.C., and Mr. Colin Duncan appeared for the appellants; Mr. P. O'Connor for the respondent.

Mr. SLADE submitted that the matters on which Mr. Justice Stable relied as circumstances aggravating the injury done to the plaintiff were not matters which he was entitled to take into consideration in assessing the amount of the damages to be awarded. In particular, the letter of September 15 could not be considered, since it did not indicate malice on the part of the security officers at the time when the tort was committed, which was the material time.

Mr. O'CONNOR was not called on.

LORD JUSTICE LAWRENCE.—This is an appeal from a decision of Mr. Justice Stable on the question of the damages awarded by him in an action for false imprisonment. The only question for this Court is whether he took into consideration, in assessing damages, matters which he ought not to have considered. The other issue in the case was whether, in fact, the plaintiff had been falsely imprisoned, and Mr. Justice Stable found that he had, for the reason that he did not remain willingly with the security officers of the defendant company. That question was not argued here by Mr. Slade on behalf of the defendants. The argument which he presented was that Mr. Justice Stable, in awarding the plaintiff £100 for false imprisonment, took into account the fact that the defendants had not in any way indicated to the plaintiff's fellow-workpeople in the factory that his imprisonment had turned out to be erroneous, and also that the Judge took into account a letter written by the defendants' solicitors on September 15, 1943, some 12 days after the imprisonment. That letter was, in Mr. Justice Stable's opinion, an unfortunate letter, and one which suggested that the charge against the plaintiff had not, in the minds of the solicitors at any rate, been withdrawn. [His Lordship read the letter and continued :]

As I understand the facts, apart from that letter, there was no other material communication between the defendants and the plaintiff or his solicitors up to the time of the trial, nor was there any evidence that any communication had been made to the plaintiff's fellow-workpeople as to the vindication of his character. Mr. Slade contends that, for evidence to be admissible for the purpose of aggravating the damages, it must be evidence which tends to show that the servants of the defendants who made the false imprisonment were actuated by malice, and that in the present case the conduct of the defendants' solicitors and of the defendant company themselves after the date of the false imprisonment did not show that the defendants' security officers were actuated by malice at the time of the imprisonment.

The only case on which Mr. Slade really relied was *Pearson v. Lemaitre* ((1843) 5 M. and G. 700). That was an action for damages for libel, and it was held that defamatory letters which were written after the date of the defamation sued on could be given as evidence of malice, but not as grounds for awarding damages in respect of the libels contained in such letters. That is to say, that a Judge in directing a jury in such a case might tell them that the letters subsequent to the libel sued on might be considered as evidence of malice, but could not be considered as separate torts. I agree with that view, but it does not seem to me to have any bearing on the present case.

Mr. Slade also referred to *Warwick v. Foulkes* ((1844) 12 M. and W. 507), a case of false imprisonment, in which the defendant pleaded that the plaintiff had committed a felony, but at the trial his counsel withdrew the plea and exonerated the plaintiff. Lord Abinger, C.B., said (at p. 508) : " The putting this plea on the record is, under the circumstances, evidence of malice, and a great aggravation of the defendant's conduct, as showing an *animus* of persevering in the charge to the very last. A justification of a false imprisonment, on the ground that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of felony, is very different; such a justification is in the nature of an apology for the defendant's conduct. And although it was very proper in the present case to tell the jury that the defendant's counsel apologized for the conduct of his client, still that apology came too late. It was one which seemed to be made for the purpose of screening the defendant from having to pay damages." Baron Parke said (at p. 509) : " But looking at the transaction as it stands, I think he " (the Judge at *nisi prius*) " was right. A man is taken up on a false charge of felony; surely he has a right to give evidence to show that it was not one lightly made and soon abandoned, but that it was seriously made, and persevered in to the last moment."

In my opinion that case lays down that any evidence in a case of false imprisonment which shows or tends to show that the defendant is persevering in the charge which he originally made in bringing about the false imprisonment is evidence which may be given for the purpose of aggravating the damages. In the same way the defendant would be entitled to give any evidence which tended to show that he had withdrawn, or had apologized for having made, the charge on which the false imprisonment proceeded. The general principle, in my view, is that any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false. For these reasons I am of opinion that the judgment of Mr. Justice Stable was correct and that the damages were not excessive. In fact, I think that they were the damages which I myself should have given. The appeal will be dismissed.

LORD JUSTICE MACKINNON.—I agree.

MR. JUSTICE CASSELS.—I agree.

[Solicitors—Messrs. Munton, Morris, King and Co., for Mr. Arthur Robson; Mr. Joseph Lilly.]

Warwick -v- Foulkes (1844) 12 M & W 50

directed the defendant to pay the costs of taxation.] A defendant ought not to be in a better position by not obtaining an order to tax until after action brought, than he would have been if he had applied within one calendar month after delivery of the bill. He would then have been obliged to give an undertaking to pay what should be found due on taxation, and the Master's certificate would have been final and conclusive against him: (sect. 43): whereas, by omitting to apply until after action brought, he escapes giving any such undertaking. [Parke, B. The Judge must be satisfied by affidavit or otherwise, that the retainer is bonâ fide disputed.] The taxation in an early stage of the cause is a mere substitute for a taxation at Nisi Prius, which could not conveniently take place there; and the defendant would have to pay the expenses of witnesses examined at the trial, although they should prove deductions exceeding one-sixth, unless he should obtain the verdict. Therefore the costs of taxation should abide the result of the action, and not the result of the taxation; unless, indeed, the language of sect. 37 is imperative in such a case as the present.

The Court, after some hesitation, said, "You may take a rule to shew cause."

Cole asked for the deliberate opinion of the Court on the construction of the statute, saying he was unwilling to take a rule, unless the Court thought it probable they would make it absolute.

LORD ABINGER, C. B. If you ask my deliberate opinion, **[506]** I think that the language of sect. 37 of the statute applies to this case, and that the order is correct. The former part of the clause appears to give some discretion, but the latter part seems to apply to a case where a taxation is ordered after action brought.

PARKE, B. If this were a matter of discretion with me, I certainly think the defendant ought to pay the costs; but I considered myself bound by the words of the statute; and I am confirmed in that view by the subsequent part of this section, which provides "that the officer shall in all cases be at liberty to certify specially any circumstances relating to such bill or taxation, and the Court or a Judge shall be at liberty to make thereon any such order as such Court or Judge may think right respecting the payment of the costs of such taxation." That is, the officer may certify anything which appears to him, in the course of the proceedings, fit ground for departing from the general rule, that the costs are to be paid by the unsuccessful party, and the Judges are empowered to order accordingly. Besides, by another part of this section, where the party does not attend the taxation, he is not liable to pay those costs.

GURNEY, B., concurred.

Cole, therefore, declined to take any rule.

[507] WARWICK *v.* FOULKES. Exch. of Pleas. Jan. 23, 1844.—To an action of trespass for false imprisonment, the defendant pleaded, by way of justification, that the plaintiff had committed a felony. At the trial, his counsel abandoned the plea, and exonerated the plaintiff from the charge:—Held, that it was not a misdirection in the Judge, to tell the jury that the putting of such a plea on the record was a persisting in the charge contained in it, and was to be taken into account by them in estimating the damages.

[S. C. 1 D. & L. 638; 13 L. J. Ex. 109; 8 Jur. 85.]

Trespass for false imprisonment, in causing the plaintiff to be taken into custody, and conveyed to a police-office on a charge of felony.

Pleas, first, not guilty; secondly, that before the time when &c., the defendant was possessed of certain buildings and premises, and of certain goods and chattels therein being, and that the plaintiff, together with one James Thomas Croke, broke and entered the said buildings &c. and then feloniously stole and seized and took the said goods and chattels from out of the said buildings, without the knowledge and against the will of the defendant, and carried away and converted the same to his own use, whereupon the defendant, having cause to suspect and then suspecting and believing that the said goods and chattels of him the defendant had been so feloniously stolen &c. inasmuch as the plaintiff, together with the said James Thomas Croke, had been seen just before lurking about the said buildings, caused the plaintiff to be taken into custody by the said police constable, and in so doing the said police constable did then gently lay his hand upon the plaintiff, under colour of the said charge

of felony, as in the declaration mentioned, in order that he might be conveyed, as soon as conveniently could be, before some or one of her Majesty's justices of the peace &c., to be dealt with according to law, as he lawfully might for the cause aforesaid, &c.

Replication, de injuriâ.

At the trial, before Rolfe, B., at the Middlesex Sittings in this term, the plaintiff having proved his being taken into custody by the defendant's orders, the defendant's counsel stated, that he should offer no evidence in support of the plea of justification, as the plaintiff had taken the defendant's goods under a bonâ fide but mistaken **[508]** claim of right, and that the putting of the plea upon the record was to be considered the act of the pleader rather than of the defendant. Rolfe, B., in summing up the case, told the jury, that, the plaintiff's case having been proved, it was a question of damages merely, and that, although the plea had been explained and apologized for, still the putting of such a plea upon the record was a matter to be taken into account by the jury in estimating the amount of damages; that such conduct was a persisting in the charge of felony; that, although the defendant's counsel had said it was the act of the pleader, still, if the plea had been found for the defendant, the plaintiff might have been indicted upon it at the Central Criminal Court. The jury having found a verdict for the plaintiff, damages £75,

Jervis now moved for a new trial, on the ground of misdirection. The plea having been abandoned at the trial, the learned Judge ought to have told the jury to pay no regard to it, which is the usual practice in such cases. If the plea were placed upon the record maliciously, it might have formed the ground of a distinct action, and therefore ought not, under the general issue, to have been made a ground of increasing the damages in this. [Parke, B. No one ever heard of an action being brought on such a ground.] It is submitted that an action on the case could be maintained, if such a plea were proved to have been put upon the record maliciously. Suppose the defendant had justified the arrest on the ground of a suspicion of felony, founded on reasonable and probable cause, could it be said that the plaintiff would be entitled on that account to additional damages, upon his negativing the felony, and shewing malice on the part of the defendant?

LORD ABINGER, C. B. I think the learned Judge was right, and that no rule ought to be granted in this case. The putting this plea on the record is, under the circum-**[509]**-stances, evidence of malice, and a great aggravation of the defendant's conduct, as shewing an animus of persevering in the charge to the very last. A justification of a false imprisonment, on the ground that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of felony, is very different; such a justification is in the nature of an apology for the defendant's conduct. And although it was very proper in the present case to tell the jury that the defendant's counsel apologized for the conduct of his client, still that apology came too late. It was one which seemed to be made for the purpose of screening the defendant from having to pay damages.

PARKE, B. I am of the same opinion. If the putting a false charge on the record by way of plea is to be considered in the same light as indicting the plaintiff without reasonable or probable cause, the direction of the learned Judge at Nisi Prius would be wrong. But, looking at the transaction as it stands, I think he was right. A man is taken up on a false charge of felony; surely he has a right to give evidence to shew that it was not one lightly made and soon abandoned, but that it was seriously made, and persevered in to the last moment. As to the damages being excessive, these are cases in which large damages are in general given, and properly so; if people choose to settle private disputes by giving others into custody, they must take the consequences.

GURNEY, B., concurred.

Rule refused.

[510] SCHOLEY *v.* WALTON AND CHAMBERS, Surviving Executors of William Purslove, Deceased. Exch. of Pleas. Jan. 23, 1844.—To an action by the payee of a promissory note for £300, against the defendants, as surviving executors of William P., the maker, the plaintiff, to take the case out of the Statute of Limitations, proved that he had been supplied by Joseph P., the deceased

Yukong Line Ltd v Rendsburg Investments Corp [2001] 2 Lloyds Rep 113

COURT OF APPEAL

Nov. 8, 9; Dec. 21, 2000

YUKONG LINE LTD.
v.
RENDSBURG INVESTMENTS CORPORATION AND OTHERS

Before Lord Justice THORPE,
Lord Justice POTTER and
Lady Justice HALE

Practice — Mareva injunction — Discharge — Inquiry into damages — Dispute under charter-party — Injunction obtained against third defendant — Whether injunction ancillary and incidental to plaintiffs' cause of action — Whether injunction wrongly granted — Whether inquiry into damages should be granted — Whether injunction should be discharged.

By a charter-party dated July 8, 1995 on the New York Produce Exchange form (as amended) the plaintiffs (Yukong) as disponent owners chartered the vessel *Rialto* to the first defendants Rendsburg for a period of three years plus or minus two months at Rendsburg's option at a daily rate of hire of U.S.$14,000. For the charterers the document was signed by the third defendant Mr. Yamvrias as director of a broking company Marcan Shipping (London) Ltd. (Marcan) described as acting on behalf of Rendsburg.

On Jan. 8, 1996 Yukong gave notice to Rendsburg of expected delivery of the vessel on about Feb. 9, 1996. On Jan. 23, 1996 Mr. Yamvrias sent a fax on Marcan paper to Yukong informing them that the charterers for reasons beyond their control were unable to perform the charter-party.

Yukong issued proceedings against Rendsburg on Feb. 2, 1996 and on the same day obtained a *Mareva* order which required disclosure of information regarding Rendsburg's shareholders, directors and relationship with Marcan.

In his affidavits Mr. Yamvrias disclosed that the shares in Marcan were held by his wife and himself as directors and by the second defendant (Ladidi) the beneficial ownership of which was held on trust for "family interests"; that the shares in Rendsburg were bearer shares all of which were held to his order as beneficial owner; that U.S.$ 244,965.60 was transferred from Rendsburg's account to Ladidi and the account was closed soon afterwards by a further transfer to Ladidi of U.S.$648.99.

In the light of these disclosures Yukong amended its claim to join Ladidi and Mr. Yamvrias alleging that either or both acted as undisclosed principal(s) of Rendsburg in respect of the charter-party or were to be treated as parties to the charter-party. Yukong claimed that at all relevant times Mr. Yamvrias directed and controlled Rendsburg and Ladidi for the benefit of himself so that he was the companies' alter ego and that he transferred Rendsburg's assets to Ladidi on the repudiation of the charter-party in order to put them beyond the reach of Yukong. Yukong also alleged that the defendants had conspired to injure Yukong by siphoning funds from Rendsburg's account at the time of the repudiation of the charter.

————*Held*, by TOULSON, J. that the claims against Mr. Yamvrias would be dismissed.

An order (the October, 1997 order) was drawn up embodying the Judge's decision par. 5 of which provided:

> . . . the injunction . . . restraining the third defendant from removing from England or Wales or in anyway disposing of dealing with or diminishing the value of any assets in the jurisdiction up to the value of U.S.$245,000 be continued . . .

On July 14, 1998 Mr. Yamvrias applied by summons for orders that the *Mareva* relief granted under par. 5 of the October, 1977 order be discharged and that there should be an inquiry as to damages suffered by Mr. Yamvrias as a result of its being granted.

————*Held*, by AIKENS, J. that (1) the injunction was properly granted in that it was ancillary and incidental to the order against Rendsburg that it should pay into Court the assets of U.S.$244,965 that had been removed from Rendsburg's account by Mr. Yamvrias' action;

(2) as to the inquiry into damages, the submission by Mr. Yamvrias that because of the October, 1997 order he was unable to participate in the "Ever" vessels project which involved the purchase and bareboat chartering of up to four Panamax vessels, would be rejected; on the evidence it was not Mr. Yamvrias personally but Marcan which had suffered the damage claimed;

(3) the submission that because of the 1997 order Mr. Yamvrias was unable to participate in the contract of affreightment scheme which involved carriage of goods from Argentina to Europe would also be rejected in that there was no credible evidence of loss to Mr. Yamvrias.

Mr. Yamvrias appealed.

————*Held*, by C.A. (THORPE, POTTER and HALE, L.JJ.), that (1) although a Court had no jurisdiction to grant an interlocutory *Mareva* injunction in favour of a plaintiff who had no good arguable cause of action against a sole defendant, it had power to grant such an action against a co-defendant against whom no direct cause of action lay provided that the claim for the injunction was ancillary and incidental to the plaintiff's cause of action against that co-defendant (*see* p. 119, col. 2; p. 121, col. 1);

————*TSB Private Bank International S.A. v. Chabra*, [1992] 1 W.L.R. 231 applied.

(2) although it was plain that the Court's *Chabra*-type of jurisdiction would only be exercised where there were grounds to believe that a co-defendant was in possession or control of the assets to which the principal defendant was beneficially entitled the jurisdiction did not appear to be limited to cases where such assets could be specifically identified in the hands of the co-defendant; and once the Court was satisfied that there were such assets in the possession or control of the co-defendant the jurisdiction existed to make a

freezing order as ancillary and incidental to the claim against the principal defendant although there was no direct cause against the co-defendant (*see* p. 123, col. 1);

(3) on the facts and the evidence Mr. Justice Toulson was entitled to make the freezing order contained in par. 5 of the October, 1997 order in the form which he did (*see* p. 123, col. 2);

(4) on the limited material before him the learned Judge's decision on the contract of affreightment scheme was entirely justifiable; and there was no good reason to admit further evidence; the appeal would be dismissed (*see* p. 125, col. 1; p. 126, col. 2).

The following cases were referred to in the judgment.

Bank v. Cox, (C.A.) July 17, 2000, unreported;

Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., (H.L.) [1993] 1 Lloyd's Rep. 291; [1993] A.C. 334;

Cheltenham & Gloucester Building Society v. Ricketts, [1993] 1 W.L.R. 1545.

Electra Private Equity Partners v. KPMG Peat Marwick, [2000] P.N.L.R. 247;

Financiera Avenida S.A. v. Shiblaq, (C.A.) *The Times*, Jan. 14, 1991;

Graham v. Campbell, (1877) 7 Ch.D. 490;

Hickey v. Marks, (C.A.) July 6, 2000, unreported;

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade & Industry, (H.L.) [1975] A.C. 295;

Ladd v. Marshall, [1954] 1 W.L.R. 1489;

Mercantile Group (Europe) A.G. v. Aiyela, (C.A.) [1994] Q.B. 366; [1993] F.S.R. 745;

Norwest Holt Civil Engineering Ltd. v. Polysuis Ltd., *The Times*, July 23, 1987;

R. v. Medicines Control Agency ex p. Smith & Nephew Pharmaceuticals Ltd., Mar. 26, 1999, unreported;

SCF Finance Co. Ltd. v. Masri, [1985] 1 W.L.R. 876;

TSB Private Bank International S.A. v. Chabra, [1992] 1 W.L.R. 231;

Tharros Shipping Co. Ltd. v. Bias Shipping Ltd., [1994] 1 Lloyd's Rep. 577.

This was an appeal by the third defendants Mr. Dimitrios Nicholas Yamvrias against an order made by Mr. Justice Aikens whereby he dismissed Mr. Yamvrias' application by summons for an inquiry as to damages which Mr. Yamvrias might have suffered as a result of a *Mareva* injunction obtained by the claimants, Yukong Line Ltd. pursuant to its cross-undertaking in damages given to the Court when Yukong obtained an injunction ordering the first defendant Rendsburg Investments Corporation to pay U.S.$244,965 into Court and further ordered the continuing of the *Mareva* injunction previously made against Mr. Yamvrias in the sum of U.S.$245,000 until such payment-in or further order.

Mr. Michael Collins, Q.C. and Mr. David Joseph (instructed by Messrs. Ince & Co.) for the claimant; Mr. Steven Gee, Q.C. and Mr. Stavros Heidemenos (instructed by Messrs. Shaw & Croft) for the third defendant.

The further facts are stated in the judgment of Lord Justice Potter.

Judgment was reserved.

Thursday Dec. 21, 2000

JUDGMENT

Lord Justice POTTER:

Introduction

1. This is an appeal by the third defendant ("Mr. Yamvrias") against pars. 1 and 2 of an order made by Mr. Justice Aikens, sealed on Dec. 9, 1999 whereby he dismissed Mr. Yamvrias' application by summons dated July 14, 1998 for an inquiry as to damages which Mr. Yamvrias may have suffered as a result of injunctive relief obtained by the claimant ("Yukong") pursuant to its cross-undertaking in damages given to the Court when Yukong obtained an injunction on Oct. 17, 1997 ordering the first defendant ("Rendsburg") to pay the sum of U.S.$244,965 into Court and further ordered the continuation of a freezing order previously made against Mr. Yamvrias in the sum of U.S.$245,000 until such payment-in or until further order ("the October, 1997 order"). Mr. Justice Aikens also ordered that Mr. Yamvrias pay the claimant's costs of the application before him.

2. The matter has a complicated procedural history which it is necessary to set out in order fully to understand and consider the arguments.

The procedural history

3. Yukong originally claimed against Rendsburg only. Rendsburg, as disponent owners of the vessel called *Rialto* had entered into a three year time charter for the vessel in July, 1995, repudiating it before the vessel was due to be delivered under the charter in early 1996. The repudiation took the form of a telex of Jan. 23, 1996 sent by Rendsburg's

broker, Marcan Shipping (London) Ltd. ("Marcan"), of which Mr. Yamvrias is a director, which telex stated that Rendsburg was "unable" to perform the charter-party. Following Rendsburg's failure to respond to requests confirming that it would perform the charter-party, Yukong accepted Rendsburg's repudiation by a telex of Feb. 1, 1996 and terminated the charter-party.

4. On Feb. 2, 1996 Yukong issued a writ claiming damages of over U.S.$2.3 m. for wrongful repudiation of the charter-party and, on the same date, obtained *Mareva* relief against Rendsburg from Mr. Justice Colman who ordered that Rendsburg must not remove assets from England and Wales totalling U.S.$3.35 m. The usual cross-undertaking in damages was given by Yukong.

5. On June 7, 1996, Mr. Justice Waller varied the form of the original *Mareva* order against Rendsburg and granted *Mareva* relief against Mr. Yamvrias, on giving leave to Yukong to join him as third defendant in the action. The amended points of claim set out two claims against Mr. Yamvrias personally: (i) that in signing the charter-party he had acted as undisclosed principal of Rendsburg so that he incurred personal liability under the charter and was thus liable in damages for its repudiation; (ii) that Rendsburg, the second defendant and Mr. Yamvrias had together conspired to injure Yukong by removing funds in the amount of U.S.$245,614.29 from an account of Rendsburg with Den Norske Bank ("DNB") shortly before Rendsburg's telex of repudiation. U.S.$164,799 of the funds were transferred to the second defendants ("Ladidi") which Mr. Yamvrias also controlled. It was asserted that Mr. Yamvrias had put the funds to his own use and that the predominant purpose of such removal was to ensure that there would be no funds against which Yukong could enforce a judgment against Rendsburg. It was also alleged that the conspiracy was to remove the funds by "unlawful means" namely breach of Mr. Yamvrias fiduciary duty as a "shadow director" of Rendsburg.

6. The amended form of *Mareva* order made against Rendsburg reduced the sum enjoined to U.S.$2.79 m. and the further *Mareva* order against Mr. Yamvrias enjoined him from removing assets up to U.S.$2.79 m. from the jurisdiction. He was also ordered to disclose information relating to his assets. The cross-undertaking in damages was in the usual form. Yukong as plaintiff undertook to the Court:

> If the Court later finds this Order has caused loss to the Defendants and decides that the Defendants should be compensated for that loss, the Plaintiffs will comply with any Order the court may make.

7. The fourth defendant ("VAL") and DNB were added as parties on June 20, 1996 and were also made the subject of *Mareva* relief.

8. On June 27, 1996, Mr. Justice Moore-Bick tried a preliminary issue as between Yukong and Rendsburg as to whether Rendsburg's actions amounted to a repudiatory breach of the charter-party. He held that Rendsburg had repudiated the charter-party and that Yukong had not subsequently confirmed it. Yukong did not go on to obtain a judgment for damages against Rendsburg as it wished to pursue its claims against Mr. Yamvrias before deciding whether to attempt enforcement against Rendsburg.

9. The trial of the claims against Mr. Yamvrias took place before Mr. Justice Toulson in July, 1997. By a judgment dated Sept. 23, 1997, reported at [1998] 1 Lloyd's Rep. 322, Mr. Justice Toulson dismissed the claims against Mr. Yamvrias. He held that Mr. Yamvrias had signed the charter-party simply as a director of the brokers, Marcan, and not as the undisclosed principal of Rendsburg. So far as the conspiracy claim was concerned, he held that at all relevant times Mr. Yamvrias exercised control over Rendsburg and Ladidi, he being the "alter ego" of both companies in which the ultimate beneficial interest belonged to him and his wife (and possibly his family). He also held there was a conspiracy to transfer Rendsburg's credit balance with the DNB for the purpose of putting assets beyond the reach of Yukong's litigation which seemed likely to arise. However, he went on to hold that the predominant purpose of the conspiracy was not to injure Yukong but to promote Mr. Yamvrias' own interests and that, although there had been a conspiracy by unlawful means to which Mr. Yamvrias was a party, in that he had ordered the transfer of the funds of Rendsburg in breach of his fiduciary duties to that company, this did not found an action for conspiracy by Yukong, to whom Mr. Yamvrias owed no direct fiduciary duty.

10. In the course of his judgment, Mr. Justice Toulson made various findings against Mr. Yamvrias, who had elected not to give evidence at the trial despite the fact that, as Mr. Justice Toulson put it, "a large number of questions cried out to be answered by him". Mr. Justice Toulson inferred that the reason why he did not do so was that:

> Either he was unwilling to perjure himself in the witness box and believed that if he were to tell the truth it would be detrimental to his cause, or else he did not believe that his case would withstand his being cross-examined on it.

11. Finally, Mr. Justice Toulson suggested that, as Mr. Yamvrias controlled Rendsburg and had organized disposal of its funds for his own benefit:

> ... he would presumably have been in a position on behalf of the company to get back from himself that which he had caused to be paid for his benefit.

and went on to observe that:

> ... in an appropriate case it might be within the scope of the court's Mareva jurisdiction to require a company, and its only effective officer, to do just that.

Subsequently, on Sept. 23, 1997, when hearing argument as to the costs of the action and the form of order to be made, Mr. Justice Toulson refused to make an order for costs in favour of Mr. Yamvrias on the grounds that his conduct had been:

> ... disreputable and devious, not only in relation to the events which gave rise to Yukong's claim, but, more significantly, in the action itself.

On Sept. 24, 1997 he ordered that the freezing order granted against Mr. Yamvrias on June 7, 1996 remain in force for the reduced sum of U.S.$245,000 pending a further application by the claimant.

12. By summons dated Sept. 29, 1997, Yukong applied for the following relief:

> 1. The Order dated 2 February 1996 ... be varied so that the First Defendant and the Third Defendant do restore to the First Defendant, at a specifically designated bank account in London ... the sum of U.S.$245,614.29, or alternatively U.S.$164,799 removed from the First Defendant's bank account in London in January 1996; and
>
> 2. There be no inquiry as to damages to the third Defendant.

13. On Oct. 1, 1997 Mr. Justice Toulson heard and gave judgment on that application. So far as Rendsburg was concerned, he was referred to a number of authorities on the Court's *Mareva* jurisdiction and held that he had jurisdiction to order a company (Rendsburg) to return money to its own bank account and that he could also order that this be done by its director and controlling mind, Mr. Yamvrias.

14. Mr. Justice Toulson was also asked to continue the *Mareva* order against Mr. Yamvrias personally, an application which had found no place in the summons of Sept. 29. In that respect he stated:

> Finally there is the matter of the *Mareva* order against Mr. Yamvrias and his possible application for an inquiry as to damages against Yukong. As to the injunction itself, I have not had argument about this, but as at present advised, it seems to me that if a court had known the full facts now known at the time the original order was made, a *Mareva* order would have been made against Mr. Yamvrias in the sum of U.S.$245,000 as relief ancillary to Yukong's claim against Rendsburg, and that accordingly such an order should remain in force until repayment of that sum into the designated account or further order.

The October, 1997 order which followed was drawn in a form subsequently agreed between Counsel and perfected on that date to embody the Judge's decision. So far as relevant, its terms were as follows:

> *Transfer of Monies into Jurisdiction*
>
> 1. The first defendant do by the third defendant, no later than twenty-eight days from service of this order on the first defendant pay the sum of U.S.$244,965 into court at the Royal Courts of Justice, London, England.
>
> 2. The sum paid into court pursuant to the order in paragraph 1 hereinabove shall remain in court until further order.
>
> *Plaintiff's Undertaking to Enter Judgment Against First Defendant*
>
> 3. Within forty-eight hours of the payment into court of the sum referred to in paragraph 1 above, the plaintiff undertakes to enter judgment against the first defendant in the action.
>
> *Continuation of Injunction Against First and Third Defendants*
>
> 4. Save as aforesaid, the injunction granted by Mr. Justice Colman on 2nd February 1996, as varied by Mr. Justice Waller on 7th June 1996, restraining the first defendant [i.e. Rendsburg] from disposing of or otherwise dealing with or diminishing the assets held in England and Wales whether in the name of the first defendant, whether or not solely or jointly owned up to a value of U.S.$2,790,000 be continued until further order.
>
> 5. Save as aforesaid, the injunction granted by Mr. Justice Colman on 2nd February 1996 [as varied by Mr. Justice Waller on 7th June 1996] and as further varied by Mr. Justice Toulson on 24th September 1997, restraining the third defendant [i.e. Mr. Yamvrias] from removing from England or Wales or in any way disposing of dealing with or diminishing the value of any assets in the jurisdiction up to the value of U.S.$245,000, be continued until paragraph 1 has been complied with or until further order ....
>
> *Liberty to Apply*
>
> 8. The first and third defendants to have liberty to apply to the court within twenty-eight days of the service of this order on the first

defendant to set aside or vary the terms of the order.

15. It is not in dispute that, because the October, 1997 order was a further variation of that of Mr. Justice Colman and Mr. Justice Waller the cross-undertaking in damages originally given by Yukong remained effective so far as Mr. Yamvrias was concerned.

16. On Nov. 13, 1997, Mr. Yamvrias applied to set aside the order against him or to vary it so that (i) the requirement that Rendsburg should pay into Court the sum of U.S.$244,965 "by or through" Mr. Yamvrias and (ii) the "restraining" order against him should both be lifted unreservedly. However, Mr. Yamvrias did not serve any evidence in support of the application punctually or, following an order that he do so, by Dec. 9, 1997. On Dec. 18, 1997 a consent order was made dismissing Mr. Yamvrias summons with costs. Rendsburg made no payment into Court. Mr. Yamvrias did not appeal against the October, 1997 order.

17. By notice of motion dated Apr. 1, 1998, Yukong applied for leave to issue a writ of sequestration against Mr. Yamvrias' assets on the grounds that he was in breach of par. 1 of the October, 1997 order in that he had not procured payment into Court of the sum of U.S.$244,965. On May 14, 1998, Mr. Justice Tuckey gave leave to issue the writ of sequestration against Mr. Yamvrias. On June 6, 1998 the Court of Appeal granted permission to appeal to Mr. Yamvrias. The argument advanced for Mr. Yamvrias was that leave to issue against the assets of Mr. Yamvrias should not have been given because par. 1 of the order of Mr. Justice Toulson to pay money into a Court was on its proper construction only made against Rendsburg and not against Mr. Yamvrias personally. Accordingly he was not personally in breach of the order when the money was not paid in. In granting Mr. Yamvrias' application for leave to appeal, Lord Justice Waller expressed anxiety about the form of the order made against Mr. Yamvrias. He said:

> What he [Toulson J] was recognising was that he was attempting to take, in effect, a short cut in relation to the enforcement of a judgment against Rendsburg he having found that the personal defendant [i.e. Mr. Yamvrias] was not liable.

18. The substantive appeal against the order of Mr. Justice Tuckey was heard on June 23, 1998. The appeal was allowed on the basis that par. 1 of the October, 1997 order was an order directed only to Rendsburg and the funds of Rendsburg and imposed no personal liability upon Mr. Yamvrias. In the course of his leading judgment, Lord Justice Nourse echoed the anxiety of Lord Justice Waller as to whether the Court had jurisdiction to make any order for payment against Mr. Yamvrias personally. However, he observed that, as there had been no argument on the point, he would express no concluded view on that issue.

19. On July 14, 1998 Mr. Yamvrias applied by summons for orders that the *Mareva* relief granted under par. 5 of the October, 1997 order should be discharged and that there should be an inquiry as to damages suffered by Mr. Yamvrias as a result of its being granted. On Aug. 10, 1998, after correspondence between solicitors, the injunction was discharged by consent, but without prejudice to the question of whether Mr. Yamvrias was entitled to an inquiry as to damages.

20. Mr. Yamvrias' summons in that regard was due to be heard before Mr. Justice Timothy Walker on Oct. 2, 1998, by which date he had served no evidence in support. On that date Mr. Justice Timothy Walker refused an application for an adjournment and dismissed the summons However, on June 17, 1999, this Court (Lord Justice Waller and Lord Justice Gibson) allowed an appeal against that order and ordered that Mr. Yamvrias' summons of July 14, 1998 should be restored for hearing before the Commercial Court.

21. The hearing of the summons took place before Mr. Justice Aikens on Oct. 22, 1999, his reserved judgment being delivered on Nov. 9, 1999.

The judgment of Mr. Justice Aikens

22. Having reviewed the principles on which a Court will grant an inquiry as to damages in terms as to which no point has been taken in this appeal, Mr. Justice Aikens identified the issues raised in argument as being: (1) Was the injunction against Mr. Yamvrias "improperly obtained?" He identified two sub-issues as having been argued under this head. The first related to the injunction against Mr. Yamvrias initially granted by Mr. Justice Waller restraining him from disposing of assets of U.S.$2.7 m. until trial or further order; second, the October, 1997 order of Mr. Justice Toulson restraining Mr. Yamvrias from disposing of assets of U.S.$244,965. For reasons which have not been challenged before us, the Judge concluded he did not need to consider whether or not the original injunction of Mr. Justice Waller had been improperly obtained; thus we have not been troubled with argument on that score. (2) Had Mr. Yamvrias adduced credible evidence of loss or damage *to himself* which was caused by the grant of either injunction? Again, as a result of unchallenged findings by the Judge in relation to the original injunction, this Court has been concerned only with the question of damage arising under the October, 1997 order. (3) Whether Mr. Yamvrias' conduct, both up to the trial and before Mr. Justice Toulson

and subsequently, was such as to deprive him of the right to obtain an inquiry as to damages.

23. As to the first issue, Mr. Justice Aikens referred to the decisions in *SCF Finance Co. Ltd. v. Masri*, [1985] 1 W.L.R. 876 and *TSB Private Bank International S.A. v. Chabra*, [1992] 1 W.L.R. 231 and held that the injunction was properly granted on the basis that:

> It was ancillary and incidental to the order against Rendsburg that it should pay into court the assets of U.S.$244,965 that had been removed from DNB by Mr. Yamvrias' action. (par. 31 of the judgment)

In this connection he stated:

> 28 Toulson J . . . concluded, in the course of dealing with the claims against Mr. Yamvrias, that he had controlled Rendsburg and had been instrumental in removing Rendsburg's assets from its account with DNB. Those assets had found their way into accounts effectively controlled by Mr. Yamvrias and had then disappeared . . . .
>
> 29. It is clear, in my view, that Toulson J had concluded, both in his judgment delivered on 23 September 1997 and in that given on 1 October 1997 (although he did not hear arguments specifically on this point at any stage) that Mr. Yamvrias was probably controlling assets (i.e. the U.S.$244,965) that were actually those of Rendsburg. When he heard argument on 1 October 1997 he was referred to the *Chabra* case specifically: *see transcript page 2 line 9*. In deciding to impose the injunction restraining Mr. Yamvrias from disposing of assets of up to U.S.$245,000 he said at *transcript page 6 line 25*:
>
> > . . . it seems to me that if a court had known the full facts now known at the time the original order was made, a Mareva order would have been made against Mr. Yamvrias in the sum of U.S.$245,000 as relief ancillary to Yukong's claim against Rendsburg and that accordingly such an order should remain in force until repayment of that sum into the designated account or further order.
>
> 30. I am therefore sure that Toulson J was exercising a *Chabra* type of jurisdiction when imposing the *Mareva* injunction against Mr. Yamvrias. Mr. Yamvrias did not pursue his right to apply to set aside that order, as he was entitled to do by paragraph 8 of the order of 17th October 1997. Nor was there any appeal from the order. When the Court of Appeal decided to reverse Tuckey J's order permitting the issue of a Writ of Sequestration against Yamvrias, their comments doubting whether Toulson J had jurisdiction to make the *Mareva* order against Mr. Yamvrias were made without hearing argument on the point: *see transcript of judgment of 23 June 1998: page 8B*. I have heard argument on the issue and I have concluded that Toulson J did have jurisdiction to make the order set out in paragraph 5 of 17th October 1997. Further, as the "freezing order" of Toulson J has not been successfully challenged, I am entitled to hold that the order was properly made.

24. As to the second issue i.e. the damage alleged, the Judge had to deal with two projects identified in a witness statement by Mr. Soutar, Mr. Yamvrias' solicitor, in which it was stated that Mr. Yamvrias was "unable to participate" as a result of the October order. The first was the purchase and bare boat chartering up to four "Panamax" vessels, called the "Ever" vessels project. That involved the setting up of four ship owning companies, each of which would be wholly owned by a company itself to be jointly owned by Marcan (of which Mr. Yamvrias was a director) and a company called Veritas owned and/or controlled by a Captain Skarvelis. The second project was a project for contracts of affreightment for carriage of goods from Argentina to Europe, again involving Veritas and Captain Skarvelis. It was a scheme to charter Panamax vessels to fulfil contracts which Veritas had concluded to carry cargoes principally from Argentina.

25. In relation to the "Ever" vessels project, on the evidence before the Judge it was not Mr. Yamvrias personally but Marcan, as broker to Rendsburg which had suffered the damage claimed. For a variety of reasons given by the Judge, against which there is no appeal, the claim for loss in respect of the "Ever" vessels project is not pursued.

26. So far as the contracts of affreightment scheme was concerned, I shall turn to it in more detail below, when considering an application by Mr. Yamvrias to adduce further evidence in relation to it. Suffice it to say that Mr. Justice Aikens found there was no credible evidence of loss to Mr. Yamvrias in the manner put forward in the affidavits of Mr. Soutar on his behalf.

27. Finally, so far as the conduct of Mr. Yamvrias throughout the proceedings was concerned, the Judge considered (i) the findings of Mr. Justice Toulson that Mr. Yamvrias had been instrumental in dissipating Rendsburg's assets so as to make it "judgment proof" (ii) the failure of Mr. Yamvrias to explain his actions at the trial before Mr. Justice Toulson by electing not to give evidence (iii) what Mr. Justice Toulson had called Mr. Yamvrias' dissembling, in relation to his cross-examination on assets, and as to who owned Rendsburg and Ladidi (iv) the fact that Mr. Yamvrias had delayed in

applying to enforce the cross-undertaking in damages for so long. The Judge stated that he shared the view of Mr. Justice Toulson that Mr. Yamvrias' conduct in the course of the case had been disreputable and devious. However, he said:

> But it has not been so shocking that, had I concluded that he had a credible claim to damages, he should, nonetheless, be debarred from pursuing it. However, I have taken the conduct of Mr. Yamvrias into account when assessing the credibility of the evidence before me on whether he has actually suffered any loss as a result of the imposition of either injunction. Because of his initial disreputable and devious behaviour and his failure to explain himself in the witness box at the trial and because he has not been now prepared to put forward his own witness statement supported with a belief as to its truth, I have had to look very carefully at the evidence put forward on his behalf by Mr. Soutar. I am sure Mr. Soutar took careful instructions and I am not doubting his honesty or credibility. But I am not prepared to accept as credible evidence any assertion of loss by Mr. Yamvrias that is made through Mr. Soutar, unless there is some other material that supports it. For the reasons that I have given above, none of the documentary material provides credible evidence that Mr. Yamvrias has sustained damage (of the kind asserted in Mr. Soutar's first witness statement) as a result of either injunction.

The grounds of appeal

28. The grounds of appeal as argued before us by Mr. Steven Gee, Q.C. for Mr. Yamvrias related to two broad aspects of the Judge's decision. First, the "propriety" of the freezing order granted under par. 5 of the October, 1997 order; second, the Judge's finding that Mr. Yamvrias had advanced no credible evidence of loss as the result of that freezing order.

29. As to the first ground, Mr. Gee submitted that the injunction was improperly granted by Mr. Justice Toulson by way of a "shortcut" method aimed at ensuring that one person (Mr. Yamvrias), against whom no cause of action had been established by Yukong, nonetheless pay to Yukong the debts of another person (Rendsburg) against whom liability had been established. That being so, Mr. Gee submitted that the order breached the principle that a freezing order "must be incidental to and dependent on the enforcement of a substantial right which usually, though not invariably, takes the shape of a cause of action": see *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.* [1993] 1 Lloyd's Rep. 291 at p. 306; [1993] A.C. 334 at p. 362 per Lord Mustill.

30. In this connection, Mr. Gee acknowledged that the Court has jurisdiction to grant a freezing order over someone against whom no direct cause of action lies, provided that the claim is "ancillary and incidental" to a cause of action the subject of proceedings against a defendant in respect of whom a cause of action is established; see *TSB v. Chabra* (above) per Lord Justice Mummery at pp. 241H–242A; *Mercantile Group (Europe) A.G. v. Aiyela*, [1994] Q.B. 366 per Lord Justice Hoffmann at p. 376C-E, Lord Justice Steyn at pp. 376F–377B and Sir Thomas Bingham, M.R. at p. 377C. However, Mr. Gee submitted that the Judge did not exercise, or at any rate should not be treated as having exercised, a "Chabra-type" jurisdiction in this case because (i) "the foundation" of the order was not Yukong's cause of action against Rendsburg, but the misconceived view (subsequently held by the Court of Appeal to be incorrect) that there was jurisdiction to make an order against Mr. Yamvrias personally to pay money into Court under par. 1 of the October, 1997 order. Mr. Gee submitted that this was evident from the provision in par. 5 that the freezing order should cease to have effect upon such payment into Court. (ii) Following the decision of the Court of Appeal on June 23, 1998 as to the meaning of par. 1 of the order, Yukong acknowledged the position in a fax to the solicitors for Mr. Yamvrias suggesting that "in the light of the decision of the Court of Appeal" the injunction should be discharged, as it subsequently was. (iii) The form of the order was in any event inappropriate to a *Chabra*-type order because it was completely general and indiscriminate in its effect over Mr. Yamvrias' assets rather than being aimed simply at the dissipation of the fund of U.S.$244,965 said to belong to Rendsburg.

31. As to the Judge's decision that the evidence placed before him was insufficient to warrant an inquiry as to damage, Mr. Gee limited his submissions to the damage alleged to have been suffered by Mr. Yamvrias under the heading "Contracts of Affreightment" in respect of which the Judge held there was no credible evidence of loss.

The relevant law

Inquiry as to damages

32. Whereas the usual practice in respect of interlocutory injunctions is not to order an inquiry into damages on the cross-undertaking until the merits of the action have been finally decided at trial, in cases where a *Mareva* injunction is involved, a defendant or other party bound in respect of whom the injunction is discharged at any stage may seek, and be granted, an inquiry into damages on the basis that, regardless of the ultimate merits of the action, the injunction was "wrongly

granted". That term is in my view preferable to "improperly obtained", because impropriety seems to me to carry connotations of improper conduct by the applicant, such as non-disclosure of material facts, whereas the term "wrongly granted" covers the far wider circumstances in which the injunction may be discharged and an inquiry ordered. In respect of those wider circumstances it is necessary, for the purposes of the argument in this case, to distinguish between the position where the order is attacked on the grounds that the Court lacked jurisdiction to make it and the position where the Court makes an order within its jurisdiction but which is subsequently demonstrated or conceded to have been too wide in its scope or unjustified or inappropriate on the facts.

33. Upon discharge of a *Mareva* injunction, the Court has a discretion whether or not to enforce the undertaking in damages. It may enforce it by a summary award of damages: see Practice Direction (*Mareva* and Anton Piller Orders: New Forms) [1994] 4 All E.R. 52 at p. 54, par. (4) of which requires consideration of such a remedy when the injunction is discharged on its return date. More usually, the Court, having exercised its discretion to enforce the undertaking, may order an inquiry as to damages. In appropriate cases it may adjourn the application to the trial or further order, as in *Cheltenham & Gloucester Building Society v. Ricketts*, [1993] 1 W.L.R. 1545. It may decide that the undertaking is not to be enforced. However, if it is established that the injunction was wrongly granted, albeit without fault on the plaintiff's part, the Court will ordinarily order an inquiry as to damages in any case where it appears that loss *may* have been caused as a result.

34. The question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged. The order for an inquiry as to damages is discretionary, such discretion being exercised in accordance with equitable principles, taking into account all the circumstances of the case, but bearing in mind that, since the injunction should not have been obtained, prima facie the plaintiff ought to bear the loss: see *Financiera Avenida S.A. v. Shiblaq, The Times* Jan. 14, 1991 (CA Civil Division). As observed by Lord Justice James in *Graham v. Campbell*, (1877) 7 Ch. D. 490 at p. 494, the undertaking ought to be given effect except under "special circumstances". Those special circumstances include the conduct of the injunctee at the time the injunction was obtained or later, see per Lord Diplock in *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State For Trade & Industry*, [1975] A.C. 295 at p. 361. However, while the principles referred to above have been enunciated as generally applicable to the exercise of the Court's discretion whether or not to order an inquiry as to damages, if the reason for the discharge of the injunction is that the Court lacked jurisdiction to make it in the first place, it is difficult to envisage any circumstances in which the Court would refuse to order an inquiry as to damages upon some evidence of loss: c.f. *Norwest Holst Civil Engineering Ltd. v. Polysius Ltd.*, *The Times*, July 23, 1987, where the Court held that, regardless of the merits of the substantive claim, the obtaining of *Mareva* relief had been misconceived in that it was clear that there was no substantial risk of dissipation of assets and the Court directed an inquiry even though the merits of the claim had not yet been decided.

35. So far as evidence of loss is concerned, upon an application for an inquiry, the applicant must adduce some credible evidence that he has suffered loss as the result of the making of the order. The Court will not order an inquiry if it appears to be pointless to do so because the intended claim for damage is plainly unsustainable. That may be because it is clear that the order is no more than the factual context for loss which would have been suffered regardless of the granting of the order, or it may equally be clear that the damage is too remote. However, at the stage of exercising its discretion whether to order an inquiry, the Court does not ordinarily hear protracted argument on whether the suggested loss will be recoverable. If the defendant shows that he has suffered loss which was prima facie or arguably caused by the order, then the evidential burden of any contention that the relevant loss would have been suffered regardless of the making of the order in practice passes to the defendant and an inquiry will be ordered: see for instance *Financiera Avenida S.A. v. Shiblaq* (above); *Tharros Shipping Co. Ltd. v. Bias Shipping Ltd.*, [1994] 1 Lloyd's Rep. 577.

36. The question of what is the appropriate test of "remoteness" in the context of a claim for damages on a cross-undertaking is a point which has not been fully explored in the English cases, as Lord Justice Neill pointed out in the *Cheltenham & Gloucester Building Society* case (above) at p. 1552C. He stated that, in exercising its equitable jurisdiction, the Court should adopt similar principles to those relevant in a claim for breach of contract, a test adopted by Mr. Justice Waller in the *Tharros Shipping* case (above). This test has recently been questioned by Mr. Justice Jacob in *R. v. Medicines Control Agency ex p. Smith & Nephew Pharmaceuticals Ltd.*, Ch.D. Mar. 26, 1999. However, it is not necessary to go into the niceties of that question for the purposes of deciding this appeal.

Jurisdiction

37. It is now settled law that, although the Court has no jurisdiction to grant an interlocutory *Mareva* injunction in favour of a plaintiff who has no good arguable cause of action against a sole defendant, it has power to grant such an injunction against a co-defendant against whom no direct cause of action lies, provided that the claim for the injunction is ancillary and incidental to the plaintiff's cause of action against that co-defendant: see *TSB v. Chabra* (above), a case in which it appeared that assets which beneficially belonged to Mr. Chabra were vested in a limited company of which he appeared to be the alter ego. Mr. Justice Mummery stated at [1992] 1 W.L.R. at p. 240:

> If the court has power to make an order against the company, the available evidence points strongly, in my view, to the need for an injunction against it. There is a good arguable case that some of the assets held in its name are the beneficial assets of Mr. Chabra either on the basis that the company holds them on trust for or as nominee for him, or on the basis that the company is nothing more than a convenient repository for Mr. Chabra's assets. It is therefore, important that any such assets should be available to the plaintiff to satisfy any judgment it may obtain against Mr. Chabra. If no injunction . . . , there is a real risk that it will dispose of assets so as to defeat the plaintiff's chances of satisfying the judgment that it may obtain. The effect of the company disposing of its assets would also be indirectly to reduce the value of any shareholding which Mr. Chabra had and may still have in the company. The disposal would have the direct effect of diminishing the prospects of any assets vested in the company which may be Mr. Chabra's beneficial assets, being available in the United Kingdom to meet the plaintiff's judgment.

That decision was subsequently expressly approved by the Court of Appeal in *Mercantile Group v. Aiyela* (above) in which Lord Justice Hoffmann stated at p. 376:

> In this case, the plaintiffs' substantive right is a judgment debt owed by Mr. Aiyela. The *Mareva* injunction against Mrs. Aiyela is incidental to and in aid of the enforcement of that right . . . *TSB Private Bank International S.A. v. Chabra* . . . was a case of a pre-judgment *Mareva*. . . . the plaintiff had a *Siskina* cause of action against Mr. Chabra and the injunction against the company was ancillary to that cause of action.
>
> Accordingly, I think that there was jurisdiction to grant the *Mareva* against Mrs. Aiyela, who did not need to be joined because she was already a party to the action.

See also per Lord Justice Steyn at pp. 1123G–1124A and per Sir Thomas Bingham, M.R. who stated at p. 1124E:

> Both principle and authority persuade me that the judges who made these orders did have jurisdiction to make them . . . I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient.

He added:

> . . . the jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. But that the jurisdiction exists . . . I do not doubt.

Was the injunction wrongly made?

38. Turning now to the question of jurisdiction, I consider that Mr. Justice Aikens was correct when he expressed himself satisfied that Mr. Justice Toulson was consciously exercising the Court's "*Chabra*-type" jurisdiction when imposing the *Mareva* injunction upon Mr. Yamvrias contained in par. 5 of the October, 1997 order. In the course of argument on Oct. 1, 1997, Mr. Justice Toulson had been referred both to the *Chabra* case and *Mercantile Group v. Aiyela* and, in my view, was plainly referring to the jurisdiction therein explained when making the observation in par. 29 of his judgment which I have quoted at par. 14 above.

39. Until that point in his judgment, Mr. Justice Toulson had been entirely concerned with arguments addressed to the question whether or not the order sought in par. 1 of the summons of Sept. 29, 1997 (see par. 12 above) was one which he could or should make in circumstances where Mr. Yamvrias had been held not to be personally liable on the cause of action brought against him in respect of which the *Mareva* relief against him had originally been granted. In that respect he stated:

> It is logical and just that if a court has jurisdiction to prohibit a party [i.e. Rendsburg] from acting in a way intended to make itself judgment-proof, so the court should be able to order that party to un-do measures taken with that object . . . .
>
> When an order is made against a company which is a party to an action, the court also has jurisdiction to make an order against an officer of a company, if that is necessary in order to secure compliance with the order by the company. In the present case, therefore, I am satisfied that I have the jurisdiction to make the order sought, and

indeed, Mr. Hamilton, Q.C. [for Mr. Yamvrias] has not submitted otherwise.

He then dealt with and dismissed a number of submissions by Mr. Hamilton by way of further objection to the form of order sought in the summons. These included a submission that the summons should be dismissed as premature because Yukong had not yet signed judgment against Rendsburg and did not wish to do so pending a decision whether or not to appeal against the Judge's dismissal of its claim against Mr. Yamvrias, and that it was inappropriate to make an order for immediate repayment of the funds paid away by Rendsburg if Yukong intended not to file judgment against Rendsburg but to pursue its claim against Mr. Yamvrias by way of appeal. The Judge held that the correct answer to that objection was to require an undertaking by Yukong that it would sign judgment against Rendsburg within 48 hours after it had complied with the order. So far as the order requested under par. 1 of Yukong's summons was concerned, which (with the wording slightly amended) became par. 1 of the October, 1997 order, Mr. Justice Toulson said:

> I will listen to any further arguments as to the precise form of wording, but I propose, subject to Yukong giving the undertaking to which I referred, to make an order that Rendsburg, by Mr. Yamvrias, cause the sum of U.S.$245,614 to be paid into an account to be specified within twenty-eight days unless within that period Rendsburg or Mr. Yamvrias apply to vary or set aside this order.

40. Having so dealt with the matter, the Judge turned to the question of whether or not the *Mareva* order already existing against Mr. Yamvrias should be discharged. He did so with the words I have already quoted at par. 14 above which I am satisfied make it clear that, in continuing the *Mareva* order against Mr. Yamvrias in reduced sum of U.S.$245,000, he did so by way of an order ancillary to Yukong's claim against Rendsburg, pending the signing of judgment against it.

41. When Lord Justice Waller, in giving leave to Mr. Yamvrias to appeal from the order of Mr. Justice Tuckey which had granted leave to Yukong to issue a writ of sequestration against Mr. Yamvrias, expressed his concern that the October, 1997 order was a "shortcut" in relation to the enforcement of a judgment against Rendsburg he was considering par. 1 of that order. It was that paragraph only which was the subject of the notice of motion for leave to sequestrate the assets of Mr. Yamvrias. Lord Justice Waller did not refer to, or apparently consider, the question of the Court's jurisdiction to make the freezing order set out in par. 5. Equally, at the substantive hearing of the appeal, Lord Justice Nourse gave no apparent consideration to the question of the Court's jurisdiction to make the freezing order. He simply echoed the concern of Lord Justice Waller about the jurisdiction of Mr. Justice Toulson, having dismissed the action as against Mr. Yamvrias, to make any order *for payment* against Mr. Yamvrias personally. The only reference which Lord Justice Nourse made to par. 5 of the October, 1997 order was in relation to the attempt of Counsel for Yukong to use par. 5 as an aid to the construction of par. 1, by submitting that, since par. 5 imposed a personal obligation on Mr. Yamvrias which continued until par. 1 had been complied with, it was indicative of an intention on the part of Mr. Justice Toulson to render Mr. Yamvrias personally liable to effect or procure the payment under par. 1. That argument was rejected by Lord Justice Nourse with the observation that par. 5 could only be relied on if there was any ambiguity in par. 1, which ambiguity did not exist in his view. That being so, I do not consider that Mr. Gee can derive support for his submissions that there was no jurisdiction to make the freezing order from any previous observations made in this Court.

42. Nor do I consider that Mr. Gee's position is improved by reason of the fact that, following the Court of Appeal decision, Yukong suggested that the injunction should be discharged. The effect of that decision was that Yukong had no entitlement, as it had supposed, to issue a writ of sequestration against Mr. Yamvrias under par. 1 of the October, 1997 order in respect of Rendsburg's failure to pay into Court the sum ordered. It was Yukong's case that, by then, it was clear that any attempts to trace assets through Mr. Yamvrias had proved hopeless and, in any event, the consequent consent order for discharge of the freezing order was expressly agreed to be without prejudice to the question of Mr. Yamvrias' entitlement to an inquiry as to damages.

43. Mr. Gee has submitted that the injunction should not be construed as having been made under the Court's *Chabra*-type jurisdiction because of the form in which it was made i.e. a form which applied generally to Mr. Yamvrias' assets up to the sum of U.S.$244,965, rather than being expressly limited to the proceeds of the U.S.$244,965 which had passed from Rendsburg's account to that of Ladidi and thereafter elsewhere. I do not accept that submission for two reasons. First, it seems to me that in a case such as this the answer to the question whether or not an order was made pursuant to a particular jurisdiction is prima facie to be determined by reference to the terms of the judgment, rather than the wording of the order. Where, a Judge makes clear (as Mr. Justice Toulson made clear in this case) that in making a particular order he is

exercising a particular jurisdiction, and at the same time he makes clear the factual assumptions and legal basis upon which he does so, then, unless, on appeal from that order, it is demonstrated that those assumptions were invalid or the legal basis incorrect, the order will ordinarily be assumed to have been regularly made in any subsequent proceedings. It may be appropriate to make an exception in a case where the wording of the order is manifestly inconsistent or at odds with the jurisdiction identified by the Judge; however, that is not this case. I say that because of the second reason, to which I now turn.

44. Although it is plain that the Court's *Chabra*-type of jurisdiction will only be exercised where there are grounds to believe that a co-defendant is in possession or control of assets to which the principal defendant is beneficially entitled, it does not seem to me that the jurisdiction is limited to cases where such assets can be specifically identified in the hands of the co-defendant. Once the Court is satisfied that there are such assets in the possession or control of the co-defendant, the jurisdiction exists to make a freezing order as ancillary and incidental to the claim against the principal defendant, although there is no direct cause of action against the co-defendant. Since the purpose of granting such an injunction against the co-defendant is to preserve the assets of the principal defendant so as to be available to meet a judgment against him, the form of order made against the co-defendant should be as specific as the circumstances permit in respect of the principal defendant's assets of which he has possession or control. Thus, generally, the form of injunction will be tailored to that purpose and should be no wider than is necessary to achieve it. However, subject to that requirement, if a co-defendant is mixed up in an attempt to make the principal defendant judgment-proof and the assets or their proceeds are not readily identifiable in his hands it is open to the Court, where it is just and convenient to do so, to make an order which catches the co-defendant's general assets up to the amount of the principal defendant's assets of which he appears to have possession and control. That was in fact the position in *TSB v. Chabra* itself. In that case, Mr. Chabra, the original defendant was alleged to be the alter ego of the co-defendant company against which the plaintiff had no direct cause of action, but in respect of which there was a good arguable case that assets vested in its name were in fact beneficially the property of Mr. Chabra, in particular the proceeds of sale of recently completed hotel and restaurant interests and the house in which Mr. and Mrs. Chabra lived. Because of the difficulty in ascertaining which assets of the company were in fact assets to which Mr. Chabra was beneficially entitled, the *Mareva* order made against the company was one which applied generally to prevent it from disposing or dealing with any of its assets within the jurisdiction, albeit it also covered "in particular" the proceeds of sale from the hotel and restaurant businesses. Mr. Justice Mummery observed at p. 242F:

> In brief, the most realistic and practical form of relief in this case is to restrain the company from disposing of, or dealing with, assets until it is established whether the plaintiff is entitled to a judgment against Mr. Chabra and until it is established which, if any, of the assets apparently vested in the company are available to satisfy any judgment obtained against Mr. Chabra.

45. In this case, at the time of the October, 1997 order, Mr. Yamvrias had failed to reveal what had happened to the U.S.$245,000-odd paid away by Rendsburg from its account with DNB save that U.S.$164,799 had been transferred to Ladidi and thence to VAL. He had failed to give any (or any credible) explanation of any consideration for or purpose behind the payments or who was the ultimate beneficiary. Mr. Justice Toulson was satisfied that Mr. Yamvrias was the controller of Rendsburg and Ladidi and the position of VAL and the reason for the transfer to it remained obscure. Mr. Justice Toulson expressed himself satisfied at trial that the sole purpose of the transfer to Ladidi (as the creature of Mr. Yamvrias) was to put Rendsburg's assets beyond the reach of Yukong and he stated that Mr. Yamvrias had "put up a cover story which has failed". As Mr. Justice Aikens observed at par. 29 of his judgment (see par. 23 above) Mr. Justice Toulson appears to have concluded that Mr. Yamvrias was still probably controlling assets to the extent of U.S.$245,000-odd which were beneficially owned by Rendsburg. In those circumstances, I consider that Mr. Justice Toulson was entitled to make the freezing order contained in par. 5 of the October, 1997 order in the form which he did.

46. Mr. Gee has advanced two principal arguments as to why the form of order was too wide. First, he submitted that the key reason in *TSB v. Chabra* for the wide wording of the order was an element absent in this case, namely the observation of Lord Justice Mummery that the effect of the company disposing of its assets would be indirectly to reduce the value of any shareholding which Mr. Chabra might have in the company, thus diminishing the prospects of company assets being available to meet a judgment against Mr. Chabra. I do not accept that submission. That observation of Mr. Justice Mummery was a makeweight observation supplementary to the reason of broad principle that there were assets of the company not currently identifiable which were beneficial assets of Mr.

Chabra which ought to be available to the plaintiff to satisfy any judgment it might obtain against him. Mr. Gee also pointed out that in the case of *Mercantile Group v. Aiyela*, there was present an important element not highlighted by the Court of Appeal, namely that there was before Mr. Justice Hobhouse at first instance, a potential claim by the plaintiffs against the original defendants under s.423 of the Insolvency Act, 1986 and the plaintiffs were also in a position to make application for leave for an order under s.424, in support of both of which claims the Court had jurisdiction to grant an ancillary *Mareva* relief. A reference to the decision of Mr. Justice Hobhouse at first instance [1993] F.S.R. 745, makes clear that that was not the basis upon which Mr. Justice Hobhouse made his order. In that respect, Mr. Justice Hobhouse observed:

> The *Mareva* is being used properly as ancillary relief in proceedings properly before the court and in conjunction with substantive rights being enforced in the proceedings. Mrs. Aiyella is a person who has become involved in what are to be assumed to be steps taken by Mr. Aiyella to defeat the course of justice. She thereby came under a duty to assist the course of justice. That duty gives the court the jurisdiction to grant an injunction against her . . . .

It was on that basis that the Court of Appeal upheld the judgment of Mr. Justice Hobhouse and approved the principle enunciated by Mr. Justice Mummery in *TSB v. Chabra* which he had applied.

47. Thus, I do not consider that the injunction was wrongly made in the sense argued for by Mr. Gee. Nonetheless, Mr. Justice Aikens held that, while the fact that the injunction was properly granted was an important feature in considering whether there should be an enquiry as to damages, it was not conclusive. He therefore proceeded to consider whether Mr. Yamvrias had demonstrated that he had personally suffered damage as a result of the October, 1997 order, having stated that, despite the "disreputable and devious behaviour" of Mr. Yamvrias, it was not so shocking as to debar him from claiming damages if he could demonstrate a credible claim in that respect. It was nonetheless a feature to be taken into account when assessing the credibility of evidence as to loss proffered on his behalf: see the passage of the judgment quoted at par. 27 above.

The contracts of affreightment scheme

48. The basis of the claim for damages in connection with this scheme was the assertion of Mr. Yamvrias, made in the witness statement of Mr. Soutar, that Captain Skarvelis had offered Mr. Yamvrias the opportunity to invest the sum of U.S.$100,000 in a scheme to charter Panamax vessels to fulfil contracts of affreightment which Captain Skarvelis' company Veritas had concluded to carry cargoes from Argentina. Mr. Yamvrias had indicated his intention to participate by a fax letter dated Oct. 17, 1997 signed by him on Marcan-headed paper and exhibited to Mr. Soutar's witness statement. The letter stated:

> I am interested to participate in the contracts of affreightment which you are negotiating on a 50/50 basis.
>
> If you accept above proposal, please confirm your agreement by return.

49. No further relevant correspondence was exhibited save (1) a telex of Mar. 16, 1998 from Marcan to the owners of one of the vessels concerned guaranteeing the obligations of Veritas under the charter-party; (2) a letter dated May 20, 1998 from Veritas to Mr. Yamvrias at Marcan Shipping, referring to the previous year's offer, and indicating that, had Mr. Yamvrias invested on a "50% participation", he would have realized almost U.S.$400,000. It offered him the chance again to participate by remittance of U.S.$100,000 by May 31, 1998. Mr. Soutar simply stated that Mr. Yamvrias had been unable to participate personally as an investor "because the injunction remained in force and he was unable to raise the required finance", that Mr. Yamvrias would have realized the profits set out in the letter from Captain Skarvelis; and that he could not accept the further invitation to invest contained in the subsequent letter because of the injunction which was still in force.

50. By a witness statement in answer, Mr. Moon, Yukong's solicitor, challenged the case put forward by Mr. Yamvrias and made the point that, if the business opportunities spoken to were genuine, there had been nothing to prevent Mr. Yamvrias from seeking Yukong's agreement, and/or to apply to the Court, to allow such investment. In this respect, the 28-day "liberty to apply" to vary the *Mareva* had not expired.

51. The Judge, having already examined in detail, and discredited, Mr. Yamvrias' claim in respect of the "Ever" vessels project (see pars. 24–25 above), dealt quite shortly with the contracts of affreightment he said:

> 45. I cannot accept there is credible evidence of loss to Mr. Yamvrias under this head. First, there is no credible evidence that Mr. Yamvrias was unable to go ahead with the project *on a personal basis* (by investing $100,000) other than the say-so of Mr. Soutar. If I am meant to read the fax of 17th October to Veritas as being an indication that Mr. Yamvrias wished to participate personally in the project, then it seems he thought he could do so at that stage. But on 17th

October 1997 the injunction restraining him from removing assets up to $244,965 was already in force. That did not stop him showing an interest. There is no contemporaneous evidence to indicate that he attempted to carry his personal interest further but was prevented because of the injunction.

46. Secondly there is no evidence that Mr. Yamvrias had $100,000 to invest, but was unable to use it because of the injunction. On the contrary, when Mr. Yamvrias filed evidence of his assets (pursuant to paragraph 2 of the Order of Waller J of 7 June 1996) he stated that he had no assets other than some equity in his home. There is no evidence that he had obtained further assets since June 1996 but was unable to utilise them because of the injunction of October 1997.

47. It seems much more likely that it was Marcan that was going to participate in the project and it did so. Hence the guarantee that Marcan gave in March 1998 to the owners of M.V. "*Spear*".

52. In my view, the decision of the Judge was entirely justifiable on the limited material before him, bearing in mind his reasons for cynicism as to the quality of the evidence advanced by or on behalf of Mr. Yamvrias in relation to his assets generally and to support the claim in respect of the "Ever" vessels project. The letter of Oct. 17, 1997 clearly indicated the view of Mr. Yamvrias that the injunction recently granted against him would, for whatever reason, present no obstacle to his investment and, without further explanation (which it did not receive) there was no reason to place credence upon his assertion that the injunction prevented him from investing. Nor was there any explanation why, if it did so, the application to set aside the injunction which Mr. Yamvrias made on Nov. 15, 1997 (see par. 16 above) was not proceeded with, at least to the extent of seeking a variation to permit the investment, but was dismissed on Dec. 18, 1997 with Mr. Yamvrias' consent. Nor, given Mr. Yamvrias' evidence as to his means, was it apparent where the money for the investment would come from. No evidence was supplied in that respect. The Judge did not touch upon the subsequent letter from Veritas dated May 20, 1998, setting out the quantum of his apparent loss and inviting further investment. No doubt he did not regard it as necessary to do so, once he had rejected the assertion that the injunction had prevented an investment being made.

53. In the light of the obvious difficulty in upsetting the finding of the Judge in this respect, Mr. Yamvrias made application at the hearing of this appeal that the Court should admit additional evidence to demonstrate why the Judge's conclusions were wrong, in the form of witness statements from Mr. Yamvrias and Captain Skarvelis. No explanation has been afforded by Mr. Yamvrias or by Mr. Gee on his behalf that the evidence sought to be adduced was not available and adduced below (c.f. *Ladd v. Marshall*, [1954] 1 W.L.R. 1489). However CPR 52.11(2), which now governs the admission of such evidence ("Unless it orders otherwise, the appeal court will not receive evidence which was not before a lower court") has freed the Court from the straitjacket of the "so-called rules" laid down in cases such as *Ladd v. Marshall*: see *Banks v. Cox*, (July 17, 2000, unreported) C.A. per Sir Andrew Morritt, V.C. In that decision, the Court adopted the statement of Lord Justice May in *Hickey v. Marks*, (July 6, 2000, unreported) C.A. that:

> Since the Civil Procedure Rules are a new procedural code, the former body of authority will not apply, although of course, the intrinsic persuasiveness of all relevant considerations, including, if they arise, those which were considered persuasive under the former procedure, will be capable of contributing to a just result.

Thus, it is plain, that while the Court will pay regard to the principles in *Ladd v. Marshall*, it will adopt a flexible approach in the light of the overriding objective. This was well illustrated in the approach of Lord Justice Auld in *Electra Private Equity Partners v. KPMG Peat Marwick*, [2000] P.N.L.R. 247 in relation to an appeal concerning new evidence in respect of an interim decision. While recognizing that "there should be some control over attempts by disappointed litigants to retrieve lost ground in interlocutory appeals by relying upon evidence which they could and should have put before the court below", he favoured an approach whereby the admission of further evidence would be "a matter for the Court's discretion, to be exercised according to the nature of the interlocutory hearing and the individual circumstances of the case". He stated that the Court might adopt a more relaxed approach in relation to applications at an early stage of the litigation where it might be unjust to expect a party (particularly a defendant) to have "all his tackle in order".

54. At the outset of the appeal, with the consent of Counsel, we read the further evidence "de bene esse", without prejudice to the objection of Mr. Collins, Q.C. on behalf of Yukong that it should not be admitted.

55. The points made by the further evidence are these. First, in relation to par. 47 of Mr. Justice Toulson's judgment (see par. 51 above), Mr. Yamvrias states that, while Marcan received benefit from the scheme in the form of substantial brokerage (in

which respect it acted as shipbroker and not investor) it did not invest in any other sense. He asserts that, even if so disposed, it could not do so, being authorized under the Regulations of the Baltic Exchange to act as a broker or agent only and not as a principal within the Baltic Market. That may or may not be so in the particular circumstances of Mr. Yamvrias' proposed investment. However it was peripheral to the Judge's reasoning as to whether Mr. Yamvrias had demonstrated personal loss. Second, so far as his assets are concerned, Mr. Yamvrias says that, if the injunction had not been in place, he would have been able to raise the money to make the investment by means of a bank loan backed by the equity in his house (jointly owned with his wife), then some £150,000. This carries the matter little further and fails to address the point which concerned the Judge, namely the absence of contemporaneous supporting evidence.

56. Third, the witness statement of Captain Scarvelis supplies a degree of chapter and verse in respect of the Contracts of Affreightment Scheme operated by Veritas. He affirms and exhibits a copy of the faxed letter of Oct. 17, 1997 and states that, shortly afterwards, Mr. Yamvrias advised him that he was unable to participate in the venture because he was involved in litigation which had resulted in a block on his assets preventing him from raising the necessary finance. He states that the first year of the scheme's operation was September, 1997 – June, 1998 and that it yielded substantial profits. He wrote again to Mr. Yamvrias on Sept. 23, 1998, advising him of the results and inviting him to participate in the second year of operation, due to commence on Oct. 1, 1998. Save in two vital respects the layout and content of the text of that letter are identical to the layout and text of the letter of May 20, 1998 earlier produced by Mr. Yamvrias. The two vital respects are (a) the date of the letters and (b) the fact that the final paragraph of the letter of Sept. 23 asks for a reply by Sept. 30, 1998 and a remittance of U.S.$100,000 by Oct. 15, 1998, whereas the letter of May 20, asks for a reply by May 31, 1998 with a remittance on that date.

57. In the face of these discrepancies, Mr. Collins submitted that it is plain that the date and text of the letter exhibited by Captain Scarvelis, rather than the date and text of the letter exhibited by Mr. Yamvrias, are authentic. The first year of operation had not been completed by May 20, whereas it had by the Sept. 23. This suggests ex post facto alteration by Mr. Yamvrias, not least because the figures shown for the first year's profits could not have been ready by May 20. Whether or not that was so, it is plain that Mr. Yamvrias was presented with the opportunity to invest in the second year of operation at a time (September, 1998) when he was free of the constraints of the injunction, it having been discharged by consent on Aug. 10, 1998 (see par. 19 above). Thus, his earlier assertion that the injunction prevented him from making the investment in the second year is wholly unsustainable. Mr. Gee did his best to argue, but failed to convince me, that this was not so. In my view the production by Captain Scarvelis of the letter of Sept. 23, 1998 would have confirmed and enhanced the Judge's view of the unreliability of Mr. Yamvrias' evidence, rather than assisting his case. Accordingly, whether by reference to the principles in *Ladd v. Marshall* or on the basis of the overriding objective in the individual circumstances of the case, I can see no sound reason to receive the further evidence sought to be adduced in this appeal.

58. I would therefore dismiss this appeal.

Lady Justice HALE: 59. I agree.

Lord Justice THORPE: 60. I also agree.

Z Ltd v A-Z and AA-LL [1982] Q.B. 558, 577E

Secretary of State, we were told, seeks guidance upon the use of the expressions "planning unit" and "a change in planning history." It is my firm opinion that the use of the former should be preserved and the guidance provided by Bridge J. in *Burdle's* case [1972] 1 W.L.R. 1207, 1212–1213, on its application, which obviously involves a study of the history of the use of the land in question, followed.

Appeal allowed with costs in Court of Appeal and below.
Matter remitted to Secretary of State under R.S.C., Ord. 94, r. 12 (5).

Solicitors: *Malkin Cullis & Sumption for Lamport Bassitt & Hiscock, Southampton; Treasury Solicitor.*

A. H. B.

[COURT OF APPEAL]

Z LTD. *v.* A-Z AND AA-LL

1981 Oct. 19, 20, 21, 22; Dec. 16 — Lord Denning M.R., Eveleigh and Kerr L.JJ.

Injunction—Interlocutory—Mareva injunction—Scope of order—Effect on banks and third parties with knowledge of order—Conditions — Whether breach of order contempt of court —Supreme Court Act 1981 (*c.* 54), *s.* 37 (3) [1]

The plaintiffs, an overseas company with their head office abroad and an office in London, were defrauded of some £2,000,000 by forged telexes and cables purporting to come from their head office authorising transfers of money to London for payments to alleged suppliers of goods. The moneys were believed to have been paid into accounts at various London banks. Before issue of a writ Bingham J. granted the plaintiffs *Mareva* injunctions against 36 defendants to stop any dealings with the assets, save in so far as they exceeded £2,000,000. The plaintiffs then issued a writ against the 36 defendants claiming damages for conspiracy to defraud against the first 17 defendants and orders against the remaining 19 defendants, including six clearing banks (the 31st to 36th defendants), for "specific discovery, interrogatories and injunctions all to preserve the subject matter of the action herein." On July 24, 1979, Webster J. made further *Mareva* injunctions against the first 17 defendants relating to their specified bank accounts and orders for interrogatories. Although a settlement was made of the plaintiffs' action, the clearing banks applied for leave to appeal from Webster J.'s order for the law regarding

[1] Supreme Court Act 1981, s. 37 (3): see post, p. 571C–D.

the position of innocent third parties who were served with notice of a *Mareva* injunction to be elucidated.

On the banks' application:—

Held, dismissing the application, (1) that the *Mareva* injunction was an established feature of English law which should be granted where it appeared likely that the plaintiff would recover judgment against the defendant for a certain or approximate sum and there were reasons to believe that the defendant had assets within the jurisdiction to meet the judgment, wholly or in part, but might deal with them so that they were not available or traceable when judgment was given against him (post, pp. 571B, E–F, 584A, 585F–G).

Dictum of Lord Denning M.R. in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273, C.A., applied.

Dictum of Ackner L.J. in *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923, 941–942, C.A., not followed.

(2) That a *Mareva* injunction operated in rem and took effect from the moment it was pronounced on every asset of the defendant which it covered; and that everyone with knowledge of the injunction had to do what he reasonably could to preserve the assets covered by the order and was guilty of contempt of court as an act of interference with the course of justice if he assisted in their disposal (post, pp. 572G–H, 573A, 584A, 586C–D).

Per curiam. (i) The words "otherwise deal with" in section 37 (3) of the Supreme Court Act 1981 should be given a wide meaning and not construed ejusdem generis with "removing from the jurisdiction" (post, pp. 571D, 584A, H).

(ii) The receipt by a bank of notice of a *Mareva* injunction affecting a customer's account may automatically revoke the customer's instructions regarding that account and make it unlawful for the bank to honour the customer's cheques (post, pp. 574A–B, 584A, 586C–D).

(iii) As a term of a *Mareva* injunction a plaintiff may be obliged to undertake to indemnify any third party affected by the order against all expenses reasonably incurred in complying with the order and all liabilities flowing from such compliance (post, pp. 575A–C, 584A, 586F).

Searose Ltd. v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894 and *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineralimport-export* [1981] 1 W.L.R. 1262 applied.

Per Kerr L.J. It is important that the *Mareva* injunction procedure should not be taken too far; let alone abused (post, p. 584D).

Per Eveleigh L.J. A defendant is not guilty of breach of an injunction unless he has had notice of it; a third party with notice should only be liable when he knows that what he is doing is a breach of the terms of the injunction; and, since mens rea based on knowledge of the quality of the act is necessary to constitute contempt of court in interfering with the course of justice, in the case of a bank or other corporate body it is necessary to show that the person to whom notice was given authorised the disposal of an asset, or knowing that a payment was likely to be made under an authority derived from him, deliberately refrained from taking steps to prevent it, before the corporation can be guilty of contempt of court (post, pp. 580B, C, 581E, 582G). It is particularly important to establish mens rea on the part of a bank when considering a breach of an injunction for a maximum sum (post, p. 582G–H).

Guidelines and directions for *Mareva* injunctions and their effect on banks and other third parties (post, pp. 574H—578A, 586F—593C).

Judgment of Webster J. affirmed.

The following cases are referred to in the judgments:

Abodi Mendi, The [1939] P. 178; [1939] 1 All E.R. 701, C.A.

Acrow (Automation) Ltd. v. *Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676; [1971] 3 All E.R. 1175, C.A.

Allen v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252; [1980] 2 All E.R. 502, C.A.

Anglo-Scottish Beet Sugar Corporation Ltd. v. *Spalding Urban District Council* [1937] 2 K.B. 607; [1937] 3 All E.R. 335.

Armstrong v. *Strain* [1952] 1 K.B. 232; [1952] 1 All E.R. 139, C.A.

Attorney-General v. *Times Newspapers Ltd.* [1974] A.C. 273; [1973] 3 W.L.R. 298; [1973] 3 All E.R. 54, H.L.(E.).

Bekhor (A. J.) & Co. Ltd. v. *Bilton* [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.

Butler's (Sir James) Case (1696) 2 Salk. 596.

Choice Investments Ltd. v. *Jeromnimon* [1981] Q.B. 149; [1981] 2 W.L.R. 80; [1981] 1 All E.R. 225, C.A.

Clipper Maritime Co. Ltd. of Monrovia v. *Mineralimportexport* [1981] 1 W.L.R. 1262; [1981] 3 All E.R. 664.

Davis v. *Barlow* (1911) 18 W.L.R. 239.

Denny, Mott & Dickson Ltd. v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265; [1944] 1 All E.R. 678, H.L.(Sc.).

Heatons Transport (St. Helens) Ltd. v. *Transport and General Workers' Union* [1973] A.C. 15; [1972] 3 W.L.R. 431; [1972] I.C.R. 308; [1972] 3 All E.R. 101, H.L.(E.).

Herbert's Case (1731) 3 P.Wms. 116.

Holtby v. *Hodgson* (1889) 24 Q.B.D. 103, C.A.

Hubbard v. *Woodfield* (1913) 57 S.J. 729.

Intraco Ltd. v. *Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256, C.A.

Iraqi Ministry of Defence v. *Arcepey Shipping Co. S.A.* [1981] Q.B. 65; [1980] 2 W.L.R. 488; [1980] 1 All E.R. 480.

Jarlinn, The [1965] 1 W.L.R. 1098; [1965] 3 All E.R. 36; [1965] 2 Lloyd's Rep. 191.

Kirby v. *Banks* (unreported), July 1, 1980; Court of Appeal (Civil Division) Transcript No. 624 of 1980, C.A.

Lampleigh v. *Brathwait* (1616) Hob. 105.

Lister & Co. v. *Stubbs* (1890) 45 Ch.D. 1, C.A.

Marengo v. *Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406, H.L.(E.).

Mathesis, The (1844) 2 Wm.Rob. 286.

Negocios Del Mar S.A. v. *Doric Shipping Corporation S.A. (The Assios)* [1979] 1 Lloyd's Rep. 331, C.A.

Power Curber International Ltd. v. *National Bank of Kuwait S.A.K.* [1981] 1 W.L.R. 1233; [1981] 3 All E.R. 607, C.A.

Rahman (Prince Abdul) bin Turki al Sudairy v. *Abu-Taha* [1980] 1 W.L.R. 1268; [1980] 3 All E.R. 409, C.A.

Rantzen v. *Rothschild* (1865) 13 L.T. 399.

Rasu Maritima S.A. v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina)* [1978] Q.B. 644; [1977] 3 W.L.R. 518; [1977] 3 All E.R. 324, C.A.

Reg. v. *Gray* [1900] 2 Q.B. 36.

Rekstin v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj* [1933] 1 K.B. 47, C.A.

Scott v. *Scott* [1913] A.C. 417, H.L.(E.).

Searose Ltd. v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894; [1981] 1 All E.R. 806.

Seaward v. *Paterson* [1897] 1 Ch. 545, North J. and C.A.

Seraglio, The (1885) 10 P.D. 120.

Smith v. *Day* (1882) 21 Ch.D. 421, C,A.

Wellesley (Lord) v. *Earl of Mornington* (1848) 11 Beav. 180.

The following additional cases were cited in argument:

A v. *C (Note)* [1981] Q.B. 956; [1981] 2 W.L.R. 629; [1980] 2 All E.R. 347.

A v. *C (No. 2) (Note)* [1981] Q.B. 961; [1981] 2 W.L.R. 634; [1981] 2 All E.R. 126.

Bakarim v. *Victoria P. Shipping Co. Ltd.* [1980] 2 Lloyd's Rep. 193.

Bankers Trust Co. v. *Shapira* [1980] 1 W.L.R. 1274; [1980] 3 All E.R. 353, C.A.

Barclay-Johnson v. *Yuill* [1980] 1 W.L.R. 1259; [1980] 3 All E.R. 190.

Beddow v. *Beddow* (1878) 9 Ch.D. 89.

Brydges v. *Brydges and Wood* [1909] P. 187, C.A.

Elliot v. *Klinger* [1967] 1 W.L.R. 1165; [1967] 3 All E.R. 141.

Etablissement Esefka International Anstalt v. *Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445, C.A.

Harbottle (R. D.) (Mercantile) Ltd. v. *National Westminster Bank Ltd.* [1978] Q.B. 146; [1977] 3 W.L.R. 752; [1977] 2 All E.R. 862.

Hirschorn v. *Evans (Barclays Bank Ltd., Garnishees)* [1938] 2 K.B. 801; [1938] 3 All E.R. 491, C.A.

Langley, Ex parte (1879) 13 Ch.D. 110, C.A.

Siskina (Owners of cargo lately laden on board) v. *Distos Compania Naviera S.A.* [1979] A.C. 210; [1977] 3 W.L.R. 818; [1977] 3 All E.R. 803, H.L.(E.).

Stancomb v. *Trowbridge Urban District Council* [1910] 2 Ch. 190.

Thorne Rural District Council v. *Bunting (No. 2)* [1972] 3 All E.R. 657; [1972] 3 All E.R. 1084, C.A.

APPLICATION for leave to appeal from Webster J.

On July 10, 1981, on the ex parte application of the plaintiffs, an overseas company wholly owned by a foreign government, and on their counsel undertaking, inter alia (1) to abide by any order the court might make as to damages in case the court should later consider the defendants had sustained any damage by reason of the order which the plaintiffs ought to pay, (2) to indemnify the 18th to 36th defendants against any costs which they should incur by reason of the order on a common fund basis if not agreed, (3) to issue a writ within three days, Bingham J. ordered (1) that the first 16 defendants permit the plaintiffs by one and not more than three servants or agents (of which one was to be a solicitor) to enter upon named premises and to remove therefrom all

books, documents, records and accounts relating to the plaintiffs, their business, undertaking and affairs; (2) that the first five and the ninth and 17th defendants be restrained and an injunction be granted restraining them from disposing of or removing from the jurisdiction or otherwise dealing with or parting with any of their assets within the jurisdiction save to the extent that their respective remaining free and unencumbered assets within the jurisdiction exceeded £2,148,457·17; (3) that the remaining defendants by themselves their servants or agents or otherwise howsoever be restrained and an injunction be granted restraining them from disposing of, dealing with or otherwise parting with any moneys emanating from the plaintiffs' bank accounts or with any chattels, property or other items of whatsoever kind purchased with the said moneys.

On July 13, 1981, the plaintiffs issued a writ against the 36 defendants, including as the 31st to 36th defendants, six clearing banks, the first five situated in England, claiming " damages against the first 17 defendants for conspiracy to defraud and for injunctions and further or other relief and against the 18th to 36th defendants (inclusive) for specific discovery, interrogatories and injunctions all to preserve the subject-matter of the action herein."

On July 24, 1981, in a reserved judgment delivered in open court after a hearing in chambers, Webster J. said that he was satisfied that the plaintiffs' affidavit evidence established a " very strong prima facie case of fraud against one or more of the defendants against whom conspiracy to defraud " was alleged. Since the majority of the defendants were admitted by the plaintiffs to be innocent of any wrongdoing the judge directed that the names of all the parties be not disclosed. Webster J., inter alia, made an order for interrogatories against six defendants, and varied the order of Bingham J. by making an order against seven defendants restraining them from dealing with any named bank account or with any asset held at the named branch; the seven defendants were restrained without leave of the court and until further order from " disposing of or removing from the jurisdiction or otherwise dealing with or parting in any manner whatsoever with any of their other respective assets within the jurisdiction save to the extent that their free and unencumbered assets within the jurisdiction exceed £2,148,457·17 "; and three of the banks were ordered " within 96 hours of receiving a written request from the plaintiffs' solicitors " to provide copies of defendants' bank accounts at named bank branches upon the plaintiffs undertaking not to use such accounts for any purpose other than the proceedings. Leave to appeal was refused to the 31st to 35th defendants.

The 31st to 36th defendants applied for leave to appeal against the judgment and order of Webster J.

The facts are stated in the judgment of Lord Denning M.R.

George Newman Q.C. and *Austin Allison* for the applicant banks. The banks are concerned to have a full juridical analysis of their obligations and responsibilities when they are given notice of a *Mareva* injunction which has been granted ex parte against a defendant. There is a prac-

tice of giving notice to a bank before the defendant is notified; and it is common practice for such injunctions to be framed to the maximum extent of the plaintiff's claim, in "the hallowed form." This poses problems which are unworkable for the banks who are given notice that all assets are frozen and have no idea of the nature and extent of the assets within the jurisdiction. Miscellaneous points arise on such matters as credit cards, joint accounts, etc.

In outline, (1) *Contempt.* (i) The banks accept that the *Mareva* injunction depends for its efficacy upon an immediate freeze, i.e., immediate upon notice to the bank. (ii) Banks are concerned to analyse the underlying basis which justifies immediate interference with their banking contract so that they can establish clearly their defence against any claim by their customer: *R. D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank Ltd.* [1978] Q.B. 146, 155G–H. (iii) If the underlying basis is that the customer's instruction is unlawful, then such illegality must stem from the law of contempt. Where, as is common, the bank receives notice before the customer knows of the injunction it is difficult to see into which category of contempt the occasion fits: see *Seward* v. *Paterson* [1897] 1 Ch. 545; *Marengo* v. *Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406 and *Scott* v. *Scott* [1913] A.C. 417, 456–459. Webster J. saw an answer in *Reg.* v. *Gray* [1900] 2 Q.B. 36, a very broad case. See also *Rantzen* v. *Rothschild* (1865) 13 L.T. 399 and *Davis* v. *Barlow* (1911) 18 W.L.R. 239. The answer may lie in the concept of agency and, or, of revocation. (iv) The customary form of notice is undesirably informal and is in stark contrast to the formalities required vis-à-vis a defendant, but a garnishee. There should be personal service in the ordinary case and the need for any other form of service should be made known to, and approved by, the judge. It is undesirable for notice to be given by telephone.

(2) *Maximum sum Marevas* are unworkable so far as banks are concerned. Either (a) banks should be given a dispensation from acting in accordance with the notice they have of a general freeze of all assets up to the maximum amount; or (b) the counts should return to the early practice of a total freeze; or (c) a freeze up to a maximum amount of any account or accounts held by the banks in the currency of that amount.

Any discrepancy between the currency of the maximum amount and that of account gives rise to problems unless guidelines are given on the lines of *Choice Investments Ltd.* v. *Jeromnimon* [1981] Q.B. 149.

(3) *Locating and Identifying Assets* involves costs and expense and questions of (a) the plaintiff's undertaking and (b) security for costs and expenses are raised. If the branch is specified in the order no location issue arises, but that should be the extent of the bank's obligation. If no branch is to be specified on an inquiry of other than of a specified bank is sought then it should be for the plaintiff to inform the judge what he wishes the bank to do and the nature of the inquiry obligation should appear on the face of the order.

The character of the *asset* covered by the order should be limited to "time, notice or demand deposits" in any currency. Unless the plaintiff can specify the assets with particularity, those such as bills in the course

of on hand for collection, safe custody items and the benefit of letters of credit or guarantees are not included in the inquiry obligation.

As to the *undertaking*, see *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894. At present it is too limited. There are policing costs and expenses incurred after ascertainment; and the undertaking instead of being limited to "costs" should say "all or any costs and expenses incurred and fees payable."

As to *security*, the burden should be on the plaintiff to show the exceptional circumstances why security should not be ordered. A personal undertaking by the plaintiff's solicitors would be adequate. Generally security is a matter for the discretion of the judge.

(4) *Ambulatory nature of Mareva injunctions.* There should be no obligation upon the bank to ascertain or freeze any asset coming into its possession after the date of notice of the order, save those which accrue to an account already located. There cannot be a continuing responsibility over accounts subsequently opened.

(5) *Joint Accounts* should not be caught by the injunction, as in garnishee proceedings: see *Hirschorn* v. *Evans* (*Barclays Bank Ltd., Garnishees*) [1938] 2 K.B. 801.

(6) *Orders permitting "Normal Living Expenses"* are, as presently made, completely unworkable by banks. It is suggested that the court should freeze the defendant's account but provide "save that the defendant shall be at liberty to open an account at—branch of—and transfer to and draw from that account £—per month."

(7) Webster J.'s view as to the special arrangements reflected in an order needed for *cheque guarantee cards and credit cards* is accepted although the debiting of the defendant's account by the bank clearly constitutes a disposition or dealing within the jurisdiction.

(8) *Letters of Credit* are to be treated as the Court of Appeal provided for bank guarantees (see *Intraco Ltd.* v. *Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256) namely the dealing by presentation of documents is not restrained but the proceeds are.

Since *Siskina* (*Owners of cargo lately laden on board*) v. *Distos Compania Naviera S.A.* [1979] A.C. 210 it is necessary to have a cause of action against a person before he is sued; unless there is a tracing order. So banks should not in the ordinary way be made parties to *Mareva* applications.

Some banks have no central index with no means of knowing particulars of their customers unless they circulate the branches. Banks take the view they have a confidential relationship with their customers. One has to see where the *Mareva* jurisdiction comes from and its development: see *Bankers Trust Co.* v. *Shapira* [1980] 1 W.L.R. 1274. *Mareva* relief has widened from those outside the jurisdiction to those within it and to the Divorce jurisdiction. The restraints which banks are asked to apply should be clear and limited to bank accounts. Assets other than deposits should be excluded. In making a *Mareva* order the court is ordering the defendant not to do something. The bank's position is that its customer has instructed it before the order is made. An injunction does not restrain a defendant until he is served and a bank should not

A be in a different position. As to the contempt jurisdiction, see *Rantzen* v. *Rothschild*, 13 L.T. 399, and *Davis* v. *Barlow*, 18 W.L.R. 239. A garnishee order nisi served on a bank operates in law as a revocation of the customer's instructions; it operates at once on the bank: see *per* Lord Hanworth M.R. in *Rekstin* v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj* [1933] 1 K.B. 47, 66, a very helpful case.

B [Reference was made to R.S.C., Ord. 29 and R.S.C., Ord. 42, r. 3 (" Date from which judgment or order takes effect ").]

It would be a complete answer for the bank to be able to say that a *Mareva* order countermanded the customer's order: see *Bowstead on Agency*, 14th ed. (1976), art. 134 (1) (*d*), p. 420 and American Law Institute, Restatement, Second Agency (1958), section 33, comment *a*, p. 116.

C The proper juristic foundation, without invoking the concepts of contempt or of aiding and abetting, is that once a bank has received notice of a *Mareva* injunction, its previous instructions from its customer are revoked.

If a bank knowingly disregards or disobeys a garnishee order nisi it is a contempt. A bank acts through its servants or agents: see *per* Warrington J. in *Stancomb* v. *Trowbridge Urban District Council* [1910] 2 Ch. 190, 194. *Holtby* v. *Hodgson* (1889) 24 Q.B.D. 103 gives valuable

D assistance. See also R.S.C., Ord. 45, r. 5 (" Enforcement of judgment to do or abstain from doing any act "). The House of Lords in *Marengo* v. *Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406 clearly approved *Seaward* v. *Paterson* [1897] 1 Ch. 545.

Applications for *Mareva* injunctions can be very urgent. Counsel and solicitors go to the judge with a draft order which should be initialled by

E the judge. Notice of an order must be proved " beyond reasonable doubt " to found a committal: *Ex parte Langley* (1879) 13 Ch.D. 110, 119. If notice is given by telephone, it should be followed at once by a copy of the order. Not all defendants to *Mareva* injunctions are rogues and banks are concerned to see that their business is conducted in accordance with established practice.

F As to (2), *Maximum Sum Marevas* (c) is preferable: a freeze up to a maximum amount of any account or accounts held by the bank. [Counsel handed in a suggested draft order.] The order should refer to the role of the bank.

Garnishee orders nisi do not bite on joint accounts which should not be caught by *Mareva* orders: see generally *per* Robert Goff J. in *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.* [1981] Q.B. 65, 70–72,

G *A* v. *C* (*Note*) [1981] Q.B. 956, 959–961 and *A* v. *C* (*No.* 2) (*Note*) [1981] Q.B. 961, 963. See also *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923 on ancillary orders such as discovery which should be sparingly used. Whether orders for disclosure can be made against banks depends on the existence of fraud which destroys the duty of confidentiality: see *per* Lord Denning M.R. in *Bankers Trust Co.* v. *Shapira*

H [1980] 1 W.L.R. 1274, 1282. It is wrong to make an order for discovery unless the person against whom it is made is made a party The procedure laid down in *Choice Investments Ltd.* v. *Jeromnimon* [1981] Q.B. 149 for garnishee orders can be adopted for accounts in different currencies.

On (3), *Locating and Specifying Assets,* there is no system whereby a bank when served with a *Mareva* order can tell whether the defendant customer is a beneficiary under a letter of credit. If banks are to obey an order of the court it should be made clear to them exactly what they have to do. *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894, 896, stresses the need for an " undertaking required of the plaintiff " as to costs. In many cases there is no inquiry as to whether a plaintiff is good for his undertaking and his solicitor should give a personal undertaking to provide security. The position of a legally aided plaintiff has to be considered.

The banks have assumed that a *Mareva* order was a freeze on their customer's assets which affected their freedom to carry out their contractual duties. If it amounts to arresting a debt it flies in the face of *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1. No juristic principle can be suggested for arresting a chose in action. Although it is against the law to commit a contempt, there is nothing unlawful in not complying with an order that is not yet binding on a defendant. To treat service on the bank as sufficient notice would appear to be contrary to R.S.C., Ord. 45, r. 7. R.S.C., Ord. 65, r. 4 provides for substituted service. There is no obligation on third parties to assist in the enforcement of orders of the court.

Any obligation of banks to disclose information about their customers' accounts can only be justified by an extension of the principle that once they have received notice of a *Mareva* order their obligations to their customers have been revoked so that they are obliged to see what assets they hold. Since *Prince Abdul Rahman bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268 there has been a tendency for *Mareva* orders to be sought without strict proof. It may be right to say that anything ancillary to the order revokes the corresponding duty to the customer. The court has no jurisdiction over anyone other than those properly brought before it: see *Brydges* v. *Brydges and Wood* [1909] P. 187 and *The Supreme Court Practice* 1982, vol. 2, para. 2006. In the face of the *Mareva* jurisdiction banks must be protected from complaints from their customers. It is of the greatest importance that banks and other parties affected by *Mareva* injunctions should as soon as possible be given precise notice of the terms of the order. The " hallowed form " order presents difficulties. Section 37 (1) (2) (3) of the Supreme Court Act 1981 assumes that the *Mareva* order is correct.

Assets commonly held by banks are (1) accounts (2) safe custody items including those held as security (3) bills of exchange (4) letters of credits (5) bonds and guarantees. A workable formula may have been devised for (1). As to (2) difficulties arise as to locations and nature; and if a *Mareva* order is intended to bite on safe custody items, specific reference should be made to them in the order. It should be made plain that so far as bank's inquiries and investigations are concerned they should not cover (3) bills of exchange (4) letters of credit or (5) bonds and guarantees.

As to (7) banks have an obligation to third parties under *cheque guarantee cards and credit cards* which should be honoured when properly used.

As to the court's jurisdiction to restrain third parties from aiding and abetting the breach of an injunction, *Hubbard* v. *Woodfield* (1913) 57 S.J. 729 goes further than *Seaward* v. *Paterson* [1897] 1 Ch. 545; but see *Elliot* v. *Klinger* [1967] 1 W.L.R. 1165. It is always difficult to distinguish jurisdictional and discretionary matters. Reliance is put on *Thorne Rural District Council* v. *Bunting* (*No.* 2) [1972] 3 All E.R. 657, 661; [1972] 3 All E.R. 1084, 1087, to show that banks are not bound to take any steps by reason of the law of contempt. The banks seek a firm understanding of what their obligations are.

Normally a plaintiff should be in a position to provide security which may be a matter for the discretion of the court: see *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894, 897. *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineralimportexport* [1981] 1 W.L.R. 1262 shows how the court considers the interests of third parties.

As to (5), banks are in a difficulty over joint accounts. A different position should not arise under a *Mareva* order than under a garnishee (see *Hirschorn* v. *Evans* (*Barclays Bank Ltd., Garnishees*) [1938] 2 K.B. 801). Partnership accounts present problems. Joint accounts should not be caught by *Mareva* injunctions unless the judge in the exercise of his discretion so directs.

Richard Slowe and *Philip Shepherd* for the plaintiffs. The banks' suggestions would interfere with the working of *Mareva* injunctions. The balance of the respective interest of plaintiffs, defendants and interested third parties has to be maintained. Banks should not be made a special case. The applicants are the main clearing banks and there are many other kinds of banks. If special rules are made to assist the applicant banks there may be less scrupulous third parties to take advantage of concession for their own or a defendant's benefit. Sympathy for the applicant banks' difficulties should be tempered with an element of civic duty reflecting their special position.

There are two stages of the *Mareva* order: (1) the ex parte application when the burden of proof and the risks must be on the plaintiff; (2) the return date when the burden of proof and the risks (of excessive restraint) shift to the defendant. Adverse effects on third parties should be reduced by the return date. [Counsel handed in a draft form of order.]

As to the plaintiff's duties on the ex parte application, the guidelines of *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] Q.B. 645, 668F–669E can now be extended to cover this developing jurisdiction. There are seven requirements. (i) Full and frank disclosure of (a) all relevant facts; (b) intention as to service on the defendant (*Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A.* (*The Assios*) [1979] 1 Lloyd's Rep. 331, 333); (c) intentions as to service on third parties also may be adversely affected (the *Clipper Maritime Co.* case [1981] 1 W.L.R. 1262); (d) intentions as to service on third parties to police the order, e.g., banks. As long as the court knows in advance on whom service is intended the actual date of service does not matter.

(ii) Particulars of claim must be given showing (a) a good arguable case (*Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan*

Gas Bumi Negara (*Government of Indonesia intervening*) (*Pertamina*) [1978] Q.B. 644); (b) a cause of action within the jurisdiction (the *Siskina* case [1979] A.C. 210); (c) any third party claims known to the plaintiff, e.g., a claim to title as in *Pertamina* [1978] Q.B. 644.

(iii) Prima facie evidence that the defendant has assets within the jurisdiction; or may shortly bring in assets when service must be delayed. The assets should if possible be specified (*Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894 and Webster J. in the present case) but that is usually difficult at that stage and is only important in relation to third parties.

(iv) A risk must be shown not only limited to the removal of assets out of the jurisdiction but also in a proper but probably rare case to the improper dissipation of assets within the jurisdiction: see *Kirby* v. *Banks* (unreported), July 1, 1980; Court of Appeal (Civil Division) Transcript No. 624 of 1980, which has been followed by Glidewell J. What Ackner L.J. said in *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923, 941–942, was obiter.

(v) An undertaking in damages (a) to the defendant and (b) to disclosed third parties. A bond or security may be required but cannot be enforced against a legally aided plaintiff unless he succeeds in his action: see *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252. The defendant and third parties will have a duty to mitigate: see *Smith* v. *Day* (1882) 21 Ch.D. 421.

(vi) An undertaking to pay the expenses in policing the order (*Prince Abdul Rahman bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273), but this may be in a limited or stated sum, should not require security, should not be required of the plaintiff's solicitors personally and may qualify as a legal aid disbursement.

(vii) An undertaking to serve the order forthwith. If service is by telephone or telex a proper copy of the order must be served as soon as possible on the defendant and third parties, and each must be told of the intention to serve the other and when service has been effected ((*The Assios*) [1979] 1 Lloyd's Rep. 331).

The defendant's duties are compliance and mitigation, by applying to discharge or vary and disclosing to the plaintiff the loss being caused.

If a third party is adversely affected by the order, provision may already have been made in the order and the loss should be mitigated either by telling the plaintiff or applying to the court: see *Bakarim* v. *Victoria P. Shipping Co. Ltd.* [1980] 2 Lloyd's Rep. 193.

If a third party is given notice to "police" an order he must comply with the terms of the order. Compliance is (a) not dependent on service on the defendant (b) required from the moment the order is made. Failure to comply would be abusing or perverting the course of justice and aiding a breach by the defendant who could not himself be committed if not served: see *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894; *Acrow* (*Automation*) *Ltd.* v. *Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676 and *Seaward* v. *Paterson* [1897] 1 Ch. 545.

If the third party is one of the major clearing banks or perhaps any large bank, problems arise. (a) the *search for the defendant's account*

should not be hindered by the absence of a central index. A company should not put the control of its affairs beyond reach (*Stancomb* v. *Trowbridge Urban District Council* [1910] 2 Ch. 190 and *Halsbury's Laws of England*, 4th ed., vol. 9 (1974), para. 53, note 3). But the order will normally only refer to certain accounts or branches; the plaintiff's solicitors can request a limited search if they have the judge's approval and so inform the bank; the cost to the plaintiffs of a full trawl could be limited to a specified sum; limited search does not absolve the bank from deliberate breach by another branch which knows of the order by chance; banks already have a "blacklist" system for credit cards and a *Mareva* order could be added to the blacklist. (b) *The identifying of assets other than current accounts* should not be excluded. The jurisdiction is too important to be truncated. (c) In a proper case there may be a specific order in relation to a *joint account* on which the defendant could be restrained from drawing and notice could be given to the other account signatories. (d) Injunctions should not restrain payment of banks' pre-existing liabilities (*Intraco Ltd.* v. *Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256). (e) *Cheque cards* can be met as under (d) and then the card called in. In the meantime the bank is in the same position as if the card had been stolen. (f) The order may provide that assets of the defendant be frozen up to the *maximum sum* specified in the order. (h) The *recovery of expenses* is a matter for the judge's discretion. (i) *Foreign currency accounts* are provided for by *Choice Investments Ltd.* v. *Jeromnimon* [1981] Q.B. 149.

For the protection of innocent third parties there should be a *return date* as soon as possible. The plaintiff must then show that the "risk" continues notwithstanding the defendant's presence in court. Perhaps courts should accept a defendant's assurance more readily than at present: see *Etablissement Esefka International Anstalt* v. *Central Bank of Nigeria* [1979] 1 Lloyd's Rep. 445. Following *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259 and *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923 it has been thought that the "risk" must be that assets will be transferred abroad but any dissipation to avoid the consequences of judgment should be restrained: section 37 (3) of the Supreme Court Act 1981; *Beddow* v. *Beddow* (1878) 9 Ch.D. 89 and see *Kirby* v. *Banks* (unreported), July 1, 1980; Court of Appeal (Civil Division) Transcript No. 624 of 1980.

It would seem that the court should restrain (1) any disposition or other act intended to reduce a defendant's ability to meet a judgment and (2) any disposition or other act which would have the same effect and which the court in its discretion considers it proper to restrain: compare section 37 of the Matrimonial Causes Act 1973. Every effort should be made on the return date to reduce any effect the order is having on third parties. The defendant then has all the vital information and should make full disclosure unless it will incriminate him: *Bankers Trust Co.* v. *Shapira* [1980] 1 W.L.R. 1274. Alternatively he may be cross-examined.

The reasoning behind the granting of a *Mareva* injunction preventing payment out of a defendant's banking account is that the payment would be an abuse of the process of the court. All parties notified of the injunction must take steps to see that the order is obeyed. The view

set out in the Restatement, Second, Agency, p. 116. See also *Bowstead on Agency*, 14th ed., art. 39, pp. 111–112. Any corporate body should be able to conduct its affairs so that its left hand knows what its right hand does. It is the banks' duty to perform their civic duties.

Newman Q.C. in reply. The banks are anxious to have the proper juristic basis of the *Mareva* injunction established. The ordinary form of the *Mareva* presents grave problems in banks. They want to know what they should do if faced with a *Mareva* which makes no mention of any branch of any bank. They seek guidance on what they should do in very difficult circumstances.

Cur. adv. vult.

December 16. The following judgments were read.

LORD DENNING M.R. In the cause list this case was concealed by letters of the alphabet. I will adopt a different device.

Ruritania is an imaginary country. The name was invented by Anthony Hope in his novel *The Prisoner of Zenda.* I will use it so as to conceal the identity of a real country and its people. There was a large company with its head office in Ruritania: and a London office here. It had its main banking account with a bank in Hentzau. Then some conspirators got to work to defraud the Ruritanian company. Telexes and cables were sent purporting to come from the company's head office in Ruritania. These authorised huge sums to be transferred from the company's bankers in Hentzau to London, and paid to suppliers of goods. The telexes and cables were forged. No goods had been supplied. The moneys went into the hands of the conspirators. The Ruritanian company was defrauded of £2,000,000. The moneys were believed to have been paid into divers accounts at various banks in London, and used to buy motor cars and other things. When the fraud was discovered, the Ruritanian company was anxious to trace the moneys into the various banking accounts, and also the goods. It was important that any dealings should be stopped before the conspirators knew that the fraud had been discovered. It was so urgent that, before issuing a writ, the Ruritanian company made application to the commercial judge seeking orders against any of those who might possibly have had a part in the fraud, and against any of the estate agents and solicitors who might, quite innocently, have taken part in the transfers, and against the banks who might still be holding any of the money. They went before the commercial judge, Bingham J., and got a *Mareva* injunction to stop any dealings with the assets, save in so far as they exceeded £2,000,000. This was followed immediately by a writ in which the Ruritanian company claimed damages against 17 defendants for conspiracy to defraud and against 18 defendants (including the five great clearing banks) for " specific discovery, interrogatories and injunctions all to preserve the subject matter of the action herein." The Ruritanian company got *Anton Piller* orders, and also orders for interrogatories. They also got *Mareva* injunctions against the first 17 defendants. By these means the Ruritanian company succeeded in recovering £1,000,000 out of the £2,000,000. Since then a settlement has been made by which the Ruritanian

company has recovered, we are told, a good deal of the balance. But the action has been kept alive because the five clearing banks desire the law to be elucidated. They want to know what is the position of innocent third parties, like themselves, when served with notice of a *Mareva* injunction. This has never been investigated before: and we are grateful to counsel for the assistance they have given.

As against the defendant

The *Mareva* injunction is now an established feature of English law. The principles applicable to it—as against the defendant—have been stated in numerous cases from 1975 to 1981. They have been given statutory force by section 37 (3) of the Supreme Court Act 1981, which says:

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

Those words " otherwise dealing with " are in my opinion to be given a wide meaning. They are not to be construed as ejusdem generis with " removing from the jurisdiction." They can be found in the parallel jurisdiction under section 32 (1) of the Matrimonial Causes Act 1965, now section 37 (2) of the Matrimonial Causes Act 1973. Giving them this wide meaning, they bear out what I said in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273:

> " So I would hold that a *Mareva* injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

Three weeks later in *Kirby* v. *Banks* (unreported), July 1, 1980; Court of Appeal (Civil Division) Transcript No. 624 of 1980, we applied that dictum in a case when a defendant was within the jurisdiction and there was a danger that he would dispose of £60,000—within the jurisdiction—in such a way as to be beyond the reach of the plaintiffs.

In view of that extension, it seems to me that the observations of Ackner L.J. in *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923, 941–942, are too restrictive. The *Mareva* jurisdiction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction.

Hitherto the cases and the statutes have been concerned primarily with the injunction against the defendant. Now we have to consider the position of the banks or other innocent third parties who hold the assets.

The nature of the problem

To show the nature of the problem I will take the type of case which first came before the courts. A shipowner is owed £10,000 by a foreign company. He knows that that company has an account at a London bank. He is fearful that the foreign company will remove its money and not pay him. He issues a writ against the foreign company claiming the money, but he cannot serve it because it is out of the jurisdiction and it will take a long time. He goes to the court and gets a *Mareva* injunction against the foreign company restraining it from disposing of its assets. He notifies the bank. The bank, on receiving that notification, freezes the foreign company's bank account. It remains frozen until the foreign company pays up—or the action is tried.

What is the justification of the bank for freezing the bank account? The bank is not a party to the action. No order has been made by the court upon the bank: see *Marengo* v. *Daily Sketch and Sunday Graphic Ltd.* [1948] 1 All E.R. 406. No authority was given by the customer for his account to be frozen. What right has the bank to freeze it? On what principle is the bank justified in freezing their customer's bank account?

A simple type of case

Take a case where the *Mareva* injunction is served on the defendant restraining him from disposing of his assets in his account at a named bank. The plaintiff notifies the bank of the injunction. But the defendant, then in breach of the injunction, draws a cheque in favour of a tradesman. The defendant is clearly guilty of a contempt of court. If the bank should honour the cheque, it would be guilty of aiding and abetting the contempt of the defendant: see *Seaward* v. *Paterson* [1897] 1 Ch. 545 and *Acrow (Automation) Ltd.* v. *Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676, 1682.

A usual type of case

Next take a case—a very usual case—where the *Mareva* injunction is not served on the defendant at the outset. He may be out of the jurisdiction or away from home, or simply not available. So the plaintiff simply gives notice to the bank of the injunction. Sometimes the plaintiff deliberately delays serving the defendant: because the defendant, on being served himself, would whisk the money away before the bank had notice of it. In such cases the defendant, not having been served, is not guilty of a contempt himself. So the bank cannot be guilty of aiding and abetting.

What then is the principle? It seems to me to be this. As soon as the judge makes his order for a *Mareva* injunction restraining the defendant from disposing of his assets, the order takes effect at the very moment that it is pronounced: see R.S.C., Ord. 42, r. 3 (1), and *Holtby* v. *Hodgson* (1889) 24 Q.B.D. 103, 107. Even though the order has not then been drawn up—even though it has not then been served on the defendant—it has immediate effect on every asset of the defendant covered by the injunction. Every person who has knowledge of it must do what he reasonably can to preserve the asset. He must not assist in any way in the disposal of it. Otherwise he is guilty of a contempt of court.

Operation in rem

The reason is because a *Mareva* injunction is a method of attaching the asset itself. It operates in rem just as the arrest of a ship does. Just as a debtor gets the ship released on giving security, so does the debtor get an aircraft released (see *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252, 1256), or any other asset. This concept of the *Mareva*—as operating in rem—is in full accord with the historical and comparative survey which I described in *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia intervening) (Pertamina)* [1978] Q.B. 644, 657–658. It operates just as the process of foreign attachment used to do in the City of London, and still does in the United States of America. It operates so as to attach any effects of the defendant, whether money or goods, to be found within the jurisdiction of the court. Under the name of " saisie conservatoire " it is applied universally on the continent of Europe. It enables the seizure of assets so as to preserve them for the benefit of the creditor: but not to give a charge in favour of any particular creditor.

Arrest of a ship

Such being the nature of a *Mareva* injunction, it is appropriate that the law of contempt should apply to it in the same way as it does to the arrest in rem of a ship. In the case of a ship, once the warrant of arrest is issued and notice of it is given by telephone or any other way to the master of the ship, then any movement of the ship by the master or anyone else is " a great and grievous offence, and one which rendered him amenable to the attachment of the court ": see *The Mathesis* (1844) 2 Wm.Rob. 286, 288, *per* Dr. Lushington; *The Seraglio* (1885) 10 P.D. 120, 121, *per* Sir James Hannen P. on the ground that it is a contempt of court; *The Abodi Mendi* [1939] P. 178, 194, *per* Scott L.J. and *The Jarlinn* [1965] 1 W.L.R. 1098.

Arrest of a bank account

So also here, once a bank is given notice of a *Mareva* injunction affecting goods or money in its hands, it must not dispose of them itself, nor allow the defendant or anyone else to do so—except by the authority of the court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of court. For it is an act calculated to obstruct the course of justice: see *Reg.* v. *Gray* [1900] 2 Q.B. 36, 40, *per* Lord Russell of Killowen C.J.

No new law

This is no new law. Long ago in 1693, when a stranger interfered with the operation of an award, it was held in *Sir James Butler's Case* (1696) 2 Salk. 596:

> " It is contempt of the court, and an attachment shall be granted; for it shall not be in anyone's power to defeat the rules of this court, or render them ineffectual."

The same principle is illustrated in *Rantzen* v. *Rothschild* (1865) 13 L.T. 399; *Davis* v. *Barlow* (1911) 18 W.L.R. 238 and *Hubbard* v. *Woodfield* (1913) 57 S.J. 729.

The bank's defence

You may ask: Suppose the defendant sued the bank for dishonouring a cheque, what would be the answer of the bank? In my opinion the *Mareva* injunction makes it unlawful for the bank to honour the cheque. "It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done": see *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [1944] A.C. 265, 272, *per* Lord Macmillan. Alternatively, it can be said that the customer has only authorised the bank to do what it is lawful for the bank to do—and not that which is unlawful—so that any prior mandate from the customer is automatically annulled when the bank receives notice of the *Mareva* injunction: see *Restatement, Second, Agency* (1958), section 33, Comment *a* p. 116 and *Bowstead on Agency*, 14th ed. (1976), art. 134 (1) (d), p. 420.

The juristic principle

The juristic principle is therefore this: As soon as the bank is given notice of the *Mareva* injunction, it must freeze the defendant's bank account. It must not allow any drawings to be made on it, neither by cheques drawn before the injunction nor by those drawn after it. The reason is because, if it allowed any such drawings, it would be obstructing the course of justice—as prescribed by the court which granted the injunction—and it would be guilty of a contempt of court.

I have confined my observations to banks and bank accounts. But the same applies to any specific asset held by a bank for safe custody on behalf of the defendant. Be it jewellery, stamps, or anything else. And to any other person who holds any other asset of the defendant. If the asset is covered by the terms of the *Mareva* injunction, that other person must not hand it over to the defendant or do anything to enable him to dispose of it. He must hold it pending further order.

The injunction does not prevent payment under a letter of credit or under a bank guarantee (see *Intraco Ltd.* v. *Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256 and *Power Curber International Ltd.* v. *National Bank of Kuwait S.A.K.* [1981] 1 W.L.R. 1233); but it may apply to the proceeds as and when received by or for the defendant. It does not apply to a credit card. The bank must honour all credit cards issued to the defendant and used by him, except when they have been used fraudulently or wrongly. It can debit the amount against the customer's account.

The things which follow

Such being the juristic principle, some things necessarily follow in justice to the bank or other innocent third party who is given notice of the *Mareva* injunction or knows of it.

First, indemnity

In so far as the bank, or other innocent third party, is asked to take any action—or the circumstances require him to take any action—and he is put to expense on that account, he is entitled to be recouped by the plaintiff: and in so far as he is exposed to any liability, he is entitled to be indemnified by the plaintiff. This is because when the plaintiff gives notice of the injunction to the bank or innocent third party, he impliedly requests them to freeze the account or otherwise do whatever is necessary or reasonable to secure the observance of the injunction. This implied request gives rise to an implied promise to recoup any expense and to indemnify against any liability; see the notes to *Lampleigh* v. *Brathwait* (1616) Hob. 105 in *Smith's Leading Cases*, 13th ed. (1929), vol. 1, p. 148. In addition, in support of this implied promise, so as to ease the mind of the third party, the judge, when he grants the injunction, may require the plaintiff to give an undertaking in such terms as to secure that the bank or other innocent third party does not suffer in any way by having to assist and support the course of justice prescribed by the injunction. Such as was done by Robert Goff J. in *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894 and *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineral-importexport* [1981] 1 W.L.R. 1262.

Secondly, precise notice

The bank, or other innocent third party, should be told, with as much certainty as possible, what he is to do or not to do. The plaintiff will, no doubt, obtain his *Mareva* injunction *against the defendant* in wide terms so as to prevent the defendant disposing, not only of any named asset, but also of any other asset he has within the jurisdiction. The plaintiff does this because he often does not know in advance exactly what assets the defendant has or where they are situate. But, when the plaintiff gives notice to the bank or other innocent third party, then he should identify the bank account by specifying the branch and heading of the account and any other asset of the defendant " with as much precision as is reasonably practicable ": see *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894, 897C.

Thirdly, search

If the plaintiff cannot identify the bank account or other asset with precision, he may request the bank or other innocent third party to conduct a search so as to see whether he holds any asset of the defendant, provided that he undertakes to pay the costs of the search: see *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894, 896F–G, 897F–G. He may, for example, ask the bank to search the accounts of its branches in inner London to see if the defendant has an account at any of them. The bank may not tell the plaintiff the result of the search, lest it breaks the confidence of the customer. But, if it finds that the defendant has an account, it will freeze it for its own protection: so that it will not be in contempt of court. We are told that in one case the Inland Revenue requested the bank to make a " trawl " of all its branches to see if the defendant had an

account at any of them. The bank could not be expected to do this, except on the footing that all the expense was to be paid by the plaintiff.

Fourthly, tell the judge

In view of the impact of the *Mareva* injunction on banks and other innocent third parties, it is desirable that the judge should be told on the application the names of the banks and third parties to whom it is proposed to give notice: but it should not preclude the plaintiff from giving notice to others on further information being obtained.

Fifthly, maximum amount

When we first granted *Mareva* injunctions, we did not insert any maximum amount. But nowadays it has become usual to insert the maximum amount to be restrained. The maximum amount is the sum claimed by the plaintiff from the defendant. This is done in case it should be that the defendant has assets which exceed the amount of the plaintiff's claim. If such should be the case, it is not thought right to restrain him from dealing with the excess. That is all very well so far as the defendant is concerned, because he knows, or should know, the value of his assets. But it is completely unworkable so far as the bank or other innocent third party is concerned: because it does not know what other assets the defendant may have or their value.

What then is to be done? In some cases the best course may be to omit the maximum amount altogether: and to make the injunction comprehensive against all the assets of the defendant, as we used to do. This would cause the defendant little inconvenience. Because he could come along at once to the court and ask for the excess to be released—by disclosing the whereabouts of his assets and the extent of them. If he chooses not to do so, it would be because he knows there is no excess. If notice is given to a bank or other third party, they know that they must not deal with any of the assets of the defendant.

In other cases, however, it may still be desirable to insert a maximum amount in the general injunction as against the defendant himself. But, as this is unworkable against a bank, it would at the same time be desirable to add a special injunction restraining the defendant from disposing of any of the sums standing to the credit of the defendant in a specified bank account in excess of the maximum: or from disposing of any item deposited with the specified bank for safe custody. The reason being that every bank or other innocent third party should know exactly what it should or should not do.

Sixthly, normal living expenses

Likewise, if in any case it is thought desirable to allow the defendant to have the use of sums for "normal living expenses," or such like, the injunction should specify the sums as figures: without saying what they are to be used for. The bank should not be required to inquire what use is to be made of them. A special account should be opened for such sums.

Seventhly, joint account

If it is thought that the defendant may have moneys in a joint account, with others, the injunction shall be framed in terms wide enough to cover the joint account—if the judge thinks it desirable for the protection of the plaintiff.

Eighthly, return day

When granting a *Mareva* injunction ex parte, the court may sometimes think it right only to grant it for a few days until the defendant and the bank or other innocent third party can be heard. The injunction is such a serious matter for all concerned that all of them should be given the earliest possible opportunity of being heard. The plaintiff will, of course, in his own interest, give notice to the bank or other innocent third parties at once—either by telephone or telex—and he must follow it up immediately by a written confirmation to be delivered by hand or earliest means. The notice should set out the terms of the injunction, and request that it be observed. The plaintiff should also serve the defendant straight away so that he can apply to discharge it if so advised: see *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A.* [1979] 1 Lloyd's Rep. 331. But in other cases where service on the defendant is not immediately practicable, for some reason or another, the return day could be later.

Ninthly, undertakings

The plaintiff who seeks a *Mareva* injunction should normally give an undertaking in damages to the defendant, and also an undertaking to a bank or other innocent third party to pay any expenses reasonably incurred by them. The judge may, or may not, require a bond or other security to support this undertaking: but this may not be insisted on when the plaintiff is legally-aided: see *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252. But the undertakings only cover damages or expenses reasonably incurred. If the defendant or third party could have reduced it by taking reasonable steps, it is his duty to do so: see *Smith* v. *Day* (1882) 21 Ch.D. 421 and *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252, 1256F–H.

Tenthly, discovery

In order to make a *Mareva* injunction fully effective, it is very desirable that the defendant should be required in a proper case to make discovery. If he comes on the return day and says that he has ample assets to meet the claim, he ought to specify them. Otherwise his refusal to disclose them will go to show that he is really evading payment. There is ample power in the court to order discovery: see *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] Q.B. 923. I am sorry that the majority of the court there reversed Parker J. and differed from Griffiths L.J., but it was only on the special facts. I see that the Report of the Committee on the Enforcement of Judgment Debts (1969) (Cmnd. 3909), paragraph 1253, recommended a reform of the law on the lines now embraced by the *Mareva* injunction, and added, in paragraph 1255 (v):

"There should be power to order the attendance of the debtor at court and, if need be, to detain him until he has disclosed the whereabouts of the property and lodged it in safe keeping, or otherwise given security as approved by the court." A

In lieu of his attendance, it might be a good thing to order him to make discovery on affidavit.

B

Conclusion

I trust that in this judgment we have set out sufficient guidelines for the banks and other third parties who have notice of *Mareva* injunctions. Mr. Newman submitted to us a draft order for our consideration. But each case depends much on its own circumstances and its own difficulties. So much so that counsel experienced in these matters should draft an appropriate order himself and submit it to the judge. C

EVELEIGH L.J. As was recognised early in the arguments before us in determining what action is called for by a bank which has notice of the terms of a *Mareva* injunction it is necessary to determine the basis of liability for contempt of court.

I think that the following propositions may be stated as to the consequences which ensue when there are acts or omissions which are contrary to the terms of an injunction. (1) The person against whom the order is made will be liable for contempt of court if he acts in breach of the order after having notice of it. (2) A third party will also be liable if he knowingly assists in the breach, that is to say if knowing the terms of the injunction he wilfully assists the person to whom it was directed to disobey it. This will be so whether or not the person enjoined has had notice of the injunction. D E

The first proposition is clear enough. As to the second, however, it was submitted that until the defendant had notice of the injunction nothing done by the bank could amount to contempt of court. Also two opposing views were canvassed (I use this expression as the arguments were not strictly contentious) as to the extent to which mens rea was a necessary ingredient in determining the bank's responsibility to the court. F

I will give my reasons for the second proposition and take first the question of prior notice to the defendant. It was argued that the liability of a third party arose because he was treated as aiding and abetting the defendant (i.e. he was an accessory) and as the defendant could himself not be in breach unless he had notice it followed that there was no offence to which the third party could be an accessory. In my opinion this argument misunderstands the true nature of the liability of the third party. He is liable for contempt of court committed by himself. It is true that his conduct may very often be seen as possessing a dual character of contempt of court by himself and aiding and abetting the contempt by another, but the conduct will always amount to contempt of court by himself. It will be conduct which knowingly interferes with the administration of justice by causing the order of the court to be thwarted. G H

In *Seaward* v. *Paterson* [1897] 1 Ch. 545, 555, Lindley L.J. said:

A "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded B against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case the court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the court has been contumaciously set at naught the offender cannot square it C with the person who has obtained the order and save himself from the consequences of his act."

Mens rea

In some kinds of contempt it is well established that no element of mens rea need be shown, for example an interference with the protective D power of the court in dealing with a ward of court: see *Herbert's Case* (1731) 3 P.Wms. 116 where a parson who performed a marriage ceremony for a ward of court sought to say that he did not know that the husband was a ward of court. Sir Joseph Jekyll M.R. said, at p. 118: "If actual notice of the infant's being a ward of court were necessary, then these offences would be continually practised with impunity . . ."

However, contempt of court may take a wide variety of forms and the E fact that it is regarded as an absolute offence in one form does not necessarily require it to be so treated in another form. It is very much a matter of public policy. In *Attorney-General* v. *Times Newspapers Ltd.* [1974] A.C. 273, 308, Lord Diplock said:

F "no sufficient public interest is served by punishing the offender if the only person for whose benefit the order was made chooses not to insist on its enforcement."

I do not regard those words as saying that the court should ignore the fact that there has been a wilful disobedience of its order, but they emphasise the importance of the general public interest which exists in so many forms of contempt. It does not seem to me to be in the public interest that a person with no wrongful intent should be brought before the court, G let alone be punished, unless there is some overriding public interest to the contrary. Recognition for this argument is to be found in the Contempt of Court Act 1981 which limits the scope of strict liability in relation to contempt of court as tending to interfere with the course of justice in particular legal proceedings.

The defendant himself is not guilty of breach of the injunction if he H has not had notice of it. In the case of a defendant corporation, the old R.S.C., Ord. 42, r. 31, provided for enforcement of any judgment or order against a corporation "wilfully disobeyed." When the rules were changed, different phraseology was employed and there is no mention of the word

" wilful " in R.S.C., Ord. 45, r. 5. Lord Wilberforce remarked in *Heatons Transport (St. Helens) Ltd.* v. *Transport and General Workers' Union* [1973] A.C. 15, 109, that the omission of the word " wilful " can scarcely assist the defendant. Nonetheless there has been no change in the law in relation to the liability of the third party and it would seem odd if at a time when R.S.C., Ord. 42 prevailed the rules were requiring a lower standard of responsibility from a defendant or, to put it another way, a higher degree of mens rea from a defendant than from a third party. In my opinion a third party with notice of the terms of an injunction should only be liable when he knows that what he is doing is a breach of the terms of that injunction. In 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. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation is said to be acting knowingly.

Before I turn to that matter I would first refer to *Seaward* v. *Paterson* [1897] 1 Ch. 545 as authority for my conclusion that mens rea based on knowledge of the quality of the act done (that is of it being contrary to the injunction) is necessary where contravention of the terms of an injunction by a third party is involved. In that case the defendant was held to be in breach of an injunction by permitting boxing matches upon his premises. One Shepherd was the Master of Ceremonies. One Murray was present and was held to be not a mere spectator but one of the persons interested in the club for which the premises were used. North J. referred, at p. 550, to the acts of Paterson which constituted the breach of the injunction saying that they " were a contempt of court by him, and by everyone who was present and knowingly assisted him in what he did." After referring to *Lord Wellesley* v. *Earl of Mornington* (1848) 11 Beav. 180, he said, at p. 551:

> " That is a clear decision that a person who knowingly assists another who is restrained by an injunction in doing acts in breach of the injunction is liable to committal for contempt, although the order for an injunction was made in an action to which he was not a party."

I think it is clear from the judgments in the Court of Appeal that the conduct of the other two respondents was regarded from the standpoint of interference with the course of justice, rather than simply that of aiding and abetting another to do an act which was wrongful in that other as being a disobedience by him of a court order. Lindley L.J. said, at p. 554:

> " He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice."

The same principle emerges from the passage at p. 555 which I have already quoted. A. L. Smith L.J. said, at p. 557–558:

A "But in this case there is evidence which clearly proves that Murray was not there as a mere spectator only, but that he was there aiding and abetting in a breach of the injunction which he knew had been granted, and which he flagrantly disobeyed."

I appreciate that on the facts of that case the two respondents clearly knew that they were acting in breach of the injunction and some of the B passages in which the word "knowingly" appears can be regarded as emphasing the enormity of the contempt. The case as a whole, however, in my opinion is to be read as though knowledge is an essential ingredient in proving the contempt. Moreover, emphasising, as it does, that interference with the course of justice is the basis for contempt in such cases, the decision supports the view that there is no need for the defendant himself to have had notice of the injunction before the third party can be guilty of C contempt.

I now turn to the question as to how knowledge may be established when it is sought to attach a corporation for contempt. Where a servant acting in the course of his employment knowingly assists in the breach of the terms of the injunction, the employer corporation will be responsible on grounds of vicarious liability. This will be so whether the contempt is D regarded as a criminal contempt and not simply civil contempt. The argument as to which kind of contempt it is (see *Scott* v. *Scott* [1913] A.C. 417) need not arise.

What is the position, however, when a bank clerk who has no notice of the terms of an injunction pays out on a cheque after notice of an injunction freezing the account has been given to another person employed by the company? The position could be said to depend upon the status E of the person receiving the notice and the relationship between him and the person making the payment. In my opinion, however, in all cases it should be necessary to show that the person to whom notice was given authorised the payment or, knowing that the payment was likely to be made under a general authority derived from him, deliberately refrained from taking any steps to prevent it. I do not think that it should be F possible to add together the innocent state of mind of two or more servants of the corporation in order to produce guilty knowledge on the part of the corporation. In my opinion the principle applied in *Armstrong* v. *Strain* [1952] 1 K.B. 232 is applicable to a case of contempt of court in assisting in a breach of an injunction. The strong criminal element in such a case, i.e. interfering with the course of justice, and consequently the need to prove mens rea calls for the application of this principle.

G In *Armstrong* v. *Strain* a representation innocently made by the agent was false to the knowledge of the principal who was unaware that the statement was being made. The making of the statement is an act which finds its parallel in our case with the act of cashing the cheque. The fact that the defendant in *Armstrong* v. *Strain* was an individual and that the H case was not one of master and servant does not affect the principle to be applied. The Court of Appeal specifically approved the judgment of Atkinson J. in *Anglo-Scottish Beet Sugar Corporation Ltd.* v. *Spalding Urban District Council* [1937] 2 K.B. 607. The plaintiffs' managing director

negotiated a new contract with the water authority at a lower price than the previous contract. The commercial manager at Nottingham and the factory manager at Spalding, unaware of the new terms, paid the water account at the old rate. It was held that the payments were made under a mistake of fact although the managing director knew of the existence of the second contract yet he was not aware that it was not being acted upon. In the course of his judgment Atkinson J. made a reference to cases of fraud. He said, at p. 621:

> "Mere knowledge of facts can never in itself be guilty. The word 'guilty' in relation to knowledge must have reference either to its mode of acquisition or to its use or non-use or to its disclosure or non-disclosure; and the knowledge referred to in the words which I have cited was clearly the knowledge that the statement was being made and was untrue."

In our case of course we are concerned to establish knowledge that the payment was forbidden. He said, at p. 627:

> "I am not satisfied that a company can be saddled with fraud unless some agent has guilty knowledge with reference to the representation complained of; and therefore even if the principles applicable to fraud apply to mistake (and I am far from laying it down as a matter of law that they do) there is nothing to prevent me giving relief in this case and holding that the mistake of the agent was the mistake of the principle. . . . In my opinion the mere fact that some agent of the company knew of the second agreement is immaterial so long as he had no idea that it was not being acted upon."

In my opinion the principle in the above two cases is applicable to contempt of court by a corporation when guilty knowledge is an element in the offence.

I therefore do not think that the fact that one of the bank's officials is given notice of the terms of an injunction obliges the bank to undertake searches in order to discover whether or not at any of its branches the bank holds the defendants' account. On the other hand, it will obviously be prudent and in its own interests for the bank to take some steps in the matter. If it does nothing and a cheque is cashed or some other transaction completed, the bank may find it difficult to resist an inference that there was complicity in or connivance at the breach. It will be a question of fact and degree in every case. The greater the difficulty in discovering the account and consequently controlling it, the less likely the risk of contempt of court.

The need to establish mens rea on the part of the bank is of particular importance in considering a breach of a maximum order injunction. I think that only very rarely will it be possible to show that a bank is in contempt. It is a fundamental requirement of an injunction directed to an individual that it shall be certain. This is particularly so in the case of a mandatory injunction. If a person to whom the injunction is addressed is entitled to certainty, how much more so should this apply to a person who is not even a party to the proceedings. From the point of view of the bank that has notice of an injunction, it has elements of a mandatory order even

though directed against the defendant himself in negative terms; for it is not simply a question of the bank refraining from doing something but of taking positive steps to see that someone else, namely the defendant, does not act in defiance of the court's order. If it were the duty of the bank to ensure compliance, it would have to make sometimes extensive inquiries to ascertain the existence of an account or whether or not it held property on behalf of the defendant and then, in the case of a maximum order injunction, to make inquiries and to liaise between different accounts and possibly with other banks in order to avoid making a payment or releasing property in contravention of the order. It is an impossible situation. On the other hand, a maximum sum order is very often the appropriate course from the defendant's point of view to be preferred to a general order. Yet, if a bank refuses to pay out on the grounds that a payment would contravene the maximum sum order, the bank might be faced with a claim from the defendant who can prove that he was preserving assets in other hands.

When there is a general order the bank can safely refuse to make a payment on the ground that to do so would be unlawful. With the maximum sum order the bank is in a dilemma. It is no answer to disobedience of an order of the court to say that to have acted otherwise would have involved a breach of contract with someone else: see *Acrow (Automation) Ltd.* v. *Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676. It may be no answer to the court for the bank to say that it made a payment in fear that it might be in breach of contract with the client. In my opinion, therefore, the need to prove guilty knowledge against the bank is all the more essential. Carelessness or even recklessness on the part of the banks ought not in my opinion to make them liable for contempt unless it can be shown that there was indifference to such a degree that was contumacious. A *Mareva* injunction is granted for the benefit of an individual litigant and it seems to me to be undesirable that those who are not immediate parties should be in danger of being held in contempt of court unless they can be shown to have been contumacious. This is a matter which should be borne in mind when the judge is asked to make the order. The more information he possesses, the more specific he can be and where it is possible to designate a particular account which is the subject of the order, and this whether general or a maximum sum order, the account will naturally be specified.

The fact that the bank is under an obligation to others to make a payment should be strong evidence that the bank was not contumacious where that obligation emanates from a relationship between the bank and such other people as was established before the making of the order. Thus to honour a cheque drawn with the support of a banker's card should not be treated as contempt because before the order is made the bank will have made it known, as banks already have, that they will honour cheques up to a certain amount when supported by such a card. Where after the order is made some positive step from the bank is necessary before it incurs liability to a third party, then, of course, it should refrain from taking that step because the court would then not regard its obligation to a third party as an excuse for contributing to the disobedience of the court's order.

I have had the advantage of reading the judgments of Lord Denning M.R. and Kerr L.J., and I respectfully agree with what they say. A

KERR L.J. Since the helpful judgment of Webster J. the substantive issues have gone out of this case. However, it is significant to note at the outset that throughout the arguments before him and this court there was virtual unanimity between all counsel as to the general principles which should govern the scope and exercise of the important jurisdiction concerning *Mareva* injunctions, and that there is also no difference of view on these general issues between Webster J. and this court. All that remains are questions of guidelines concerning the logistics and machinery of the jurisdiction. B

1. I begin with some general observations on the issues raised before us. The *Mareva* injunction was created by this court on appeal from the Commercial Court, where this case also began, but it is clear that it has now pervaded the whole of our law and that it is an extremely useful addition to our judicial armoury. Thus, it has been used in personal injury and Fatal Accidents Acts cases (see, e.g., *Allen* v. *Jambo Holdings Ltd.* [1980] 1 W.L.R. 1252), and we have been told that it is quite frequently used in matrimonial cases and also in other situations to which I refer briefly hereafter. The jurisdiction is therefore clearly capable of general application, and I would not wish to see any limitation put on it in relation to the nature or subject matter of the proceedings. At the same time, however, it is important that it should not be taken too far; let alone abused. C D

The original justification for the new procedure was that foreign defendants should not be able to deprive a plaintiff of the fruits of a judgment in his favour, when it appears to the court that the plaintiff is likely to succeed in his claim, by removing their assets out of the jurisdiction. When the procedure was first sanctioned by this court in 1975, residents of this country were subject to Exchange Control. With the abolition of Exchange Control it was therefore logical to extend the jurisdiction to residents. However, the danger of assets being removed from the jurisdiction is only one facet of the "ploy" of a defendant to make himself "judgment-proof" by taking steps to ensure that there are no available or traceable assets on the day of judgment; not as the result of using his assets in the ordinary course of his business or for living expenses, but to avoid execution by spiriting his assets away in the interim. It does not seem to me that this was the kind of situation considered by this court in the old cases, such as *Lister & Co.* v. *Stubbs* (1890) 45 Ch.D. 1; nor does the grant of a *Mareva* injunction have the effect, as was then feared, of a preference of the plaintiff as against other creditors of the defendant: see *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.* [1981] Q.B. 65, 71, 72. It is, therefore, logical to extend the scope of this jurisdiction whenever there is a risk of a judgment which a plaintiff seems likely to obtain being defeated in this way. Accordingly, I welcome section 37 (3) of the Supreme Court Act 1981 and respectfully agree with Lord Denning M.R. as to its interpretation, which will put the position beyond doubt and on a statutory basis when this provision is in force. E F G H

A However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a *Mareva* injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself " judgment-proof "; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and B where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even knows, C that the demand is unlawful; and where he obtains a *Mareva* injunction ex parte in advance of the payment, which is then immediately served and has the effect of " freezing " the sum paid over. Thus, we were told by Mr. Slowe that payments are sometimes made for premiums which are required illegally on the assignment of leases, and which are then " frozen " immediately as soon as the payment has been made. In effect, this amounts to using the injunction as a means of setting a trap for the payee. A D reported instance of such a case (though not in a context of alleged illegality) was *Negocios Del Mar S.A.* v. *Doric Shipping Corporation S.A.* [1979] 1 Lloyd's Rep. 331, where the injunction was set aside because the plaintiff had not disclosed to the court that he intended to use the order for this purpose. However, in my view even the disclosure of the intention should not suffice to obtain the injunction in such cases. If a person is E willing to make such a payment, appreciating the implications, the courts should not assist him to safeguard the payment in advance by means of a *Mareva* injunction. However, this is a special type of situation, and, like all others in this field, ultimately a matter for the discretion of the judge to whom the application is made. Accordingly, I say no more about it.

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

G On this basis it is clear that the jurisdiction may be properly exercisable in many cases which are not limited to situations where the defendant is foreign or only has some tenuous connection with this country by reason of having assets here. On the other hand, it would not be properly exercisable against the majority of defendants who are sued in our courts. In non-international cases, and also in many international cases, the defen- H dants are generally persons or concerns who are established within the jurisdiction in the sense of having assets here which they could not, or would not wish to, dissipate merely in order to avoid some judgment which seems likely to be given against them; either because they have

property here, such as a house or a flat on which their ordinary way of life depends, or because they have an established business or other assets which they would be unlikely to liquidate simply in order to avoid a judgment. It is impossible to categorise such situations. In each case the court will have to form a view, when the application is made, on which side of the line each particular case falls, but bearing in mind that the great value of this jurisdiction must not be debased by allowing it to become something which is invoked simply to obtain security for a judgment in advance, and still less as a means of pressurising defendants into settlements.

2. The foregoing remarks deal with a number of general submissions which were made to us as to the scope of the jurisdiction and in what kinds of situations it should or should not be exercised. However, the main issue before Webster J. and on this appeal relates to the position of third parties on whom notice of the terms of a *Mareva* injunction is served. Banks are not in principle different from other third parties in this respect, and I agree that they are bound by the terms of the injunction as soon as they have notice of it, even though the defendant himself has not yet been served and does not know that the order has been made. In this connection it seems to me that, in addition to the matters referred to by Lord Denning M.R., the authority of a bank or other third party to give effect to the instructions of a defendant is revoked once it has notice of the injunction in the same way, by analogy, as in garnishee proceedings: see *Rekstin* v. *Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj* [1933] 1 K.B. 47. In practice, however, the position of banks creates particular problems, both for the banks themselves and also for plaintiffs. The problems for banks are discussed below. The problems which the procedure may unwittingly create for plaintiffs are due to the fact that it is now accepted that plaintiffs should be obliged to undertake, 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. The former indemnity is illustrated by *Searose Ltd.* v. *Seatrain U.K. Ltd.* [1981] 1 W.L.R. 894 and *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineralimportexport* [1981] 1 W.L.R. 1262. The need for the latter has been accepted by this court in the present case.

3. Against this background I turn to the particular problems which arise when an order freezing the assets of a defendant is served on banks. The special position of banks, in particular of the clearing banks before us, is that they cannot in practice ensure compliance with such an order without instituting what may be a very costly and elaborate search throughout all their branches in order to see whether they hold any assets of the particular defendant. If such an order is served upon a bank, it is obliged, as a matter of self-defence for the purpose of complying with the order, to carry out such a search; and by virtue of his undertaking the plaintiff will then be liable to pay their reasonable costs. In this connection we were told that a full "trawl" through all the branches of a clearing bank could cost as much as £2,000. However, a plaintiff may well be unaware, when applying for a *Mareva* injunction covering all the assets of

a defendant which is then served upon a bank, that this is the level of the liability which he may be incurring. This is the first problem. The second problem, which is faced by banks to a greater extent than other third parties, is that they may have no ready means of establishing through any central register or other records what assets of a particular defendant they in fact hold. Thus, we were told that, while they should be able to establish whether or not they hold any account in the name of a particular defendant, at any rate when he is identified by his address, and should also be able to do so in relation to other assets which they hold as security or for safe-keeping in his name, they are unable to ascertain whether the defendant is a beneficiary under a letter of credit established with them or the payee of a bill of exchange which may be presented to them for payment. Further, there are also other difficulties which were mentioned to us in relation to banks. These relate to joint accounts, the liability of banks under cheque or credit cards, assets of the defendant which may come into a bank's possession after it has made the necessary search and frozen the assets of which it has become aware, and accounts held by banks in a currency other than that mentioned in the order. I will therefore shortly deal with these matters in a moment. However, two considerations should be borne in mind throughout. First, the suggestions made below are only for guidance, and are of course not intended to fetter in any way the form of order for which a plaintiff may ask in a particular case and, above all, the discretion of judges on the hearing of such applications. Secondly, it should be remembered that the present case is exceptional. It involves claims for conspiracy to defraud against a number of individual defendants, and the alleged "salting away" of about £2,000,000 by means of payments to a large number of innocent third parties whom it was felt necessary to join as defendants. Accordingly, many of the points debated in this case will not, or at any rate should not, cause the same difficulties in the ordinary run of applications for *Mareva* injunctions.

4. Turning then to the various problems mentioned above, the important point is that they all centre on the terms of the order which is applied for and, if this is granted in principle, on the terms in which it is ultimately expressed. Any subsequent hearing, when adjustments of the original order may be made, should in my view only be regarded as a fall-back position. Thus, it should not be the practice—as I believe it to be at present, at any rate to some extent—that relatively little thought is given to what should be the appropriate terms of the order at the stage of the ex parte application, because it is felt that these can always be adjusted subsequently. Although this undoubtedly provides a crucial safeguard, it should not be allowed to overshadow the original application. The reasons are easy to see. While subsequent hearings inter partes may be unavoidable in many cases, these involve additional time for the court and costs for the parties, and also for any possible interveners, such as banks. For this reason I feel doubtful whether it should become the practice in every case to fix a return date at once. It seems to me that such a practice would have two undesirable consequences. First, it would tend to lessen the degree of thought which should be given to ensuring, so far as is then foreseeably possible, that the appropriate order is made on the ex parte application.

Secondly, return dates given as a matter of routine will clutter up the courts, and in particular the Commercial Court, with hearings on *Mareva* injunctions to an even greater extent than is already happening. Moreover, in most cases where return dates are given on the original application I think that it will be found that this will usually be followed by an application for an adjournment, often by the consent of both parties, and it then takes further time on the part of the listing officer, and often of the court itself, to deal with such applications. In this connection it should also be borne in mind that in many cases of *Mareva* injunctions the defendant may be outside the jurisdiction or otherwise difficult to serve expeditiously, and that thereafter further time will usually be needed by both parties to consider whether, and if so to what extent, the original order requires adjustment and whether or not any contested hearing inter partes is necessary for this purpose. Consent orders varying or discharging the original order, on the other hand, could no doubt usually be submitted to the court for initialling without the need of any appearance on behalf of the parties. Accordingly, I am of the view that, while 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. The primary consideration should be at the stage of the ex parte application, and what then appears to be the appropriate order.

5. It follows that in my view it should be accepted that at that stage it is the duty of the plaintiff and of his legal advisers to do the following: (i) To consider carefully whether an application for a *Mareva* injunction is justified, in the sense of being reasonably necessary in the particular case in order to achieve the objectives for which this procedure has been designed. (ii) If so, to consider very carefully what should be the extent of the injunction in order to safeguard the plaintiff's prima facie justified claim against a real risk of the defendant deliberately taking steps to avoid execution on a judgment which the plaintiff is likely to obtain. (iii) On the foregoing basis, in what way and to what extent the injunction should apply to assets of the defendant within the jurisdiction. (iv) To the extent to which the assets are known or suspected to exist, these should be identified even if their value is unknown; and if it is known or suspected that they are in the hands of third parties, in particular of banks, everything should be done to define their location to the greatest possible extent. Thus, to take the example of bank accounts, the plaintiff should make every effort to try to indicate (a) which bank or banks hold the accounts in question, (b) at which branches, and (c) if possible, under what numbers. (v) The plaintiff should consider how soon and in what manner the defendant can be served as expeditiously as possible, both with the writ (if this has not already been served) and the injunction if it is granted, and he should generally give an undertaking about service on the defendant as part of the order. Further, the plaintiff should consider on what third parties it is meanwhile intended—and reasonably necessary —to serve a copy of the injunction. (vi) All the foregoing matters should be fully and frankly dealt with in an affidavit supporting the ex parte

application or, if it is urgent, in a draft affidavit coupled with an undertaking to swear and file this forthwith. (vii) The application should be supported by a full draft order for consideration by the judge, i.e. one which contains all the undertakings on the part of the plaintiff to which I have already referred, and which gives effect to the appropriate injunction in terms which are adapted to the particular circumstances of the case. These are to some extent already indicated in the foregoing remarks, and are further discussed below in relation to cases in which it is intended to serve a copy of the order on a bank.

6. Before considering the form of *Mareva* injunctions in cases where it is intended to serve copies of the order on third parties, in particular banks, I must deal with the vexed problem as to whether it is better in the first instance to freeze the defendant's assets in the jurisdiction generally, or to make what have been referred to as " maximum sum " orders, i.e. injunctions which only freeze the defendant's assets up to the level of the plaintiff's prima facie justifiable claim, leaving him free to deal with the balance. As to this, it seems to me to be plain that the latter alternative must be preferred, unless the case is exceptional, like the present one. There are two obvious reasons for this preference. First, it represents no more than what a plaintiff can justifiably request from the court. Secondly, an order which freezes all assets is, in the ordinary case, bound to lead to an outcry from the defendant and to the need for an adjustment, at any rate if he is resident or carries on business within the jurisdiction. Further, such an order cannot in my view be justified in principle, save in wholly exceptional cases, unless it is clear that (a) his assets within the jurisdiction are insufficient to meet the claim, *and* (b) he is neither resident nor carries on business within the jurisdiction. It therefore follows, in my view, that the norm should be the " maximum sum " order, and that an order applying to all assets should be the exception.

However, while this was not disputed in principle on behalf of the banks on this appeal, it was pointed out that a " maximum sum " order is unworkable so far as any individual bank is concerned, and also in relation to any other third party on whom a copy of the order may be served. The reason, obviously, is that in such cases the particular party which has to give effect to the order cannot know what assets the defendant may or may not have elsewhere. I accept this, of course; but I do not regard it as a sufficient ground for preferring orders which freeze all the assets of a defendant to those which only freeze a maximum sum. In this context the interests of the defendant must be paramount. At the same time, however, the court must clearly not make an order which is unworkable so far as concerns third parties who may be required to obey it. In these circumstances it appears to me that there is only one via media, though inevitably an imperfect one. This is to draft 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 sum specified in the order. Admittedly, this may involve duplication against the defendant and the consequent need for an adjustment. It may also involve the plaintiff in liability in damages on his undertaking, but that is a risk which he takes in any event. However, a " maximum sum " order is at any rate fairer to

the defendant than to freeze all his assets; and, if it is drafted in this way in so far as it relates to assets in the hands of third parties, it is also workable so far as they are concerned.

7. It therefore follows, where the injunction does not relate to a particular fund or other specific assets, such as a ship or aircraft, but where it is intended and reasonably necessary to serve a copy of the injunction on third parties, in particular banks, that it may be necessary for the terms of the order to make different provisions in relation to the defendant's assets generally and in relation to such of his assets as are known or believed to be in the hands of third parties. So far as the latter assets are concerned, it may be necessary to provide specifically to what extent the defendant—and therefore the third parties on whom a copy of the order is served—are entitled or restrained from dealing with such assets. Thus, take the case of a " maximum sum " *Mareva* where the defendant is restrained from removing out of the jurisdiction or otherwise dealing with his assets up to a value of £X, where it is known or believed that he has accounts at two banks on whom it is intended to serve a copy of the order, but where it is unknown how much stands to the credit of any of these accounts, and indeed what other assets the defendant may have. In such cases it will be unavoidable, as it seems to me, that the first paragraph of the order should restrain the defendant in general terms up to the " maximum sum " in question, but that the second paragraph should then qualify the first by providing that, so far as any such accounts are concerned, the defendant is not to be entitled to draw upon any of them except to the extent to which any of them exceed the maximum sum referred to in the first paragraph. The effect of this will be to restrain the defendant generally up to the desired amount, but at the same time to make some more qualified, though precise, provision about the extent to which any of the defendant's bank accounts are to be frozen. An order drafted in this form will achieve the general restraint which it is desired to impose on the defendant, who will know the value of the assets which he has within the jurisdiction, and will also at the same time enable the banks to know precisely what they may or may not permit the defendant to do in relation to any accounts of his which they may hold.

8. An order drafted in this way, so as to distinguish between the general restraint upon the defendant and any assets of his which are held by third parties, in particular banks, on whom it is proposed to serve a copy of the order, should also overcome the difficulties referred to in paragraph 3 above which, as explained to us on behalf of the banks, are of particular concern to them. I will briefly deal with these in turn, with the object, in each case, to explain how the terms of the order applicable to assets in their possession, other than ordinary bank accounts, should be adapted so as to remove these difficulties.

First, take the case of shares or title deeds which a bank may hold as security, or articles in a safe deposit which the bank may hold in the name of the defendant. Unless these are either specifically referred to in the order, because they are in some way connected with the subject matter of the action, the order should not apply to such assets even if the bank

in question is able, through some central register, to ascertain that they are held in the name of the defendant. The reason is that the bank may not, and generally will not, know their precise value, and that the bank should not be expected to try to assess this in some way; even at the plaintiff's expense, unless the terms of the order are specifically drafted so as to include them. The same applies to articles held in safe custody in the name of the defendant, with the additional complication that the bank may neither know the contents of a safe deposit or of some other container entrusted to it for safe-keeping, let alone the value of the contents; nor whether or not the contents in fact belong to the defendant or are held by him for someone else. Accordingly, the order should be so drawn as to make it clear that its terms do not apply to such assets, if any.

Similarly, take the case of joint accounts in the name of the defendant and of some other person or persons. A bank will not generally know in what way the amounts standing to the credit of such accounts have been provided by the defendant or the other account holders respectively; and the other account holders may not be parties to the action and accordingly cannot be subjected to the injunction. Accordingly, any order which it is intended to serve upon a bank should not be applicable to joint accounts unless the order is so drafted as to make it clear that it is also intended to apply to them; but this would only be justifiable in rare cases. Where it is justifiable and the other holders of the joint account are not parties, the order should include references to joint accounts, and a copy of the order should be served on the other holder or holders.

Next, take the case of letters of credit of which the defendant may be the beneficiary or of bills of exchange of which he may be the payee. It is clear from what we were told that the banks do not have any central register or other means of identifying the defendant as the beneficiary or payee even if he is a customer in whose name they hold accounts. It follows that banks on whom a copy of the order may be served may find themselves obliged to make such payments to him. Moreover, in relation to payments of this nature the *Mareva* jurisdiction should have no application, because these involve obligations towards other parties under instruments of commerce which banks must be entitled, and indeed obliged, to honour according to their tenor. It follows, as pointed out by Lord Denning M.R., that while the proceeds of such obligations may be frozen if these come to be paid into an account of the defendant to which the order applies, they should not otherwise be comprised within the terms of the order to which the banks are obliged to give effect by reason of having been served with a copy of the order. This, again, can be achieved by confining the terms of the order, so far as it affects the defendant's bank accounts, to the accounts themselves, and not to extend the order to the defendant's assets generally in so far as these may be under the control of banks on which a copy of the order is served.

Similarly, as regards cheque and credit cards issued to the defendant by a bank on whom a copy of the order is served. In the argument before us their implications were not debated in detail, but it is clear that they involve previously undertaken obligations on the part of banks to third parties, who may give cash or credit to the defendant. Any bank on

whom a copy of the order is served must clearly be entitled, as indeed is obliged, to honour such obligations to the third parties concerned. The only question, accordingly, is whether, having done so, the bank is then also entitled to debit the defendant's account with the corresponding amount, even though such account is otherwise frozen by the terms of the order. In this respect the bank's position is different from that discussed in the judgment of Lord Denning M.R. concerning the honouring of cheques drawn by the defendant after the date of the order, or of cheques which might possibly be deliberately ante-dated by him after he has had notice of the order. In relation to cheques drawn by the defendant the bank's obligation is solely to him. But in relation to cheque and credit cards the bank is also obliged to indemnify third parties who have provided cash or credit. In most cases involving *Mareva* injunctions, such as cases of international disputes between companies, this problem will not arise at all. But if it should arise, because the defendant is an individual who might avoid the incidence of the order freezing his bank accounts by means of cheque and credit cards, in relation to which he would not be able easily to ante-date the transactions in question, then the order should make it clear that it will not preclude the debiting of his account in respect of any such transactions effected by the defendant prior to the date when the order is served on the bank. However, once the bank has been served, it will no doubt consider it prudent to take steps to withdraw such facilities from the defendant in so far as it is in its power to do so.

Finally, and similarly, there is the question of any accounts or other assets of the defendant which may come within the control of the bank subsequently to the date on which a copy of the order is served on the bank, and after its ascertainment of the assets of the defendant which it then holds. This is unlikely to present any major problem in practice, since a defendant is unlikely to place fresh assets within the control of a bank upon which a copy of the order has already been served. However, in so far as this may happen, the order should not apply to such assets unless these are specifically referred to in it.

9. What, then, is the way of dealing with all the foregoing difficulties where banks, and indeed any other third parties, on whom a copy of the order is served, are concerned? In my view, the first part of the order should bind the defendant in relation to his assets generally to the extent to which this is reasonably necessary. Secondly, where it is intended to serve a copy of the order on third parties, the order should provide expressly to what extent assets in the hands of third parties are affected by the generality of the first part of the order. Thus, this part of the order should make it clear that, so far as concerns assets in the hands 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. Accordingly, in relation to banks, the terms of the order should in general only apply to accounts held by any bank referred to in the order, and only to the extent specified in the order.

We were told that all accounts held by banks for customers can be identified by describing these as " time, notice or demand deposits," the

latter being ordinary current accounts. In relation to the particular problems of banks which were debated before us, it may therefore be convenient, when it is proposed to serve a copy of a *Mareva* injunction on a bank, that the terms of the order should prescribe specifically that, without prejudice to the generality of the order against the defendant, he should be restrained from drawing on any "time, notice or demand deposit" which may be held in his sole name by any bank referred to in the order, up to the maximum sum stated in the order.

10. Of the problems debated before us this then only leaves the relatively simple one where the order is expressed in one currency and is made applicable expressly to bank accounts, but where a bank served with the order then discovers that it holds an account in another currency. It seems to me that this problem should be resolved in the same way as was held by this court in relation to garnishee orders in *Choice Investments Ltd.* v. *Jeromnimon* [1981] Q.B. 149: upon being served with the order, the bank should convert the credit balance into sterling at the then buying rate to the extent necessary to meet the sum stated in the order, and then put a stop on the account to this extent.

I think that these guidelines cover all the problems which were debated on this application.

Application dismissed with costs on solicitor and client basis.

Solicitors: *Coward Chance; Slowes.*

A. H. B.

REGINA *v.* SECRETARY OF STATE FOR THE ENVIRONMENT, *Ex parte* BRENT LONDON BOROUGH COUNCIL AND OTHERS

1981 July 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 30; Oct. 21

Ackner L.J. and Phillips J.

Crown—Minister—Statutory power—Statutory discretion to reduce rate support grant—Discussions with local authorities before powers obtained—Minister refusing to hear further representations from authorities liable to reduction before exercising discretion—Decision to reduce grant—Whether valid—Whether Order containing formulae for calculating reduction valid—Local Government, Planning and Land Act 1980 (*c.* 65), *ss.* 48, 49, 50—*Rate Support Grant (Principles for Multipliers) Order* 1980 (*S.I.* 1980 *No.* 2047), *para.* 3, *Sch.*

The government considered that certain features of the rate support grant distribution system in force under the Local Government Act 1974 were inequitable and incompatible with its commitment to reduce public expenditure since they tended

Choudhury, F., "The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability", *Georgetown Law Journal,* Vol. 104:725

The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability

FARHANA CHOUDHURY*

TABLE OF CONTENTS

* Georgetown Law, J.D. expected 2016; Baruch College, The City University of New York, B.A. 2012. I would like to thank the late Judge Francis Allegra for getting me started. Thank you to my family and friends for their unwavering support. Finally, thank you to the editors and staff of *The Georgetown Law Journal* for their help and hard work throughout the publication process.

INTRODUCTION

> More than ever before in human history, we share a common destiny. We can master it only if we face it together. And that, my friends, is why we have the United Nations.
>
> —Kofi Annan, Former Secretary-General of the United Nations[1]

Considered one of the western hemisphere's worst natural disasters in recorded history, the January 2010 earthquake in Haiti caused massive destruction, killing hundreds of thousands and leaving the country's physical and political infrastructure in ruins.[2] Enter the United Nations (U.N.). Pervasively present in Haiti even before the earthquake, the overall United Nations Stabilization Mission in Haiti (MINUSTAH)[3] forces were increased, and its mission was expanded "to support the immediate recovery, reconstruction and stability efforts" in the aftermath of the earthquake.[4]

Within nine months of deploying additional peacekeepers into Haiti, the nation—rampant with strife from political insurgency and struggling to recuperate from the earthquake—was confronted with another catastrophe: a cholera epidemic resulting in thousands of Haitian deaths and illnesses.[5] Cholera, which had not been documented in Haiti in over a century, is an infection that causes severe diarrhea, that can lead to dehydration and death, and is the byproduct of inadequate hygiene and poor sanitation.[6] Running afoul of its mission, U.N. peacekeepers joining MINUSTAH from Nepal caused the cholera outbreak when they were stationed near a major river and discharged raw sewage into the water that villagers then used for cooking and drinking.[7]

---

1. *U.N. Millennium Message*, BBC NEWS (Dec. 30, 1999), http://news.bbc.co.uk/2/hi/special_report/millennium/584374.stm.

2. *See* Matt Fisher & Alisha Kramer, *An Epidemic After an Earthquake: The Cholera Outbreak in Haiti, Part 1*, GLOBAL HEALTH POL'Y CTR. (Mar. 6, 2012), http://www.smartglobalhealth.org/blog/entry/an-epidemic-after-an-earthquake-the-cholera-outbreak-in-haiti/. The earthquake killed over 316,000 and affected 3 million Haitians. *Id.*

3. S.C. Res. 1542 (Apr. 30, 2004). MINUSTAH was originally set up to support the transitional government and assist with the restoration and maintenance of public order in Haiti in the wake of a contested presidential election that resulted in armed conflict in several cities across the country. *MINUSTAH Mandate*, UNITED NATIONS PEACEKEEPING, http://www.un.org/en/peacekeeping/missions/minustah/mandate.shtml (last visited Oct. 23, 2015).

4. S.C. Res. 1908, ¶ 1 (Jan. 19, 2010); *see also* S.C. Res. 1927, ¶ 1 (June 4, 2010).

5. *Cholera Confirmed in Haiti, October 21, 2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 22, 2010), http://www.cdc.gov/haiticholera/situation/. Between October 2010 and October 2011, "over 470,000 Haitians have been sickened by cholera and nearly 7,000 have died." *Cholera in Haiti: One Year Later*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 25, 2011), http://www.cdc.gov/haiticholera/haiti_cholera.htm.

6. *See Cholera in Haiti: One Year Later*, *supra* note 5.

7. Matthew Mosk, *Bill Clinton, U.N. Envoy, Admits Peacekeepers as Source of Haiti Cholera*, ABC NEWS (Mar. 9, 2012), http://abcnews.go.com/Blotter/bill-clinton-admits-united-nations-source-haiti-cholera/story?id=15885580 (quoting former President Clinton) ("[T]he person who introduced cholera in Haiti, the U.N. peacekeeper . . . was the proximate cause of cholera. That is, he was carrying the cholera strain. It came from his waste stream into the waterways of Haiti, into the bodies of Haitians.");

Victims filed grievances with the MINUSTAH claims unit in Haiti and the Secretary-General seeking reparations for the harm and injustices they suffered as a result of the U.N.'s misconduct.[8] They requested the creation of an adequate accountability mechanism to evaluate claims and a committee to oversee the distribution of settlements.[9] Fifteen months after the complaints were filed, relief was unequivocally denied despite the U.N. Secretary-General's "profound sympathy for the terrible suffering caused by the cholera outbreak."[10] Thus, faced with inaction and left with no recourse, victims sought justice in the U.S. District Court for the Southern District of New York in October 2013.[11]

Georges v. United Nations is a class action lawsuit filed by human rights lawyers on behalf of victims and their relatives seeking access to a standing claims commission to receive and adjudicate the victims' claims for compensation for the deaths and illnesses caused by the cholera epidemic.[12] *Georges* presents a question of first impression in a U.S. court: whether the U.N. can and should enjoy immunity from suit where it has refused to comply with its treaty obligations to provide victims with access to a dispute resolution mechanism,[13] thereby denying their fundamental right to a remedy.[14] In January 2015, District Court Judge James Paul Oetken ruled that victims cannot sue the U.N. in a U.S. court because the U.N. has absolute legal immunity that only the organization can waive.[15] Judge Oetken held that the U.N.'s ability to block lawsuits was established by the Convention on the Privileges and Immunities of the United

---

see also Renaud Piarroux et al., *Understanding the Cholera Epidemic, Haiti*, 17 EMERGING INFECTIOUS DISEASES 1161, 1162, 1165 (2011) (epidemiologic study finding an "exact correlation in time and places" between the arrival of Nepalese troops from an area experiencing a cholera outbreak and the appearance of the first cholera cases in a Haitian village shortly after).

8. Petition for Relief from Mario Joseph et al., Attorney for Petitioners, Bureau des Avocats Internationaux, to Chief of the Claims Unit of MINUSTAH (Nov. 3, 2011), http://www.ijdh.org/2011/11/topics/law-justice/chief-claims-unit-minustah-log-base-room-no-25a-boule-toussaint-louverture-clercine-18-tabarre-haiti-ijdh-bai/. Claims were filed on behalf of cholera victims by the Bureau des Avocats Internationaux, Kurzban Kurzban Weigner Tetzeli & Pratt P.A., and the Institute for Justice and Democracy in Haiti to the Chief Claims Unit of MINUSTAH. *Id.*

9. *Id.* at 33.

10. Letter from Patricia O'Brien, Under-Sec'y Gen. for Legal Affairs, U.N. Office of the Legal Counsel, to Brian Concannon, Dir. of the Inst. for Justice & Democracy in Haiti (Feb. 21, 2013) [hereinafter O'Brien Letter]. The U.N. responded by merely stating that the claims were "not receivable" without providing any legal foundation or explanation. *Id.*

11. Class Action Complaint & Demand for Jury Trial at 1, Georges v. United Nations, 84 F. Supp. 3d 246 (S.D.N.Y. 2015) (No. 13-cv-7146).

12. *Georges*, 84 F. Supp. 3d at 247–48. Suit was brought against the U.N., MINUSTAH, Ban Ki-moon (Secretary-General of the U.N.), and Edmond Mulet (former Under-Secretary-General for MINUSTAH). *Id.* at 247.

13. *See id.* In a prior case against the U.N. in the Second Circuit, plaintiffs "argue[d] that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate[d] a waiver of immunity . . . ." Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010). *Georges* presents a novel issue because in *Brzak* there was a mechanism put in place whereas here, the U.N. did not hear claims at all. *See Georges*, 84 F. Supp. 3d at 249.

14. *See infra* Section III.A.

15. *Georges*, 84 F. Supp. 3d at 248–49.

Nations (CPIUN)[16] and clarified by the Second Circuit's 2010 ruling in *Brzak v. United Nations*.[17]

The victims filed an appeal of the *Georges* decision in the Second Circuit.[18] The precedent established in the appellate decision will have a broad immediate impact, determining the fate of not only the plaintiffs in this class action suit but also the plaintiffs in a sister suit brought in the Eastern District of New York. *LaVenture v. United Nations*[19] has been stayed pending the disposition of the Second Circuit in *Georges*.[20] Looking beyond the immediate implications, *Georges* brings to the forefront significant issues concerning the extent of liability and the limits of immunity for the U.N. and other intergovernmental organizations. Challenging the U.N. to comply with its obligation to establish settlement mechanisms has universal implications beyond Haiti.

This Note attempts to highlight the necessity for international organizations (IOs) to implement dispute resolution mechanisms as a prerequisite to seeking immunity. Part I of this Note examines the sources of the U.N.'s obligations to provide a dispute resolution mechanism for victims of the cholera outbreak in Haiti. Part II explores the foundation and extent of immunity afforded to the U.N. and other IOs. Part III analyzes the doctrinal and policy implications of permitting immunity from suit where the U.N. has violated treaty obligations to provide victims with a mechanism for redress. To further the objective of maintaining continued legitimacy of IOs, Part IV makes two contributions to the legal scholarship concerning their immunity. First, it suggests that certain agreements should constitute an express waiver of immunity. Second, it identifies and examines the underlying, unresolved problem of determining what is in fact adequate or appropriate when considering the requirement of a dispute resolution mechanism.

I. ESTABLISHING THE U.N.'S OBLIGATIONS

It was originally considered necessary that the U.N. have the status of a legal person under the domestic law of all its Member States.[21] Nevertheless, the Charter of the United Nations (U.N. Charter) only provided that "[t]he Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its

16. Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 4 U.N.T.S. 15 [hereinafter CPIUN].

17. *Georges*, 84 F. Supp. 3d at 248–49.

18. Notice of Appeal, Georges v. United Nations, No. 1:13-CV-07146 (JPO) (S.D.N.Y. Feb. 12, 2015).

19. Class Action Complaint & Demand for Jury Trial, LaVenture v. United Nations, No. CV14-1611 (E.D.N.Y. Mar. 11, 2014).

20. Order Staying Case at 1, LaVenture v. United Nations, No. 14-CV-1611 (SLT) (E.D.N.Y. Mar. 24, 2015).

21. August Reinisch, Introductory Note, *Convention on the Privileges and Immunities of the United Nations*, AUDIOVISUAL LIB. INT'L L. 2 (2009), http://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html.

purposes."[22] Since its creation, the U.N. has been recognized as an international personality distinct from its member states and therefore is "capable of possessing international rights and duties."[23] As observed by leading international lawyer Sir Hersch Lauterpacht:

> The provisions of the Charter on the subject impose legal obligations not only upon the Members of the United Nations. They imply a comprehensive legal obligation upon the United Nations as a whole . . . . [T]he degree of legal obligation is particularly high with regard to a subject matter which, as in the case of human rights and freedoms, is a constant and fundamental theme of the Charter.[24]

Accordingly, with great power comes great responsibility. The U.N.'s obligations derive from various sources of international and customary law. This Part examines the foundation for the U.N.'s duty to provide cholera victims in Haiti with a dispute resolution mechanism. This specific duty arises primarily from the CPIUN and the Status of Forces Agreement (SOFA) between the U.N. and Haiti.[25]

A. CPIUN EXPANDS UPON THE U.N. CHARTER

The CPIUN was adopted in 1946 in the immediate aftermath of the U.N.'s creation.[26] Though the U.N.'s rights and obligations as a legal personality were set out in the U.N. Charter, the rules establishing legal capacity and legal immunity required further clarification to be workable.[27] The CPIUN delineates these necessary explanatory provisions.

Article VIII, section 29 of the CPIUN creates an obligation for the U.N. to "make provisions for appropriate modes of settlement" in two circumstances:

> (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any

22. U.N. Charter art. 104.

23. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11) (affirming the U.N.'s international legal personality).

24. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 159 (unaltered reprint 1968) (1950). The author was a member of the U.N.'s International Law Commission from 1953 to 1954 and a Judge of the International Court of Justice from 1955 to 1960. *Sir Hersch Lauterpacht, 1897-1960*, LAUTERPACHT CTR. FOR INT'L L., http://www.lcil.cam.ac.uk/about_the_centre/sir-hersch-lauterpacht-1897-1960 (last visited Nov. 21, 2015).

25. Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, July 9, 2004, 2271 U.N.T.S. 235 [hereinafter SOFA].

26. *See* CPIUN, *supra* note 16.

27. CPIUN was created and adopted to expand on the U.N. Charter's article 104 (establishing the U.N.'s legal capacity) and article 105 (establishing the U.N.'s privileges and immunities). CPIUN, *supra* note 16, at 16. It begins by stating these two provisions and proceeds: "*Consequently* the General Assembly . . . approved the following Convention and proposed it for accession by each Member of the United Nations." *Id.*

> official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.[28]

Thus, the U.N. has an affirmative duty to create mechanisms by which injured victims can seek redress for damages from contractual disputes and tort claims where the U.N. is involved. The U.N. has repeatedly affirmed that section 29 imposes legal obligations on the organization and its leadership to compensate individuals who have suffered damages for which the organization is legally liable.[29] Furthermore, the U.N. has substantially complied with the provision throughout the years by providing various forms of dispute resolution.[30] Nevertheless, the U.N. has failed to create such a mechanism for Haitian cholera victims.

B. SOFA BETWEEN THE U.N. AND HAITI

SOFAs are bilateral agreements between a state or IO leading a military or peacekeeping operation and the host state.[31] They establish a framework under which visiting forces will operate within the host state.[32] The legal norms stipulated in these agreements derive principally from the laws on visiting forces and international privileges and immunities along with addressing how the domestic laws of the foreign nation shall apply to visiting personnel.[33]

---

28. *Id.* art. VIII, § 29.

29. *See, e.g.*, *The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Study Prepared by the Secretariat*, [1967] 2 Y.B. Int'l L. Comm'n 154, 220, U.N. Doc. A/CN.4/L.118 and Add. 1–2 ("It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal principles and with the [CPIUN]."); *Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations*, 2001 U.N. Jurid. Y.B. 381, 381–82, U.N. Sales No. E.04.V.12 [hereinafter *Selected Legal Opinions*] ("[T]he United Nations is required to make provisions for appropriate modes of settlement . . . .").

30. *See Selected Legal Opinions*, *supra* note 29, at 382 ("[W]hile specific procedures have been devised for particular types of claims, the central features of the modes of settlement used by the United Nations pursuant to article VIII, section 29, of the Convention are the amicable resolution of such claims, where possible, such as through negotiation or, in certain cases, insurance, and, if amicable settlement cannot be achieved, the submission of claims to formal dispute resolution procedures, usually arbitration.").

31. OLA ENGDAHL, PROTECTION OF PERSONNEL IN PEACE OPERATIONS: THE ROLE OF THE 'SAFETY CONVENTION' AGAINST THE BACKGROUND OF GENERAL INTERNATIONAL LAW 3 (2007); *see also* R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 1 (2009), http://www.fas.org/sgp/crs/natsec/RL34531.pdf.

32. *See* MASON, *supra* note 31.

33. *See id.*; ENGDAHL, *supra* note 31. The agreements also function to systematically protect personnel involved in peace operations under international law. *See* ENGDAHL, *supra* note 31; MASON, *supra* note 31. A state has "the responsibility of ensuring the protection of individuals within its jurisdiction." ENGDAHL, *supra* note 31, at 10. Pursuant to SOFAs, the host government assumes the responsibility for the U.N. and related personnel and is placed under an obligation to secure the general protection of all members of the peace operation. *See id.*

In accordance with this standard practice, the U.N. and Haiti entered into a SOFA in 2004 to govern the legal status of peacekeeping troops in Haiti.[34] The SOFA explicitly provides that MINUSTAH shall cooperate with the Government of Haiti "with respect to sanitary services and shall extend to each other the fullest cooperation in matters concerning health, particularly with respect to the control of communicable diseases, in accordance with international conventions."[35] The SOFA establishes the U.N.'s jurisdiction and acceptance of liability for victims' claims by requiring the U.N. to settle "[t]hird-party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to MINUSTAH"[36] by a "standing claims commission to be established for that purpose."[37] Upon determining liability, the U.N. "shall pay compensation" to those injured.[38] The agreement also provides sufficient detail on how the commission should be composed and the procedures it should follow,[39] indicating the paramount significance of this provision. Despite the U.N.'s clear obligation to establish a standing claims commission, the U.N. not only failed to create it but has also subsequently refused to establish a commission after the catastrophe.[40]

II. BASES OF U.N.'S IMMUNITY

The immunity of the U.N. and other IOs stems from the concept of state immunity—the law governing the immunity of foreign governments—which is a classic topic of international law. For the most part, IOs have immunity comparable to that of nation states.[41] However, the legal foundation and rationale for the immunity of IOs differs significantly from that of state immunity. State immunity predominately arises from the principle of sovereign equality of the states[42] as expressed by the Latin maxim: *par in parem non habet imperium*.[43] Other rationales for state immunity include the "principle of non-

34. SOFA, *supra* note 25.

35. *Id.* art. V, ¶ 23.

36. *Id.* art. VII, ¶ 54.

37. *Id.* art. VIII, ¶ 55.

38. *Id.* art. VII, ¶ 54.

39. *See id.* art. VIII, ¶ 55. The agreement provides that the committee shall consist of three members: (1) one appointed by the Secretary-General of the U.N.; (2) one appointed by the government of Haiti; and (3) a chairman appointed jointly by the Secretary-General and the Government. *Id.* It also sets forth a method to fill vacancies, establishes quorum requirements, and requires the approval of any two members for all decisions.

40. O'Brien Letter, *supra* note 10.

41. *See* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 58 (1995).

42. Patrick J. Lewis, *Who Pays for the United Nations' Torts?: Immunity, Attribution, and "Appropriate Modes of Settlement,"* 39 N.C. J. INT'L L. & COM. REG. 259, 310 (2014).

43. *Id. Par in parem non habet imperium* is the principle in public international law that "one sovereign power cannot exercise jurisdiction over another sovereign power." *Par in parem non habet imperium*, A DICTIONARY OF LAW (Jonathan Law 8th ed., 2015), http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-2772?rskey=rNW4iU&result=1.

intervention in the internal affairs of other states and the inability of a national court to enforce its own judgments against a foreign state."[44] The creation of the U.N. itself is fundamentally rooted in the sovereign equality of the states.[45]

To the contrary, jurisdictional immunity of IOs is the result of distinct justifications such as protecting the organization from: (1) biased domestic courts; (2) baseless actions brought with improper motives; and (3) the possibility that courts of member states will interpret the legal effects of their acts in different (perhaps inconsistent) ways.[46] It is a means of ensuring that judiciaries, through the impact of a judgment, do not become proxies by which states gain unmerited avenues to influence organizational activity. Additionally, the development of IO immunity has been influenced by the doctrine of functional necessity.[47] Functional necessity grants IOs as much jurisdictional immunity as they need to exercise their prescribed functions to fulfill their intended purposes.[48]

This Part explores some of the bases of immunity for the U.N. Section A focuses on the sources discussed in Part I (establishing the U.N.'s obligations to provide a dispute resolution mechanism), which also contain provisions concerning immunity. Section B discusses the International Organizations Immunity Act (IOIA) which regulates immunity from suit in the United States. [49]

A. IMMUNITY IN THE CPIUN

Similar to the provision in the U.N. Charter establishing the U.N.'s obligations, the Charter's guidance on the extent of immunity the U.N. enjoys is limited. Article 105 provides that "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."[50] The CPIUN provides that the U.N. "shall enjoy immunity from every form of legal process except insofar as . . . it has expressly waived its immunity."[51] This language expands the U.N.'s immunity from functional immunity to something closer to absolute immunity. Accompanying

---

44. Lewis, *supra* note 42, at 310 (internal citation omitted). "The earlier perception was that states were free, self determining actors within the international legal system.. . . However, since that time, the development of human rights law has changed our view of states." Singer, *supra* note 41, at 57. Despite the principle of nonintervention and broad state immunity, it is now understood that states are duly bound by customary and treaty law to respect the human rights of those within their jurisdiction. *Id.* Thus, "each state may go about its business as it pleases, within the limits of international law." *Id.* at 65.

45. U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

46. *See* Hugh McKinnon Wood, *Legal Relations Between Individuals and a World Organization of States*, 30 TRANSACTIONS OF GROTIUS SOC'Y 141, 143–44 (1944) (U.K.) (discussing why jurisdictional immunity is essential for an organization like the League of Nations).

47. Singer, *supra* note 41, at 56.

48. *Id.* Like states, IOs require jurisdictional immunity in order to carry on "their autonomous and independent business in the world." *Id.* at 65.

49. 22 U.S.C. § 288a (2012).

50. U.N. Charter art. 105, ¶ 1. The U.N. Charter accords similar privileges to U.N. officials and representatives of U.N. Members for the independent exercise of their organizational functions. *Id.* ¶ 2.

51. CPIUN, *supra* note 16, art. II, § 2.

this broad immunity, the CPIUN creates an obligation for the Secretary-General to waive the immunities of U.N. personnel whenever the assertion of immunity would "impede the course of justice" and waiver may be accomplished "without prejudice to the interests of the United Nations."[52]

The SOFA between the U.N. and Haiti does not further clarify or alter the immunity provided by the CPIUN. Pursuant to the SOFA, "MINUSTAH, as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the United Nations in accordance with the Convention."[53] Thus, the primary international source of the U.N.'s immunity in Haiti is found in the CPIUN.

B. IMMUNITY IN U.S. FEDERAL COURTS

Returning to the *Georges* decision, Judge Oetken's ruling recognized that the U.N.'s immunity from suit relied upon the CPIUN and the 2010 Second Circuit decision *Brzak v. United Nations*.[54] *Brzak* is an appeal by two U.N. staff members from a judgment of the U.S. District Court for the Southern District of New York dismissing sex discrimination and retaliation claims against the U.N. and three U.N. officials on immunity grounds.[55] The dismissal of the case was based on the CPIUN and the IOIA.[56] The court held that under the CPIUN, the U.N. "enjoy[ed] absolute immunity from suit unless 'it ha[d] expressly waived its immunity,'" and "purported inadequacies with the United Nations' internal dispute resolution mechanism [could not] indicate a waiver of immunity."[57]

The IOIA confers attributes of a legal personality on IOs, such as the capacity to contract and institute legal proceedings.[58] The statute only applies to IOs to which the United States is a party and which have been designated by the President as being entitled to the privileges and immunities offered.[59] The U.N. was among the first organizations to have been designated as such.[60] Thus, under the IOIA, the U.N. in the U.S. federal courts "enjoy[s] the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[61]

---

52. *Id.* art. V, § 20.

53. SOFA, *supra* note 25, art. IV, ¶ 15 ("The provisions of article II of the Convention . . . apply to MINUSTAH . . . .").

54. *See* Georges v. United Nations, 84 F. Supp. 3d 246, 248–49 (S.D.N.Y 2015).

55. Brzak v. United Nations, 597 F.3d 107, 113 (2d Cir. 2010), *cert. denied*, 562 U.S. 948 (2010). *Brzak* is binding in the Second Circuit following the denial of certiorari by the Supreme Court.

56. *Id.* at 112–13.

57. *Id.* at 112.

58. 22 U.S.C. § 288a(a)(i), (iii) (2012).

59. 22 U.S.C. § 288 (2012).

60. *See* Exec. Ord. No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

61. 22 U.S.C. § 288a(b) (2012).

III. THE U.N. SHOULD NOT ENJOY IMMUNITY WHERE IT HAS VIOLATED TREATY OBLIGATIONS

The scope and limitations of immunity have been the subject of ongoing debate both in scholarship and in judicial practice. With the mounting role of IOs in administrating world affairs, evidenced by the sheer volume and heterogeneity of the tasks they have come to assume, concerns about the broad immunity of these organizations have surfaced. The significant advantages that immunity provides, such as independence and efficiency, are tarnished by the advent of assertions of absolute immunity where treaty obligations have been unequivocally violated. The U.N.'s regime of absolute immunity is apparent from its refusal to establish an alternative mechanism for adjudicating victims' claims. The failure to receive Haitians' claims is both illegal and immoral and is part of an emerging trend of the U.N. shirking its legal and moral responsibilities in peacekeeping operations worldwide.[62]

The U.N.'s claim of absolute immunity—despite failing to set up a standing claims commission, causing the cholera epidemic, and subsequently refusing to provide a remedy for victims—amounts to a refusal to own up to its agreement with Haiti and a disavowal of the U.N.'s foundational principles. This Part will explore the U.N.'s twofold responsibilities in creating an adequate dispute resolution mechanism to provide those injured by the U.N. and its subordinates with a means of redress. Section A will discuss the organization's legal obligation pursuant to treaty provisions. Section B will discuss the U.N.'s moral duty to further its mission and serve as a role model for other IOs.

A. LEGAL JUSTIFICATIONS WEIGHING AGAINST ABSOLUTE IMMUNITY

Various sources of international law—including the U.N. Charter, several treaties, and SOFAs—require that the U.N. provide victims injured by its peacekeeping operations with mechanisms for bringing claims against the organization.[63] International law and jurisprudence recognize that immunity cannot be so absolute as to foreclose all avenues for redress. The right to an effective remedy is an essential component of international human rights law.[64]

While international courts have been willing to limit the immunities of IOs

62. *See, e.g.*, MARTEN ZWANENBURG, ACCOUNTABILITY OF PEACE SUPPORT OPERATIONS 288 (2005) ("The standing claims commission provided for in Article 51 of the UN Model Status of Forces Agreement . . . has never been established in practice.").

63. *See supra* Part I.

64. The fundamental right to a remedy exists for victims of gross violations of international human rights law and serious violations of international humanitarian law. *See* G.A. Res. 60/147 (Dec. 16, 2005). Recognition of this right is guided by the U.N. Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights, other relevant human rights instruments, and the Vienna Declaration and Programme of Action. *Id.* at 1. "*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law . . . ." *Id.* at 4. Accordingly, remedies for such violations of international law include the victim's right to: (a) "access to justice"; (b) "reparation for harm

when no dispute resolution mechanism has been provided, the *Georges* decision did not follow this trend. This section will (1) discuss why victims must have access to a remedy through a dispute resolution mechanism in order to preserve the essential function of the U.N.'s immunity, and (2) illustrate the discrepancy between Judge Oetken's interpretation of the CPIUN's bifurcated provisions for immunity and obligation to create appropriate modes of settlement.

1. Adequate Accountability Mechanism Requirement

Immunity cannot be so broad as to constitute impunity. Without an adequate accountability mechanism, the essential function of the U.N.'s immunity is frustrated.[65] European courts have often linked immunities to the availability of "reasonable alternative means."[66] The European Court of Human Rights has held that a material factor in determining whether interference with the right to a fair trial under Article 6 of the European Convention of Human Rights was proportionate is whether there was a reasonable alternative means to protect the plaintiffs' rights under the Convention.[67] Though these cases interpreted the European Convention, the same rationale is applicable to the U.N. in its obligations under the CPIUN and SOFA.

The European Court of Human Rights' reasoning was similarly followed by the Belgian Court of Cassation in *Western European Union v. Siedler*, but that court went further and found the alternative means provided by the IO inadequate to protect the rights of the plaintiff and voided the IO's immunity.[68] The court "confirmed that the mere existence of a dispute-settlement mechanism . . . did not suffice for the organization to successfully invoke its immunity."[69] The system should meet a number of "qualitative due process criteria before an organization could rely on the mechanism to justify the invocation of its immunity, particularly the semblance of independence."[70]

---

suffered"; and (c) "[a]ccess to relevant information concerning violations and reparation mechanisms." *Id.* at 6.

65. The essential purpose of the U.N.'s immunity is to enable the organization to fulfill its functions efficiently and independently without the undue influence of the host state. Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 104 (2002). This rationale does not support such a far-reaching impediment to legal protection when the enforcement of human rights violations is at issue.

66. *See* Eur. Parl. Ass., Comm. on Legal Affairs and Human Rights, *Accountability of Int'l Orgs for Human Rights Violations*, Doc. No. 13370, at 10–11 (2013), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20310&lang=en (courts have made their exercise of judicial review dependent on the availability of other adequate accountability mechanisms).

67. Waite v. Germany, App. No. 26083/94, 1999-I Eur. Ct. H.R. 1, 15 (1999); Beer v. Germany, App. No. 28934/95, (1999), http://hudoc.echr.coe.int/eng?i=001-58299.

68. *See* Cedric Ryngaert, *Western European Union v Siedler*, OXFORD PUB. INT'L L.: OXFORD REP. ON INT'L L., http://opil.ouplaw.com/view/10.1093/law:ildc/1625be09.case.1/law-ildc-1625be09?prd=ORIL (last visited Oct. 30, 2015). This report contains an in-depth analysis and breakdown of the Belgian case.

69. *Id.*

70. *Id.*

Thus, there has been an active effort under international law to condition the preservation of immunity on the availability of a reasonable alternative means of obtaining a remedy when important rights are at stake. Furthermore, the U.N. itself has implied through its representation in *Brzak* that immunity under the U.N. Charter and the CPIUN is conditioned on the U.N.'s adherence to its corresponding duties, particularly the obligation to establish a mode of dispute settlement.[71] The *Georges* decision relied upon *Brzak* in dismissing the suit,[72] but such reliance absent a dispute resolution mechanism is unfounded. In *Brzak*, there was a dispute resolution mechanism put in place, although the court rejected the plaintiffs' argument that purported inadequacies with the internal dispute resolution mechanism indicated a waiver of immunity.[73]

In the absence of a legal mechanism to address victims' complaints, thousands of Haitians have been left without a remedy. Consequently, the U.N. should not enjoy immunity where it has failed to provide a method of redress and a forum for victims to have their claims heard pursuant to treaty obligations.

2. Interpreting the CPIUN's Provisions

Contrary to the CPIUN's object and purpose, the *Georges* decision extends unconditional, absolute immunity to the U.N.[74] Although the CPIUN states that the United Nations "*shall* enjoy immunity from every form of legal process except insofar as . . . it has expressly waived its immunity,"[75] it equally provides that the U.N. "*shall* make provisions for appropriate modes of settlement of . . . [d]isputes . . . of a private law character to which the United Nations is a party . . . ."[76] However, Judge Oetken's understanding of the Convention creates a discrepancy between the interpretation of the word "shall" in the separate provisions. Although acknowledging that section 29 uses mandatory language, he considers the "shall" in providing appropriate modes of settlement as discretionary, and the "shall" in enjoying immunity as unequivocal.[77] The opinion states: "This language may suggest that section 29 is more than merely aspirational—that it is obligatory and perhaps enforceable. But even if that is so, the use of the word 'shall' in section 29 cannot . . . override the clear and specific grant [of immunity]."[78] This construction of the treaty's language effectively renders section 29 of the CPIUN meaningless. How can the provision be both

71. Memorandum of Law in Support of the Motion of the United Nations to Dismiss and to Intervene at 4, Brzak v. United Nations, 551 F. Supp. 2d 313 (S.D.N.Y. 2008) (No. 1:06-cv-03432-RWS) ("In civil matters, the uniform practice is to maintain immunity, while offering, in accord with Section 29 of the General Convention, alternative means of dispute settlement. . . . This practice . . . eliminates the prospect of impunity . . . .").

72. Georges v. United Nations, 84 F. Supp. 3d 246, 248–49 (S.D.N.Y. 2015).

73. Brzak v. United Nations, 597 F.3d 107, 112 (2d Cir. 2010).

74. *Georges*, 84 F. Supp. 3d at 250–51.

75. CPIUN, *supra* note 16, art. II, § 2 (emphasis added).

76. *Id.* art. VIII, § 29 (emphasis added).

77. *Georges*, 84 F. Supp. 3d at 250–51.

78. *Id.* at 250.

obligatory and enforceable if there are no legal consequences when it is breached?

Although it is possible for statutory language to be mandatory, yet not provide for an enforcement mechanism,[79] section 29's function itself is to create the enforcement mechanism that will hold the U.N. accountable for its actions. Furthermore, it comports with the fundamental right to redress required under international law in such cases. The introductory note to the CPIUN itself acknowledges that section 29's requirement to provide alternative dispute settlement where the U.N. is immune from legal process mitigates the U.N.'s de facto absolute immunity and can be regarded as an "acknowledgment of the right of access to court as contained in all major human rights instruments."[80] Thus, in this instance, the failure to impose repercussions where the U.N. has violated this treaty provision renders both the provision itself and the victim's fundamental right to a remedy meaningless.

Treaties must be interpreted in a way that gives effect to the legal obligations established by the plain language of the treaty.[81] Rules of construction cannot be used to render the text of the treaty "meaningless or inoperative."[82] To read the CPIUN as according absolute immunity even when section 29 is violated not only restricts the rights under the treaty but extinguishes them. The CPIUN should be interpreted in a manner that gives effect to its provision requiring alternative mechanisms of dispute resolution.

B. POLICY IMPLICATIONS

The U.N.'s actions and the manner in which it handles its obligations while undertaking a peacekeeping operation will have ramifications that extend far beyond the four corners of the entity. Absolute immunity runs afoul of the U.N.'s stated missions, and the negative implications of such immunity will hinder the organization's legitimacy and set an undesirable example for other IOs that rely on the U.N. for guidance. This section identifies two reasons why the U.N. has a moral obligation to fulfill its treaty obligations and accept responsibility where it has failed to do so: (1) accountability is required to further the U.N.'s stated missions; and (2) the U.N. has a unique position as a role model to other IOs .

1. Accountability Is Imperative to Furthering the U.N.'s Stated Missions

The U.N. was founded in the aftermath of World War II and sought to undertake four commitments: "(1) to maintain international peace and security; (2) to develop friendly relations among nations; (3) to cooperate in solving

79. *See id.* (Judge Oetken's "perhaps enforceable" reflects this point).

80. Reinisch, *supra* note 21.

81. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 303–04 (1933) (holding that all words and phrases of a treaty are "to be given a meaning, if reasonably possible").

82. *Id.*

international problems and promoting respect for human rights; and (4) to be a centre for harmonizing the actions of nations."[83] Neglecting treaty obligations to provide an adequate dispute resolution mechanism is directly contrary to the U.N.'s purpose of promoting respect for human rights and limits its stated missions. Equal protection under the law and protection of private life are among the human rights delineated by the U.N. that the organization has impinged upon.[84] Absolute immunity for the U.N. undermines the basic right to life and liberty recognized by the institution and runs afoul of the U.N.'s self-proclaimed commitments.[85]

Accountability is necessary to ensure that all states will have the trust necessary to maintain international peace and stability, develop sustainable and friendly relationships, cooperate in protecting human rights, and otherwise coordinate their respective responses to such catastrophes. A lack of accountability for the human rights violations in Haiti, failure to set up a standing claims commission, and refusal to provide victims a means of redress undercuts the reputation of the U.N. and has led to extensive negative scrutiny of the organization and its operations in Haiti.[86]

Good intentions are not enough to justify the harms that countries have suffered under the U.N.'s missions. The U.N. has repeatedly failed to establish standing claims commissions pursuant to SOFAs in its peacekeeping missions.[87] A persistent refusal to take responsibility would "further undermine the organization's claim to promote the rule of law and human well-being in its missions."[88] Thus, it is in the U.N.'s best interest to refrain from taking advantage of its absolution from responsibility. The crisis in Haiti highlights the inadequacy of steering clear of accountability in the international context. The U.N.'s neglect in creating commissions to hear victims' claims, coupled with their insistence upon absolute immunity, runs counter to the fundamental pur-

83. UNITED NATIONS, UNITED NATIONS AT A GLANCE 2 (2012), http://www.unic-ir.org/UNatGlance.pdf.

84. *See id.* at 126. In describing the common characteristics of human rights and explaining the importance of respecting such rights, the U.N. states that human rights are: (1) universal; (2) inalienable; (3) interdependent and indivisible; (4) equal and nondiscriminatory; and (5) both rights and obligations. Because these rights are inalienable, "[t]hey should not be taken away, except in specific situations and according to due process . . . ." UNITED NATIONS, *supra* note 83, at 127.

85. *Id.* at 53 ("The United Nations is guided in its endeavours by the conviction that lasting international peace and security are possible only if the economic and social well-being of people everywhere is assured.").

86. *See, e.g.*, Jonathan M. Katz, *In the Time of Cholera*, FOREIGN POL'Y (Jan. 10, 2013), http://foreignpolicy.com/2013/01/10/in-the-time-of-cholera/ (observing "[h]ow the U.N. created an epidemic—then covered it up."); Charanya Krishnaswami & Muneer I. Ahmad, Opinion, *U.N. Hypocrisy in Haiti*, WASH. POST (Mar. 21, 2013), http://www.washingtonpost.com/opinions/un-hypocrisy-in-haiti/2013/03/21/1b3c9a10-8d87-11e2-9f54-f3fdd70acad2_story.html ("How can [the U.N.] purport to hold human rights abusers in Haiti accountable when it refuses to hold itself to the same standard?").

87. *See* ZWANENBURG, *supra* note 62.

88. Celso Perez & Muneer I. Ahmad, *Why the UN Should Take Responsibility for Haiti's Cholera Outbreak*, ATLANTIC (Aug. 16, 2013), http://www.theatlantic.com/health/archive/2013/08/why-the-un-should-take-responsibility-for-haitis-cholera-outbreak/278762/.

poses of the U.N. and undermines its goal of being a unified and accountable global body.

2. U.N. as a Role Model

Since its creation in 1945, the U.N. has grown rapidly and currently stands strong with 193 member states.[89] As the most representative IO in the world, the U.N.'s role in world affairs has an enormous impact on member states and other IOs. The U.N. can play a pivotal and positive role, or it can choose to thwart responsibility for its actions and become a negative exemplar. Setting the stage for the establishment of a just and reasonable international, political, and economic order requires that the rights and interests of member states, including developing countries, are safeguarded. Thus, it is imperative that the U.N. does not blatantly disregard its obligation to provide appropriate modes of settlement pursuant to the CPIUN.

Currently, the CPIUN has 161 state parties.[90] The U.N. immunity regime has been a model for other organizations, and the CPIUN's provisions on jurisdictional immunity have been applied to other organizations through the development of similar treaties and customary international law.[91] Most of the major IOs have adopted the CPIUN as a model for their own treaties, and some scholars and courts even argue that the terms of the CPIUN have matured into rules of customary international law that presumptively apply to a broader range of IOs.[92]

Accordingly, the interpretation of the CPIUN's provisions for immunity and providing appropriate modes of settlement going forward will serve as a guide for other IOs. The U.N.'s emerging role as the paragon of IOs insists upon a moral obligation to act diligently in protecting the rights of victims injured by the organization's actions.

IV. MOVING TOWARD AN ERA OF ACCOUNTABILITY

When a peacekeeping force causes more deaths than it prevents and does not face any repercussions for its negligent and reckless actions, it is a good

89. *Growth in United Nations Membership, 1945-Present*, U.N., http://www.un.org/en/members/growth.shtml (last visited June 7, 2015).

90. Status, *Convention on the Privileges and Immunities of the United Nations*, U.N. TREATY COLLECTION (Jan. 22, 2016, 7:34 AM), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&lang=en.

91. Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 22 (2000). For example, the General Agreement on Privileges and Immunities of the Council of Europe incorporates a similar provision providing that "[t]he Council . . . shall enjoy immunity from every form of legal process . . . ." General Agreement on Privileges and Immunities of the Council of Europe pt. II, art. 3, Sept. 2, 1949, 250 U.N.T.S. 12. The Agreement on Privileges and Immunities of the Organization of American States also has a parallel provision. Agreement on Privileges and Immunities of the Organization of American States ch. 1, art. 2, May 15, 1949, O.A.S.T.S. No. 22.

92. Brower, *supra* note 91, at 23.

indication that it is not being adequately monitored and change is desirable. The epidemic in Haiti uncovers how far even the most well-intentioned organizations can drift when they are not subject to a hard external check, and how badly the U.N. is in need of mechanisms that will force it to do better. With the U.N.'s current immunity regime, the organization is essentially self-regulating. Not only is this dangerous and undesirable, it is legally and morally reprehensible, as discussed in Part III.

However, criticizing the current state of the U.N. immunity regime without providing guidance on how to remedy the situation will not fuel changed circumstances in future mishaps. Due to the nature of international law, expecting rapid changes in the law is not conceivable, and rather, a systematic approach is desirable. Thus, this Part contributes two proposals going forward. First, it suggests that SOFA provisions should constitute an express waiver of immunity when they have a sufficiently detailed mandate for creating a claims commission. Second, it identifies a problem that remains to be resolved as a corollary to requiring a dispute resolution mechanism as a prerequisite to receiving immunity.

A. A SOFA PROVISION SHOULD CONSTITUTE AN EXPRESS WAIVER

In *Georges*, neither party asserted that the U.N. expressly waived its immunity,[93] so this was not in contention nor discussed in the decision. However, this case presents an interesting issue: whether the U.N. perhaps did expressly waive its immunity through the SOFA between itself and Haiti. In the SOFA, the U.N. promised to create a standing claims commission.[94] Yet since its entry in Haiti in 2004, the U.N. has failed to take steps to establish such a commission.[95]

This Note proposes a bright-line rule that when the U.N. enters a SOFA, a provision explicitly necessitating a standing claims commission with corresponding procedural requirements should be considered an express waiver of immunity if the U.N. fails to institute the commission. SOFAs are distinct from treaties, such as the CPIUN, because they are bilateral agreements that are created for the purpose of governing the peacekeeping operation.[96] Although the SOFAs entered into by the U.N. are based on a model SOFA,[97] each one is a separate contractual agreement between the U.N. and the host nation. A SOFA can be tailored to the situation with modifications that are agreed to by the U.N. and the host country. When the U.N. is signing the agreement upon entering, it is aware of the commitments that it is making. Unlike treaties, SOFAs are not

93. Georges v. United Nations, 84 F. Supp. 3d 246, 248–49 (S.D.N.Y. 2015).

94. SOFA, *supra* note 25, art. VIII, ¶ 55.

95. *See* O'Brien Letter, *supra* note 10. The U.N. refused to create the commission even after the victims of the cholera epidemic requested posthoc creation. *See id.*

96. ENGDAHL, *supra* note 31; MASON, *supra* note 31.

97. U.N. Secretary-General, *Model Status-Of-Forces Agreement for Peace-Keeping Operations*, ¶ 1, U.N. Doc. A/45/594 (Oct. 9, 1990).

documents of general applicability. Thus, it is preposterous that in the current state of affairs, the U.N. itself drafts and signs these agreements then breaches them by unilaterally refusing to establish the commissions, leaving no legal recourse available to victims.

The contractual agreement in a SOFA is also distinct from the CPIUN obligations. The SOFA delineates the explicit creation of a standing claims commission and identifies the composition and procedures that the commission should follow.[98] On the other hand, the U.N.'s obligation pursuant to the CPIUN is to provide "appropriate modes of settlement,"[99] which is a vague directive that is more difficult to substantiate into an adequate mechanism. Although the U.N. should not enjoy immunity when it fails to provide a dispute resolution mechanism in breach of its CPIUN obligations, an appropriate mode of settlement is problematic to measure and enforce. But a bright-line rule waiving U.N. immunity where there is a SOFA with a specific requirement to establish a standing claims commission, accompanied by details for implementing it, would be sufficiently easier for courts to identify and follow.

B. PERSISTING PROBLEM: THE MEANING OF APPROPRIATE

Courts have made inconsistent rulings on whether the availability of an appropriate dispute resolution mechanism is necessary for IOs to claim immunity. Even if there were consensus on the requirement to have a mechanism pursuant to treaty obligations—such as the CPIUN—progress would still be hindered by the ambiguity of the obligation. Whether the alternative means are in fact appropriate or adequate would remain an issue for courts to determine in a given case. Although the judgments of *Waite v. Germany*[100] and *Beer v. Germany*[101] held that reasonable alternative means were a requirement to granting immunity, they lack a critical assessment of the adequacy of the alternative remedies that were available to the applicants. This begs the question whether there should be substantive requirements imposed on this duty to have a dispute resolution mechanism or whether IOs such as the U.N. should be permitted to enjoy immunity where they have made a good faith effort to have a system in place.

The latter route can be analogized to the protection of the business judgment rule[102] that corporate directors enjoy when exercising their good faith effort to

98. SOFA, *supra* note 25, art. VIII, ¶ 55.

99. CPIUN, *supra* note 16, art. VIII, § 29.

100. Waite v. Germany, App. No. 26083/94, 1999-I Eur. Ct. H.R. 1, 15 (1999).

101. Beer v. Germany, App. No. 28934/95, (1999), http://hudoc.echr.coe.int/eng?i=001-58299.

102. The business judgment rule presumes that in making a business judgment, a corporation's directors acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the corporation. Shlensky v. Wrigley, 237 N.E.2d 776, 779–80 (Ill. App. Ct. 1968). Courts will defer to the judgment absent highly unusual circumstances—such as fraud, illegality, gross inattention, or a conflict of interest. *Id.*

create a compliance system for internal monitoring.[103] There is a duty to create some form of compliance system, but details of how onerous that system should be benefits from the business judgment rule.[104] The board of directors is only subject to liability in the event of a "sustained or systematic failure" to put in place an effective compliance system and to monitor and oversee its operations.[105] Whether or not it would desirable for the U.N. and other IOs to receive such broad deference once they have established a mechanism to handle victims' claims would remain to be resolved.

Applying the carte blanche approach of corporate law by allowing IOs to put in any system merely to pass the hurdle to immunity may not be sufficient where a body is entrusted with the public good. The business judgment rule has its merits in the corporate context where directors require a degree of latitude to make decisions in furtherance of the interests of the corporation and its shareholders; but in the context of IOs, the very essence of the organization is to ensure that fundamental rights are respected while carrying out their duties. The independence of IOs is pivotal to their functioning as a conglomeration of states, and their effectiveness hinges on how fairly and efficiently internal rules are set. Such fairness and efficiency is largely measured by the adequacy of the dispute resolution mechanisms adopted and the quality of the compensatory schemes provided by IOs. Thus, in resolving this persisting problem of determining whether the alternative means are adequate or appropriate, the bar should be set higher than requiring a perfunctory creation of an alternative dispute mechanism.

Construing SOFA mandates to create claims commissions as an express waiver of immunity and imposing substantive requirements on the duty to have an appropriate dispute resolution mechanism will better ensure the accountability of the U.N. and improve compliance with its legal obligations. These solutions will contribute to closing the accountability gap pervasively affecting IOs.

CONCLUSION

The *Georges v. United Nations* class action plaintiffs seek to ensure that U.N. immunity does not equate to impunity and that the victims of the U.N.-caused cholera epidemic are not denied a legal remedy. Not only is this case legally significant in setting precedent concerning U.N. immunity, it is morally compelling. It raises significant questions as to the accountability of IOs and the limits of their immunity.

IOs have a distinct legal personality, separate from their member states, with various rights and obligations. Immunizing them without requiring effective accountability mechanisms to remedy potential human rights infringements

103. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).
104. *See id.*
105. *Id.* at 971.

creates an obvious accountability gap. It also undermines the basic human rights standard that a remedy should be available to victims of human rights violations. Yet, IOs routinely make sweeping claims to jurisdictional immunity, and courts grant those claims with little persuasive analysis of the legal provisions establishing the human right to a remedy or the relevant policies shaping the organizations' best interests. Thus, it is imperative that efforts are made to move forward towards a system of accountability for IOs rather than permitting them to remain cloaked behind their supposed absolute immunity.

THE GEORGETOWN LAW JOURNAL

VOLUME 104 **APRIL 2016** **NUMBER 4**

THE GEORGETOWN LAW JOURNAL

VOLUME 104 | NUMBER 4 | Pages 745–1056 | APRIL 2016

THE GEORGETOWN LAW JOURNAL

Volume 104 **April 2016** **Number 4**

DeGuzman, M., M. "Article 21. Applicable Law", *in* Triffterer, O., Ambos, K. (eds.), *Rome Statute of the International Criminal Court A Commentary*, C.H. Beck Hart Nomos, 2016, 3rd ed.

denying leave to appeal is a lacuna that should be remedied by applying general principles of law as provided in article 21 (1) (c). The Appeals Chamber rejected this argument, holding that the Statute exhaustively sets forth when parties may appeal decisions of the Pre-Trial and Trial Chambers.[42] The Appeals Chamber also applied this reasoning to reject a defendant's argument that his case should be found inadmissible under the doctrine of 'abuse of process' because he was 'unlawfully detained and ill-treated' by the national authorities that arrested him.[43] The Chamber held that 'abuse of process' is not a ground for finding a case inadmissible under article 17.[44] Although the Chamber recognized that some powers not explicitly granted in the Statute inhere in the judicial function, it held that the power to stay proceedings based on abuse of process is not such a power.[45]

In other circumstances, however, the Court has taken a more liberal approach to applying its primary sources of law. For instance, a Trial Chamber has held that the Court has the implied power to subpoena witness testimony, even though the Statute only refers to the voluntary appearance of witnesses.[46] The Appeals Chamber has also controversially held that an accused need not be present during his or her trial under some circumstances[47] even though the Statute states that '[t]he accused shall be present during the trial'.[48] Some scholars have criticized the Court for such broad interpretations of the Statute.[49]

2. 'In the second place, where appropriate'

19 The inclusion of the phrase 'where appropriate' serves to emphasize the discretion the Court enjoys in determining when treaties or principles and rules of international law are applicable.

20 **a) 'applicable treaties'.** The debate with regard to this provision surrounded whether to include 'relevant' treaties or to limit the source to 'applicable' treaties[50]. In particular, the delegates debated whether the Vienna Convention on the Law of Treaties and the Convention Against Torture are applicable or merely relevant[51]. The drafters have been criticized for ultimately settling on the term 'applicable'[52]. As one commentator has pointed out, '[a] narrow reading of the term could prevent the Court from referring to the ICCPR or the European Convention on Human Rights on the grounds they are not 'applicable', but only relevant'[53]. However, this fear is somewhat allayed by the requirement in paragraph 3 that

[42] *Id.*

[43] *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Appeals Chamber, 14 December 2006, available at http://www.legal-tools.org/doc/1505f7/.

[44] *Id.* para. 34.

[45] *Id.* para. 35.

[46] *Prosecutor v. Ruto and Arap Sang*, ICC-01/09-01/11-1274-Corr2, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Trial Chamber V(A), 17 April 2014.

[47] *Prosecutor v. Ruto and Arap Sang*, ICC-01/09-01/11-1066, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', Appeals Chamber, 25 October 2013, para. 56, available at http://www.icc-cpi.int/iccdocs/doc/doc1669852.pdf.

[48] Rome Statute art. 63.

[49] See e. g., Bitti, in: Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009) 285.

[50] Saland, in: Lee (ed.), *The International Criminal Court: The Making Of The Rome Statute: Issues, Negotiations, Results* (1999) 215.

[51] See *id.*

[52] See Pellet, in: Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1067–70; Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 177, para. 12.

[53] Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 177.

the application of law under the Statute must be consistent with internationally recognized human rights.

Applicable treaties include, for instance, the Geneva Conventions of 12 August 1949, 21
which are incorporated into the definition of war crimes. Moreover, the Court has held that the Vienna Convention on the Law of Treaties applies to its interpretation of the Rome Statute.[54] Other applicable treaties include those to which the Court is a party, such as the treaty governing the Court's relationship with the Netherlands.[55] The Court should avoid following the practice of the *ad hoc* tribunals, which have applied international agreements that are binding on the states that would normally have jurisdiction over the offence. Given the ICC's wide-ranging jurisdiction, this approach would contribute to the fragmentation of international criminal law.[56]

In practice, the choice of the term 'applicable' may be less important than the drafters 22
believed because the Court is free to refer to all treaties in its search for the principles and rules of international law referenced in paragraph 1 (b). While treaties that are merely 'relevant' to the work of the Court cannot be applied directly, therefore, they can nonetheless provide evidence in support of the other sources. This makes sense because, as Leila Sadat has noted, it is unlikely that the drafters wished to deprive the Court of the possibility of referring to international treaties to assist them in deciding novel issues[57].

b) 'principles … of international law'. The inclusion of 'principles … of international 23
law' in paragraph 1 (b) as a source of law distinct from 'general principles' derived from national laws in paragraph 1 (c) has generated confusion. The Statute clearly defines the source of paragraph 1 (c)'s 'general principles': they are derived 'from national laws of legal systems of the world'. However, the Statute fails to identify the provenance of 'principles … of international law' in paragraph 1 (b), raising the question of how these principles differ from the general principles in paragraph 1 (c).

There is widespread agreement that paragraph 1 (b) at a minimum includes customary 24
international law. The drafters may have used this formulation, rather than a direct reference to customary law, out of concern that the latter is insufficiently precise in the context of criminal law.[58] Commentators have taken different views of the meaning of 'principles' in this provision, however. Allain Pellet asserts that the inclusion of 'principles' in paragraph 1 (b) was a mistake, a 'verbal tic', and that subparagraph (b) is simply an awkward reference to customary international law[59]. William Schabas, on the other hand, interprets this provision as encompassing not only custom but also general principles of law derived from the national legal systems of the world.[60] He finds support for this position in the drafting history. The 1993 draft Statute of the ILC contains a commentary explaining that 'principles and rules of general international law' includes 'general principles of law'.[61] According to Professor Schabas, paragraph 1 (c)'s 'general principles' refer not to the general principles of international law but to principles derived from comparative law.[62]

A third possibility, and the one that is most supported by the Court's case law, is that 25
paragraph 1 (b) includes both customary international law principles and other kinds of

[54] DRC (Appeals Chamber Judgment on Prosecutor's Application), *note 41*, para. 33.

[55] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 390.

[56] See *id.*, 1069, para. 104 (citing decisions of the ICTY and criticizing this approach as 'open[ing] the way to an 'à la carte' jurisdiction').

[57] Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 177, para. 12.

[58] *Id.* 384.

[59] Pellet, in: Cassese, Gaeta, and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1072.

[60] *Id.*

[61] *Id.* citing ILC, 'Report of the International Law Commission on the Work of its 45th Session (3 May-23 July 1993) UN Doc A/CN.4/SER.A/1993/Add.l (Part 2) 111 para. 2.

[62] Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 391.

Doak, J., "Victims' Rights in Criminal Trials: Prospects for Participation",
***J. of Law & Soc* (2005)**

JOURNAL OF LAW AND SOCIETY
VOLUME 32, NUMBER 2, JUNE 2005
ISSN: 0263-323X, pp. 294–316

Victims' Rights in Criminal Trials: Prospects for Participation

JONATHAN DOAK*

Victims in common law jurisdictions have traditionally been unable to participate in criminal trials for a number of structural and normative reasons. They are widely perceived as 'private parties' whose role should be confined to that of witnesses, and participatory rights for such third parties are rejected as a threat to the objective and public nature of the criminal justice system. However, recent years have witnessed both a major shift in attitude in relation to the role of victims within the criminal justice system and a breakdown in the public/private divide in criminal justice discourse. This article considers the standing of the victim within the criminal trial against the backdrop of such changes, and examines the arguments for a more radical course of reform that would allow victims to participate actively in criminal hearings as they are able to do in many European jurisdictions.

INTRODUCTION

The plight of the victim within the criminal justice system has been widely documented since the 1970s, but during the past two decades the interests of victims have come to play a more prominent role in the formulation of policy in both domestic and international criminal justice systems. In the United Kingdom, successive governments have introduced a range of measures designed to bolster the so-called 'social' or 'service' rights of the victim, such as improved access to information, upgraded court facilities, and entitlements to compensation. A wide range of statutory measures is now

* *Department of Law, University of Sheffield, Crookesmoor Building, Conduit Road, Sheffield S10 1FL, England*
j.doak@sheffield.ac.uk

A previous version of this paper was presented at the SLSA Conference in April 2004 at the University of Glasgow. Thanks to John Jackson and Sean Doran, and to the anonymous reviewers.

available to assist vulnerable witnesses to give evidence at court,[1] and the new Domestic Violence, Crime and Victims Act brings into effect a statutory code of practice for criminal justice agencies and creates a new 'Victims' Commissioner' to promote and protect the interests of victims and witnesses.[2]

On the whole, such reforms have been broadly welcomed and have proved relatively non-contentious. They can be said to emanate primarily from the victims' emerging status as consumers of the criminal justice services,[3] and it is largely agreed that they threaten neither the public character of the criminal justice system nor the due process rights of the accused. Yet many proponents of victims' rights view such developments as long overdue, and argue that the idea of victims' rights should be developed one step further, entailing some form of procedural right of participation within criminal proceedings. The concept of 'participation' is something of an abstract term and lacks any concrete definition. Edwards has suggested that it may be perceived as stemming from the broader concept of citizenship, and may include 'being in control, having a say, being listened to, or being treated with dignity and respect'.[4] Interpreted in this way, 'participation' in criminal justice may appear both feasible and desirable, but the debates around the *extent* of participation to which victims ought to be entitled touch upon the much deeper issue of how far the interests of a third party ought to be accommodated within the traditionally dichotomous nature of the criminal trial between the state and the accused. If, as most theorists state, the main function of the criminal justice system ought to be the punishment of the guilty and the acquittal of the innocent,[5] questions need to be addressed concerning the proper place of the 'private' interests of a third party in a system where the state is charged with protecting the public interest and safeguarding core values such as certainty and objectivity.

In recent years, the 'public' nature of key decision-making processes has been increasingly influenced by private interests, with victims in some jurisdictions having acquired the right to participate in sentencing and diversion processes. Following the establishment of several pilot schemes in England in the late 1990s, the government introduced a nationwide Victim

1 The Youth Justice and Criminal Evidence Act 1999 introduced a range of 'special measures' for vulnerable witnesses testifying in court. Witnesses eligible under the Act may be entitled to use a range of measures to maximize the quality of their evidence. The measures include the erection of physical screens; the use of live televised links; removal of the public from the courtroom in certain sexual offences cases; the removal of gowns and wigs; the admission of both pre-recorded examination-in-chief and cross-examination as alternatives to live testimony; and the use of intermediaries or 'aids to communication'.

2 See ss. 33 and 48 of the Act respectively.

3 D. Faulkner, *Crime, State and Citizen* (2001) 232.

4 I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *Brit. J. of Crim.* 967, 973.

5 A. Sanders and R. Young, *Criminal Justice* (2000) 9.

Personal Statement Scheme in October 2001, which allows victims to explain the impact of the crime upon them by way of a personal statement made to the police.[6] The specific merits and potential pitfalls of the participation in sentencing are widely discussed elsewhere,[7] but the notion of victim 'participation' implies much more than the giving of some form of victim impact statement. In the common law world, relatively little attention has been given to the concept of direct participation rights for victims within the criminal trials where the guilt of the accused remains an issue. In the pre-conviction phase of criminal proceedings, the aims and objectives of proceedings are different from the sentencing stage of proceedings where guilt is no longer an issue. The concept of victim involvement here is fraught with numerous difficulties on account of the myriad of competing aims of criminal justice, which include the objective adjudication of guilt, the desirability of truth-finding, the preservation of public interests, and the need to preserve fair trial rights for the accused. It is additionally complicated by the fact that his or her status as a 'victim' is somewhat uncertain prior to the determination of the accused's guilt.[8]

Recently, however, some adversarial systems have introduced mechanisms whereby the victim's legal representative may intervene in relation to specific issues arising in the trial. For example, the Republic of Ireland adopted legislation in 2001 to permit complainants to be represented by their own counsel in a *voir dire* where the defence had applied to introduce previous sexual history evidence.[9] However, the provision is extremely narrow, in so far as it will only apply in cases of rape or sexual assault, and, like many similar United States provisions,[10] it will only apply in the specific circumstance

6 The statement is appended to the case papers, but does not have the same effect as those types of victim impact statements that are used as sentencing tools in parts of the United States of America and Canada. It was made clear in a Practice Direction from the Lord Chief Justice that the 'opinions of the victim or the victim's close relatives as to what the sentence should be are therefore not relevant, unlike the consequence of the offence on them': *Practice Direction (Victim Personal Statement)* [2002] 1 Cr. App. R. (S) 482.

7 A good overview of the arguments can be found in I. Edwards, 'The place of victims' preferences in the sentencing of "their" offenders' [2002] *Crim. Law. Rev.* 689.

8 The very designation of an individual as a 'victim' may give rise to an inherent implication that the allegations made by that person ought to be accepted as the historical truth before the tribunal of fact has arrived at its determination as to the guilt of the accused. See, however, M. Brienen and E. Hoegen, *Victims of Crime in 22 European Justice Systems* (2000) who argue that the presumption of being a 'non-victim' until the trier of fact has determined otherwise operates to prevent some of the above-noted *substantive* rights and interests being protected during the pre-trial and trial stages (p. 30).

9 s. 4A(1) of the Criminal Law (Rape) Act 1981, as inserted by s. 34, Sex Offenders Act 2001.

10 Some American states, such as Wisconsin, West Virginia, and New Hampshire, allow the attorneys of rape complainants to make representations when questions

where the defence is attempting to introduce sexual history evidence. Any broader, more general role for a victim, which might involve the right of an advocate to intervene in cross-examination, the calling of character witnesses, or the pursuit of reparation from the accused would potentially cause immense structural and normative problems within any adversarial system.

BARRIERS TO VICTIM PARTICIPATION

1. *Structural barriers*

One of the major obstacles to victim involvement in the criminal process stems from the bifurcated structure of the adversarial criminal justice system. The trial has been said to centre upon the 'sharp clash of proofs presented by litigants in a highly structured forensic setting,'[11] where a heavy onus rests on the parties to produce evidence to substantiate their own case, and to perforate the arguments of their opponent. Without radical reform, existing trial structures could not easily be adapted to accommodate the meaningful participation of any third party. Proceedings would undoubtedly become lengthy, awkward affairs – particularly if victim's counsel were to call their own witnesses and spend a considerable amount of time cross-examining others called by either the prosecution or the defence. A whole series of further issues may also be introduced into the trial that would have minimal relevance to the determination of guilt. Indeed, Jorda and de Hemptinne have identified the dichotomous nature of proceedings as being one of the main factors that is likely to obstruct the effective participation by victims at the International Criminal Court.[12]

This bipartisan structure of criminal proceedings dictates that trials are typically characterized by a highly competitive atmosphere, which renders them fundamentally ill-equipped to address emotional trauma and private conflicts that have arisen as a result of the offence. The entire criminal process is designed to culminate in a confrontational showdown between the prosecution and the accused, and such postures can serve only to deepen the existing conflict.[13] As William Pizzi has remarked, the adversarial system

governing the admissibility of sexual history evidence are being considered by the court. One South Carolina provision is even broader in that it permits representations from a victim's advocate in any type of case where the defendant alleges improper or illegal conduct on the part of the victim as part of his or her defence.

11 S. Landsman, *Readings on Adversarial Justice* (1988) 2.

12 C. Jorda and J. de Hemptinne, 'The Status and Role of the Victim' in *The Rome Statute of the International Criminal Court*, eds. A. Cassese, P. Gaeta, and J. Jones (2002) 1388.

13 D. Frehsee, 'Restitution and the Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications' (1999) 2 *Buffalo Crim. Law Rev.* 235, 236.

'turns witnesses into weapons to be used against the other side.'[14] Their testimony must be shaped to bring out its maximum adversarial effect,[15] and witnesses are thereby confined to answering questions within the parameters set down by the questioner. The victim is denied the opportunity to relay his or her own narrative to the court using his or her own words, which seems something of an irony given that logic dictates that such an account should have a key role to play in arriving at the truth.[16] In practice, counsel in adversarial trials seek to take control of the witness, and use questioning to elicit only those facts which he or she feels should be included. Questions are carefully framed to avoid the witness speaking about anything that counsel feels should be omitted from the testimony. The goal, essentially, is to manipulate witness testimony in such a way that victory is made more likely.[17] This form of control exercised by advocates over witnesses means that the conflict is entirely removed from the hands of its protagonists. The contest culture of the courtroom is not at all conducive to *listening* to the accounts of individual witnesses, let alone healing conflicts.

It may also be suggested that, from a due process viewpoint, the involvement of another party in the case could be seen to breach the principle of equality of arms. Since the adversarial system relies so heavily on the delicate balance of power achieved through the clear delineation of roles for the prosecution and defence, the system could be perceived as appearing 'out-of-balance' if another party were involved in the case that could actively work against the interests of the defence. Thaman, for example, has noted the risk that the defence may be significantly undermined if victim's counsel is perceived to be aligning himself or herself closely to the prosecution in some form of 'good cop bad cop' ploy against the accused.[18]

2. *Normative barriers*

Just as victims are sidelined in practice during the trial, they are also normatively viewed as outsiders to the criminal hearing. Historically, this

14 W. Pizzi, *Trials Without Truth* (1999) 197.

15 id.

16 Note also that it is well documented how the structures, rules, and advocacy tactics which prevail within the adversary system frequently results in the general obscuring of historical facts. See, generally, R. Eggleston, 'What is wrong with the adversary system?' (1975) 49 *Aust. Law J.* 428; M.E. Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 *University of Pennsylvania Law Rev.* 1031; Pizzi, op. cit., n. 14; S. Steffen, 'Truth as Second Fiddle: Re-Evaluating the Place of Truth in the Adversarial Ensemble' (1988) 4 *Utah Law Rev.* 799.

17 L. Ellison, *The Adversarial Process and the Vulnerable Witness* (2001) 53–4. See, also, for example, M. Stone, *Cross-Examination in Criminal Trials* (1995) 120–6.

18 S. Thaman, 'Europe's New Jury Systems: The Cases of Spain and Russia' (1999) 62 *Law & Contemporary Problems* 233, 244.

was not always the case. Victims once had an active participatory role in criminal proceedings, and were responsible for not only initiating, but also for prosecuting offenders without the assistance of a public prosecutor. As Nils Christie has famously noted, these functions were 'appropriated' by the state,[19] as the focus of the criminal law shifted from the sphere of private law into a form of public law.

Various reasons have been mooted for this shift,[20] but whatever the historical explanations may be, they do not necessarily constitute a rational justification for the continuation of a strict dichotomy in the modern criminal justice system between public and private interests. The structures of the contemporary legal system clearly delineate the separate functions, sanctions, and rationales of the criminal and the civil law. Whilst civil law has been widely regarded as the appropriate channel for the resolution of disputes between individuals, the criminal law and its penal sanctions are geared towards protecting the public interest in denouncing and punishing unacceptable behaviour, and not the private interests of individual parties.[21] Ashworth sees the function of the criminal law as 'to penalise those forms of wrongdoing which ... touch public rather than merely private interests.'[22] It is on the basis of this punishment paradigm that the structures and values of the criminal justice system have been largely conceived.

Conceptually then, victims have no role to play in the modern criminal justice system other than to act as 'evidentiary cannon fodder'.[23] In contrast to continental systems, discussed below, they have no 'right to be heard',[24] and are denied any form of proactive participation in the trial since their interests are deemed to fall outside the remit of the criminal trial as a forum for the resolution of the dispute between the state and the accused. Victims have been 'conscripted' into an operational role within the criminal justice system, and are generally treated as its servants or agents.[25] In the view of criminal law purists, the 'rights' and the 'interests' of the victim should thus be pursued under the civil, as opposed to the criminal law, using the law of tort. Therefore, although many victims may feel as though they are 'owed' a

19 N. Christie, 'Conflict as Property' (1977) 17 *Brit. J. of Crim.* 1.

20 See generally, J.H. Langbein, 'The Origins of Public Prosecution at Common Law' (1973) 17 *Am. J. of Legal History* 313; D.J. Seipp, 'The Distinction between Crime and Tort in Early Common Law' (1996) 44 *Buffalo Law Rev.* 59.

21 A. Ashworth, 'What Victims of Crime Deserve', paper presented to the Fulbright Commission on Penal Theory and Penal Practice, University of Stirling, September 1992, as cited by M. Cavadino and J. Dignan 'Towards a Framework for Conceptualising and Evaluating Models of Criminal Justice from a Victim's Perspective' (1996) 4(3) *Inernational Rev. of Victimology* 153.

22 id.

23 Cavadino and Dignan, op. cit., n. 21, p. 155.

24 J. Spencer, 'Improving the Position of the Victim in English Criminal Procedure' (1997) 31 *Israel Law Rev.* 286, 292.

25 Faulkner, op. cit., n. 3, p. 226.

right to exercise a voice in decision-making processes, such as prosecution, reparation, and sentencing, the criminal justice system places such rights or interests in a firmly subservient position to the collective interests of society in prosecuting the crime and imposing a denunciatory punishment.[26]

3. *The purist view*

The supremacy afforded to these collective interests is justified primarily on the basis that crime is harmful to society, and that the penal measures imposed by the court are thereby conceived of as an official denunciation of the offender's wrongdoing. It is also considered vital to sideline the subjective desires of individual victims in order to maintain objectivity, consistency, and hence the overall legitimacy of the criminal justice system. It is thus unsurprising that many purists like Ashworth perceive a real risk in compromising the key values and objectives of the criminal justice system in order to recognize the validity of furthering private interests.[27] According to Weisstub, their central fear is that 'squatters and anarchists' would 'run wild' in the criminal justice system, and that 'ad hoc populism' could 'replace the impersonal rigour of codified and judicially made law'.[28]

The problem for the purist viewpoint, however, lies in the fact that, whatever the historical explanations for the *de facto* distinctions between public and private realms of law, the distinction has been artificial since its inception during the Middle Ages. Indeed, a closer look at the actual nature of individual crimes and torts suggests that it is not so easy to separate neatly the public from the private interests. As Smith and Hogan note, crimes, as opposed to torts, can be defined as wrongs which Parliament or the courts have deemed to be 'sufficiently injurious to the public to warrant the application of criminal procedure to deal with them',[29] but the real issue, as Frehsee contends, is whether such separations of doctrine can 'ultimately be found in the measure of whether our stated aims and purposes have been achieved in practice.'[30] Civil and criminal liability are each based on overlapping concepts of fault, recklessness, and strict liability,[31] and many

26 M. Cavadino and J. Dignan, 'Reparation, Retribution and Rights' (1997) 4(4) *International Rev. of Victimology* 233, 237.

27 See A. Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Ox. J. of Legal Studies* 86; A. Ashworth, *The Criminal Process: An Evaluative Study* (1998) 32. See, also, A. Von Hirsch, *Censure and Sanctions* (1993) 6.

28 D. Weisstub, 'Victims of Crime in the Criminal Justice System' in *From Crime Policy to Victim Policy*, ed. E. Fattah (1986) 205.

29 J.C. Smith and B. Hogan, *Criminal Law* (2002) 17.

30 Frehsee, op. cit., n. 13, p. 243.

31 A. Goldstein, 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi Law J.* 515, 530.

crimes have their equivalent in the law of tort.[32] As Weisstub has argued, public and private wrongs may be conceived as variations along the same continuum of fault,[33] a theoretical blurring already reflected in a number of ways on both the domestic and international platforms.

4. *The merging of public and private interests*

Over the course of the past three decades, the concept of victim/offender restitution has made significant inroads into the criminal law. In their examination of the Race Relations (Amendment) Act 2000, Field and Roberts argue that a 'subtle but important shift' has taken place, whereby the criminal justice system is becoming increasingly geared 'toward a more interactive relationship between the individual rights of victims and their families on the one hand, and collective interests on the other.'[34] Since 1972, criminal courts have been empowered to order an offender to pay a victim compensation for 'any personal injury, loss or damage resulting from the offence',[35] and criminal courts are now obliged to consider whether it would be desirable to make a compensation order and must give reasons for refusing to do so.[36] So too, the explosion in restorative justice initiatives has presented victims with much greater opportunities to seek reparation directly from the offender. In the last decade, such projects have become widespread and have been placed on some form of a statutory footing in many jurisdictions.[37]

This apparent breakdown in the public/private divide has not been confined to the domestic arena. Advances in human rights and criminal justice discourses on the international platform have guaranteed victims of 'non-state' crime similar human rights safeguards as the more 'conventional' victims of abuse of state power. A key theme to have evolved in international

32 L. Sebba, 'Will the 'victim revolution' trigger a reorientation of the criminal justice system?' (1997) 1 *Israel Law Rev.* 379, 399.

33 Weisstub, op. cit., n. 28, p. 206.

34 S. Field and P. Roberts, 'Racism and Police Investigations: Individual Redress, Public Interests and Collective Change after the Race Relations (Amendment) Act 2000' (2002) 22 *Legal Studies* 493, 495. The Act provides for remedies for victims of racial discrimination in criminal investigations.

35 The court may make a compensation order, instead of, or in addition to, any other penal sanction. Where the offender has insufficient means to pay both, the court shall give preference to the compensation order (s. 130(12) Powers of Criminal Courts (Sentencing) Act 2000). The powers were originally set out in Criminal Justice Act 1972.

36 s. 130, Powers of Criminal Courts (Sentencing) Act 2000: s. 130(4) of the Act states that compensation 'shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor, the Court.'

37 For an international overview, see D. Roche, *Accountability in Restorative Justice* (2003) ch. 1.

human rights discourse in recent years is that the state has a duty to enforce domestic criminal sanctions against offenders, thus severely curtailing the level of prosecutorial discretion in determining which crimes to prosecute.[38] In many international criminal justice systems and human rights fora, 'victims' rights' are therefore increasingly being construed as a form of human rights, worthy of legal protection within domestic systems.[39] Perhaps even more significant in the context of this article is that these norms grant victims certain participatory rights in criminal proceedings, overreaching the purist delineation of the functions of criminal and civil law. For example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime states that judicial and administrative processes should allow 'the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected.'[40] Given that the accused has a right to counsel in many international human rights instruments,[41] it could be argued that the principle of 'equality of arms' requires that complainants should be afforded similar protection before the courts. This theme was highlighted by a recent United Nations working paper that stated:

> Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant's right to counsel. There is no zero-sum game between those two rights. The victim's right to be treated with respect seems to have little if any negative implications for the offender.[42]

The provisions of the Rome Statute permit victims at the International Criminal Court to choose their legal representatives, who have a right to present their views and make submissions when their interests are likely to be affected.[43] Such views and submissions may be made at all stages of the court proceedings with only the limitation that it would not be prejudicial or inconsistent with the rights of the accused.[44] In an era where globalization and harmonization of criminal procedure seem set to continue indefinitely, it is inevitable that domestic processes and policymakers and criminal justice agencies will be increasingly influenced by such international developments.

38 See, generally, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

39 J. Doak, 'Victims' Rights and the Criminal Process: an analysis of recent trends in regional and international tribunals' (2003) 23 *Legal Studies* 1; F. Klug, 'Human Rights and Victims' in *Reconcilable Rights? Analysing the Tension between Victims and Defendants,* ed. E. Cape (2004).

40 UN Doc A/40/53 (1985). GA Res 40/43, para 6(b).

41 See, for example, Art. 6(3)(c) ECHR; Art. 14(3)(d) ICCPR; *Basic Principles on the Role of Lawyers*, Principle 8.

42 United Nations, *Offenders and Victims: Accountability and Fairness in the Criminal Justice Process*, UN Doc A/ CONF.187/8 (1999), para. 21.

43 See Art. 68, Rome Statute.

44 Art. 68(1). Many commentators are, however, sceptical of the potential effectiveness of these mechanisms. See, further, Jorda and de Hemptinne, op. cit., n. 12, p. 1401.

Whilst it is clear that the rise of the victim agenda has affected the formulation of policy and the direction of criminal justice discourse in both the domestic and international contexts, its impact has been limited in most common law systems. In the adversarial system of England and Wales, the victim's interests in criminal trials have traditionally been subsumed by the broader 'public' interest which is, in theory, safeguarded by the prosecution. However, there are clear signs that the conceptual collapse of the public/private divide has encouraged both the Crown Prosecution Service and the General Council of the Bar to undertake a number of initiatives aimed at forging a much closer relationship between prosecutors and victims. Such initiatives would appear to be founded on the assumption that, if prosecutors were to assist the victims in their preparation for testifying, this could alleviate some of the stress associated with testifying and in turn lead to better evidence.[45] However, in addition to heightening the potential for conflicts of interest, the path of reform has been uncertain and its ultimate destination is still undetermined.

Traditionally, Crown prosecutors have not been obliged to represent the interests of the victim. Instead, they have been expected to exercise a broad discretion, strongly rooted in the public interest, in determining the extent to which the wishes of the victim should influence both the charging decision and the conduct of the case at court. The victim/prosecutor relationship has nonetheless undergone a significant change over the course of the past decade. In 1993 the Crown Prosecution Service (CPS) published its *Statement on the Treatment of Witnesses and Victims* and declared its intent to make 'provision for the proper care and treatment of victims and witnesses ... an essential part of CPS initiatives'. Prosecutors were obliged, among other things, to take into account the interests of victims and witnesses in any decision to prosecute; inform the court where the victim has made a claim for compensation; try to help victims and witnesses at court by giving 'appropriate and useful information'; introduce themselves to witnesses; look after the interests of the witnesses as the trial progresses; and to explain the results of cases, whenever possible, to victims at court. Following recommendations made by Sir Iain Glidewell in his review of the service in 1998,[46] and similar recommendations contained in Sir William Macpherson's report into the death of Stephen Lawrence,[47] the CPS has assumed responsibility for communicating and explaining decisions to drop or alter charges directly to victims rather than via the police.

45 Home Office, *Achieving the Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses, Including Children* (2001).

46 Sir I. Glidewell, *Review of the Crown Prosecution Service* (1998; Cmnd. 3960).

47 Sir W. MacPherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny* (1999; Cmnd. 4262).

One of the most notable areas of reform relates to the degree of contact victims ought to have with prosecutors prior to the trial. Although the Code of Conduct of the Bar of England and Wales prohibits barristers from discussing the evidence in the case with witnesses,[48] it was altered in 1995 to permit barristers to introduce themselves to witnesses prior to the trial.[49] More recently, the role of the prosecution has also expanded so that pre-trial meetings can now be accommodated in cases involving vulnerable witnesses in order to 'to establish a link between the CPS and the witness and provide witnesses with reassurance that their needs will be taken into account.'[50] Where prosecutors believe that the witness may be eligible for special measures under the Youth Justice and Criminal Evidence Act 1999, meetings are now arranged prior to the trial in order to determine which measure(s) should be the subject of an application to the court. However, the parameters of such meetings are stringently set: their purpose is solely to determine whether the quality of a witness's evidence might be improved by a Special Measures Direction under the Act. It is still clear from the Home Office/CPS guidance that any substantive issues relating to the evidence must not be discussed:

> It is imperative that there is no discussion whatsoever with the witness as to the evidence in the case. It is quite possible that the witness will wish to mention or discuss a matter relating to evidence but both the Bar Code of Conduct and the Guide to the Professional Conduct of Solicitors make it clear that there must be no discussion of evidence with the witness. Any such discussion would be likely to lead to an allegation of rehearsing or coaching of the witness ... If the witness does wish to discuss an evidential matter, the prosecutor must explain that the witness must discuss his or her evidence with the police officer, not the prosecutor, and that arrangements for this to happen can be made.[51]

The rules regulating pre-trial contact are now set to be unravelled still further. Following the report by the Director of Public Prosecutions into issues arising out of the Damilola Taylor murder trial,[52] the Attorney

48 See para. 6.3.1 of the Code of Conduct. Lay client, character, and expert witness are exempt.

49 The change followed a recommendation from the Royal Commission of Criminal Justice that the rule whereby prosecution barristers were prohibited from having any contact whatsoever with witnesses to the fact should be relaxed (Royal Commission on Criminal Justice, *Report* (1993; Cmnd. 2263) para. 50).

50 Home Office, *Early Special Measures Meetings between Crown Prosecutors and Vulnerable or Intimidated Witnesses* (2001).

51 id., paras. 23–4.

52 The full findings of the CPS inquiry were never published, although a summary was given through a press release. One of these issues concerned the extent to which the CPS should have been able to conduct interviews with a 12-year-old girl, known as Bromley, in preparation for her evidence. The DPP's inquiry expressed regret that the prosecution was very limited in its ability to investigate the witness's story in advance of the trial, and the inquiry concluded that the possibility of changing the rules to allow for such meetings should be given careful consideration.

General issued a consultation paper considering whether or not prosecutors should be permitted to interview prosecution witnesses before trial.[53] A response to the consultation was issued in December 2004,[54] and confirmed radical reform to the rules governing pre-trial contact was indeed on the horizon.

The Attorney General concluded that professional rules should be altered to enable prosecutors to conduct pre-trial interviews where they consider them necessary to confirm the reliability of a witness's evidence, or to clarify the evidence which the witness can give. It was envisaged that the major benefits of such interviews would include 'enabling prosecutors to form better prosecution decisions, to clarify issues and to make witnesses more comfortable with the trial process.'[55] Although the Attorney-General acknowledged concerns expressed by a number of bodies over the risks of coaching and of potential blurring of the investigative and prosecutorial elements of the criminal process,[56] he considered that training for prosecutors, coupled with 'detailed guidance' contained in the Code of Practice, would be sufficient to safeguard against such concerns.[57]

The long-standing practice of not discussing evidence with witnesses in England and Wales will thus be discontinued, and as such, the Bar's Code of Conduct will have to be amended in the near future.[58] It remains to be seen how widely prosecutors will make use of the new discretion to interview witnesses, although it can probably be assumed that such meetings will be the exception, rather than the norm, and as such are unlikely to alter dramatically the perception held by many victims that they are 'outsiders' to the legal process.

The limitations of the victim/prosecutor relationship

While the increased recognition of the difficulties facing victims and witnesses by the CPS is to be welcomed, there are clear limits as to how far the rapport can be stretched. It has been a traditional maxim of common law systems that the duty of prosecuting counsel is not to obtain a conviction at

53 Crown Prosecution Service, *Pre-trial Witness Interviews by Prosecutors: A Consultation Paper* (2003).

54 Lord Goldsmith QC, *Pre-Trial Witness Interview by Prosecutors: Report* (2004).

55 id., p. 13.

56 See, for example, Criminal Bar Association, *Response to 'Pre-Trial Witness Interviews by Prosecutors, A Consultation Paper'* (2003); *Liberty's Response to the CPS Consultation on Pre-Trial Interviews* (2003). For a closer examination of the issue surrounding 'coaching' of witnesses, see J. Grohovsky, 'Giving Voice to Victims: Why the Criminal Justice System in England and Wales Should Allow Victims to Speak Up for Themselves' *J. of Crim. Law* 416.

57 Goldsmith, op. cit., n. 54, p. 20.

58 At the time of writing, a working group is currently being established to consider how best to pilot the proposals. Discussions are also to be held with the professional bodies to consider how best to implement changes to their codes of conduct.

all costs but to act instead as a 'minister of justice'.[59] As Louise Ellison has argued, there is an inherent tension in the idea of an objective 'minister of justice' presenting evidence to the court dispassionately as part of the overall public interest in pursuing a conviction, whilst at the same time performing any sort of support or protective function in relation to the victim.[60] Indeed, empirical evidence would seem to reflect the view that prosecutors are fundamentally unable to take into account effectively the private interests of the victim whilst pursuing the public interest in the prosecution. Research suggests that practice is still variable on the extent to which barristers introduce themselves to complainants before trial and many victims continue to feel as though prosecutors are uninterested in their cases and that their interests are poorly represented in the court proceedings.[61] Prosecutors are also perceived as being less vigorous or energetic in the manner in which the case was presented, but it is worth noting that even those who do strive to secure a conviction are clearly limited in their ability to conduct their case with the same degree of zeal as that of the defence.[62]

It is, however, the stress of giving testimony that is one of the most significant factors in secondary victimization. It is well documented that witnesses frequently report feeling harassed and badgered under cross-examination, particularly in cases of rape or sexual assault.[63] The character of such victims is frequently called into question, and cross-examiners will deploy a range of linguistic tricks in an attempt to 'trip up' the witness.[64] It is at this point in proceedings that the inadequacy of the victim/prosecutor relationship manifests itself most clearly. In their survey of Scottish sexual

59 See, for example, *R* v. *Banks* [1916] 2 K.B. 621, where the court held, citing *R* v. *Puddick* (1865) 4 F. & F. 497, 499, that 'prosecuting counsel should regard themselves as ministers of justice assisting in its administration rather than advocates'.

60 L.E. Ellison, 'A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems' (1997) 281–4 (unpublished PhD thesis, University of Leeds).

61 See J. Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *J. of Law and Society* 219; H.M. Crown Prosecution Service Inspectorate, *A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape* (2002) para. 11.34; Goldsmith, op. cit., n. 54; J. Shapland, J. Willmore, and P. Duff, *Victims in the Criminal Justice System* (1985); G. Chambers and A. Millar, *Prosecuting Sexual Assault* (1986); Victim Support, *Women, Rape and the Criminal Justice System* (1996); Audit Commission, *Victims and Witnesses Providing Better Support* (2003); Northern Ireland Statistics and Research Agency, *Victims' and Witnesses' Views on their Treatment in the Criminal Justice System* (2004).

62 Ellison, op. cit., n. 60. There are evidential rules that impede the scope of the prosecutor's cross-examination of the accused. Admission of evidence regarding previous convictions or bad character of the accused will only be permitted in very particular circumstances under section 101 of the new Criminal Justice Act 2003.

63 See S. Lees, *Carnal Knowledge: Rape on Trial* (1996); I. Bacik, C. Maunsell and S. Grogan, *The Legal Process and Victims of Rape* (1998).

64 See Ellison, op. cit., n. 17, pp. 94–8.

offence trials, Brown et al. found that prosecutors will avoid frequent objections to shield the witness from such character attacks, since too many interventions are not regarded as tactically astute.[65] It is broadly acknowledged amongst practitioners that too many objections make a jury suspicious and they may want to know what counsel is trying to hide.[66] Besides, a physically distressed witness suffering at the hands of an overly zealous cross-examiner for the defence could play into the hands of the prosecution by winning the jury's sympathy for the victim. In particular, there is evidence to suggest that some prosecutors believe that the appearance of a visibly distressed child witness may make a jury more likely to convict.[67] Thus, in most cases, it would seem that the prosecutor will only object to such questioning if it is expedient to do so.

Few would dispute the idea that prosecutors ought to exercise courtesy and respect whilst dealing with victims, but it is not clear whether the adversarial structures of the criminal hearing, or indeed the public interest which underpins criminal prosecutions could accommodate any expansion in the role of the Crown Prosecution Service. Ultimately, it would seem that the imposition of additional duties and responsibilities on Crown prosecutors is unlikely to be an effective means of safeguarding the interests and rights of victims. The parameters of the trial dictate that the victim has no right to ensure that his or her voice is heard. Even where victims do testify, their words are limited in that he or she must only respond to the questions posed by counsel, and has no right to respond directly where his or her character is attacked by the defence. From the victim's perspective, he or she is largely denied the opportunity of explaining consequences of an offence directly to the court.[68] This raises serious issues not only in respect of the extent to which the system can be responsive towards protecting the rights and interests of victims, but also in relation to the truth-finding potential of the adversarial mode of trial. It might therefore be asked whether the victims or their legal representatives ought to be able to exercise a right of allocution within the criminal trial. This would save the prosecutor from having to juggle two roles which are ultimately incompatible. The inquisitorial systems of continental Europe may provide a useful insight into how such a mechanism could work.

65 B. Brown, M. Burman, and L. Jamieson, *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials* (1992) 188, as cited by Ellison, op. cit., n. 60, p. 282.

66 See, generally, J. Glissan and S. Tilmouth, *Advocacy in Practice: Being the Third Edition of Cross Examination: Practice and Procedure* (1998) 169.

67 Australian Law Reform Commission, *Children's Evidence: Closed Circuit Television*, Report 63 (1992) para. 14.105.

68 Note that Victim Personal Statements, referred to above, are not released to the jury and may only be used for the purposes of sentencing.

THE VICTIM AS A TRIAL PARTICIPANT: THE INQUISITORIAL EXPERIENCE

Although there is no such thing as a 'prototype' inquisitorial system, most European criminal justice systems are regarded as non-adversarial as they place little emphasis on party control. Many make some sort of formal provision for the participation of the victim within, and indeed beyond, the trial process. Questions concerning the punitive aspects of the criminal process are not divorced from the reparative elements of the civil process. The same set of facts thus gives rise to a unitary process, which seeks to uphold the rights and interests of the state, the victim, and the accused. Many continental jurisdictions permit victims to join the criminal action instituted by the state as 'subsidiary prosecutors' or, through using a *partie civile* or 'adhesion' procedure.[69]

1. *Subsidiary prosecution*

For example, in Germany, victims of certain serious offences or the relatives of a murder victim may act as subsidiary prosecutors (*Nebenkläger*).[70] A lawyer is often appointed for this purpose, although the cost will be borne by the complainant unless the accused in convicted.[71] The victim is entitled to certain active participatory rights, including the right to be present at all stages of the process; to put additional questions to witnesses; to provide additional evidence/make a statement; or to present a claim for compensation. The procedure thereby recognizes the special status of the complainant as the alleged victim of the criminal offence, whilst acknowledging at the same time the normative role of the state in prosecuting crime. Thus the public prosecutor retains the burden of preparing and presenting the prosecution, and there is no official relationship with the auxiliary counsel.

Although some form of subsidiary prosecution has been an avenue open to victims in Germany since 1924, it had fallen into virtual disuse until the rise of the victim on the policy agenda in the 1980s.[72] A survey by Kaiser et al. conducted in 1989/90 found that subsidiary prosecutors participated in 14.3 per

69 It is ironic however, that unlike the English common law systems, continental systems do not generally permit victims to pursue their own private prosecutions. Some, including France and Belgium, do permit the victim to set the prosecution process in motion where the *ministère publique* has declined to do so, through issuing a summons for the accused to appear in court. Once this occurs, however, the public prosecutor must take over (Brienen and Hoegen, op. cit., n. 8, pp. 1066–7).

70 id., p. 364.

71 R. Juy-Birmann, 'The German System' in *European Criminal Procedures*, eds. M. Delmas-Marty and J. Spencer (2002) 302.

72 A. Sanders, *Taking Account of Victims in the Criminal Justice System: A Review of the Literature* (1999) 12.

cent of cases,[73] and tended to play a predominantly passive role, only intervening occasionally to request that additional evidence be taken or to appeal against procedural decisions.[74] However, where victims did make use of the facility, most felt it had a positive effect upon their position within the system.[75]

Erez and Bienkowska evaluated the operation of a similar subsidiary prosecution scheme in Poland, where the researchers found that over a third of victims (36 per cent) whose cases went to trial acted as subsidiary prosecutors.[76] However, the survey also found that the main reason mentioned by victims for not exercising this privilege was that no one had informed them of this right (49 per cent)[77] As with those victims who had prosecuted offences privately, higher satisfaction rates were recorded for those victims who acted as subsidiary prosecutors than for those who did not.[78]

Although the procedure has the potential to help ease the plight of victims testifying in criminal proceedings, it is clearly underdeveloped in both Germany and Poland. Kury and Kaiser reported that 28.6 per cent of victims stated that they would have liked to have participated in the trial had they been made aware of their right to do so, and it would seem that, in general, victims in Germany are ill-informed of their rights to participate as subsidiary prosecutors.[79] In one survey, a quarter of prosecutors stated that they 'never' informed victims of their rights, and only one in ten stated that they 'always' made such information available, as they are required to do under the law.[80] Most prosecutors stated that their duty to give such advice was 'quite simply forgotten' or that 'there was no suitable opportunity' to do so.[81] The researchers concluded that the majority of judges and lawyers retained a negative attitude towards the procedure which they were unwilling to change.[82]

A more optimistic picture of the subsidiary prosecution procedure in Germany was presented by Bacik et al. The authors found that the procedure was used widely where the complainant is a victim of rape or sexual assault;

73 M. Kaiser, 'The Status of the Victim in the Criminal Justice System According to the Victim Protection Act' in *Victims and Criminal Justice: Legal Protection, Restitution and Support*, eds. G. Kaiser, H. Kury, and H.-J. Albrecht (1991) 604.

74 id., p. 605.

75 id., p. 602.

76 E. Erez and E. Bienkowska, 'Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland' (1993) 21 *J. of Crim. Justice* 47, 50. Note, however, that Andrew Sanders has suggested that this figure is 'misleadingly high' since there was a relatively low response rate to the survey (Sanders, op. cit., n. 72, p. 13).

77 id., p. 50.

78 id., p. 51.

79 H. Kury and M. Kaiser, 'The Victim's Position within the Criminal Proceedings – An Empirical Study' in Kaiser, Kury, and Albrecht, op. cit., n. 73.

80 H. Kury, M. Kaiser, and J.R. Teske, 'The Position of the Victim in Criminal Procedure – Results of a German Study' (1994) 3 *International Rev. of Victimology* 69, 75.

81 id.

82 id., p. 76.

it was estimated that up to 50 per cent of these complainants may make use of it.[83] However, while all those interviewed agreed that it could be psychologically helpful for the victim to have his or her own lawyer present during the trial, the researchers did express some concerns that, in many cases, the victim's lawyer merely duplicated the role of the prosecution.[84]

The empirical research from continental jurisdictions would seem to suggest that, while many victims would like to play such a role in the trial, they are regularly prevented from doing so by the reluctance of the legal profession to advise victims of their rights and push forward the interests of the victim proactively. The main reason for this is that '[j]udges and prosecutors still regard the victim predominantly in his or her role as a witness, whereas the victim wants to be regarded as a party to the proceedings.'[85] Unlike the bipartisan nature of the adversarial trial, the structural framework of the inquisitorial system would facilitate a proactive role for the victim without much difficulty. The problem with the procedure is thus essentially an attitudinal one: victims are still perceived as outsiders to the criminal hearing. Bacik et al. suggest that the victim is often conceived as some sort of 'assistant' to the prosecutor,[86] which could prove extremely problematic where the interests of the victim and the prosecution diverge.

2. *The adhesion/*partie civile *procedure*

One possible way of sidestepping the particular difficulty highlighted by Bacik et al. may be to accommodate the victim's counsel as an individual party to the proceedings, distinct from the prosecution, and capable of exercising a protective role within the trial whilst at the same time pursuing a reparative claim. An alternative model which allows for this is commonly referred to as the 'adhesion' or '*partie civile*' procedure.

Participation of the victim as an independent civil party bears some similarity to the subsidiary prosecution model, although it has a distinct advantage in that it acknowledges the victim's status as a separate party to the trial. The procedure is relatively commonplace in France and Belgium, where the victim must formally demonstrate his or her intention of becoming a party to the proceedings by initiating an independent action before the *juge d'instruction* (*constitution de partie civile*) at any stage in the proceedings.[87] The procedure confers three important rights upon victims of crime. First, they can use the procedure to initiate a prosecution; secondly, they have the right to participate and be heard as a party in any

83 Bacik et al., op. cit., n. 63, p. 68.
84 id.
85 Kury and Kaiser, op. cit., n. 76, p. 606.
86 Bacik et al., op. cit., n. 63, p. 68.
87 Sebba (op. cit., n. 32, p. 406) cites a 1991 survey which found that it was regularly used by a third of victims.

prosecution; and thirdly, they have a right to pursue a claim for civil damages in the criminal action.[88]

However, while there is evidence to suggest that parties do exercise the right to be heard and pursue civil claims, it appears that victim-initiated prosecutions in France are rarely invoked and depend heavily on the discretion of the examining magistrate.[89] From the outset of proceedings, the victim can insist that the examining magistrate investigates and documents in the dossier any civil claim for damages. Participation within the trial tends to be limited to the pursuit of the civil claim, although the *partie civile* (or their legal representative) has the power to examine witnesses and make submissions relevant to the defendant's guilt. He or she also has a right to give a closing argument, although no intervention is possible while the victim is undergoing questioning.[90] Various appeal mechanisms are also open to victims where the judgment has negatively affected their civil interests.[91] Similarly, the German 'adhesion' procedure, distinct from the subsidiary prosecution described above, confers similar participatory rights to the victim and also makes it possible for civil damages to be claimed within the criminal action.[92] A civil claim may be made through notifying the clerk of the court: it is not necessary for victims to attend the trial or be legally represented.[93]

3. *Potential benefits of participation*

This sort of participation should, in theory, reap benefits both for victims and for the criminal justice system more generally. The ability to pursue civil damages in the criminal trial should, in theory, improve speed, cost, and time involved given that both civil and criminal issues are resolved in the same forum. In addition to improved efficiency of both the criminal and civil justice systems, there are a number of advantages that would be specific to the complainant. Under a unitary system, the civil party can have a 'free ride' on the evidence at the criminal trial,[94] which should guarantee victims some tangible or symbolic compensation.[95] The victim would not, therefore,

88 R.S. Frase, 'Comparative criminal justice as a guide to American law reform: how do the French do it, how can we find out and why should we care?' (1990) 78 *California Law Rev.* 538.

89 id., p. 615.

90 Bacik et al., op. cit., n. 63, p. 59.

91 Jorda and de Hemptinne, op. cit., n. 12, p. 1401.

92 ss. 403–406, *Stafprozeordnung* (Criminal Code).

93 M. Kaiser and M. Kilchling, 'Germany' in *Compensating Crime Victims*, ed. D. Greer (1996) 265.

94 R. Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French *Cour d'Assises*' (2001) *University of Illinois Law Rev.* 791, 815.

95 Providing, of course, that the accused is found guilty. Furthermore, the actual amount of compensation seems to be a secondary concern of many victims, who seem more concerned about whether the offender has made a personal contribution to the compensation. See Shapland et al., op. cit., n. 61, p. 67.

have to testify again under stressful adversarial conditions in order to obtain full compensation in the civil courts.[96] Bacik et al. noted a number of key advantages for complainants in the rape cases they observed. The researchers found that participants with some form of legal representation experienced fewer difficulties in obtaining information about case developments; had a clearer understanding in relation to their role at trial; reported higher levels of confidence and articulateness when testifying; experienced less hostility from the accused's lawyer; and were much more satisfied with their overall treatment within the legal process.[97] It would therefore appear that offering victims some form of acknowledged and formal role at the trial should enhance their sense of satisfaction with the criminal justice system, and serve to combat the sense of powerlessness that many have reported during criminal proceedings.[98] In turn, more victims might be encouraged to report crimes and cooperate with the police and prosecution authorities.

Aside from these specific benefits to victims, there are conceivable advantages for the criminal justice system as a whole. Victim involvement in the trial could provide an important contribution to the wider values of criminal justice, in promoting truth-finding in criminal proceedings. It is ironic that the person whose complaint was instrumental in bringing the case to court is denied the right to participate as a separate player in proceedings, but must instead play an extremely limited role in so far as they may only testify if called by the prosecution, and may only relay information to the factfinder within the questioning parameters laid down by counsel. As the alleged victim of the offence, it would seem logical that the complainant is best placed to give an account of the circumstances of the offence in his or her own words, notwithstanding more general problems of witness testimony such as vagaries of memory and the fact that not all complainants may tell the truth.[99] The injection of the victim's perspective could lend additional transparency to the outcome of the case, and, as Telford and Walker point

96 Even if a victim does pursue compensation through the civil courts, the vast majority of offenders will have very limited resources and so would be unable to pay out damages which victims may seek, particularly for serious offences against the person. Greer has noted that one of the main reasons for the establishment of state compensation schemes was the inability of victims to obtain compensation directly from offenders. He argues that, overall, the 'amount of compensation ... obtained by victims of crimes of violence through the criminal process in one form or another appears to be comparatively modest.' (D. Greer, *Compensation for Criminal Injury* (1990) 221.)

97 Bacik et al., op. cit., n. 63.

98 See, also, Kury and Kaiser, op. cit., n. 76; Erez and Bienkowska, op. cit., n. 73, pp. 39–40. A study of victims in the Dutch criminal justice system has also suggested that many victims feel that procedures which even allow *passive* participation in the criminal trial carry a certain symbolic importance for many victims which, in turn, can reduce feelings of exclusion and unfairness. (J. Webbers, 'Victims in the Dutch Criminal Justice System' (1995) 3 *International Rev. of Victimology* 323, 339.)

99 Jorda and de Hemptinne, op. cit., n. 12, p. 1400.

out, the broad notion of participation as a basic value of the criminal justice system could serve to enhance its overall legitimacy:

> Participation is clearly an important concept in criminal justice as an instrument for assisting in the achievement of other ultimate objectives. For example, without the involvement of the public in reporting crime the criminal justice system would be fatally handicapped in its pursuit of the security objective. Similarly, participation in the criminal process also serves to legitimise the system by engaging interested, and often aggrieved parties in resolving a dispute, or as a form of external audit to help ensure equitable procedures ... [T]he concept of participation, in the sense of involvement in the public life of the community and polity with the sense of dignity and personal respect which this brings, is also a good in itself. Furthermore, insofar as there is a non-state or informal sector in criminal justice, participation is a key good in this context also, again both as a means of securing other key objectives and in its own dignitarian terms.[100]

Similarly, Weisstub has argued that the civil justice system could also benefit from 'infusing itself' with the symbolism of criminal sanctions, thereby showing itself to be 'consonant with public morality and conscience.'[101] There are also various economic arguments that could be used in support of this view: reparative sentences significantly lessen the financial burden on the taxpayer and a corresponding reduction in separate civil claims could reduce litigation in the courts.[102]

In spite of the apparent advantages that a participatory model of criminal justice may bring, it seems that practitioners in at least some inquisitorial countries are reluctant to grapple with the inevitable complexities that arise from a procedure that attempts to resolve both civil and criminal issues in a unitary action. Kaiser and Kilchling have reported that the adhesion procedure is 'very unusual', and suggest while it is widely recognized, it attracts insufficient legal fees for attorneys and a majority of jurists regarded it as an 'alien body' within criminal procedure.[103] Similarly, Frehsee has noted:

> Lawyers who specialise in criminal law do not like to deal with civil law matters; they do not like to be misused as civil executory officers ... [T]he procedure is not routine; its management and control are rather awkward and ineffective.[104]

The lack of a contest-based structure in inquisitorial trials should mean that, in theory, there should be few difficulties in accommodating direct input from victims in the trial as compared with the severe logistical difficulties that would be encountered in attempting to integrate the procedure into a

100 N. Walker and M. Telford, *Designing Criminal Justice: The System in Comparative Perspective*, Report 14, Review of the Criminal Justice System in Northern Ireland (2000) 10.

101 Weisstub, op. cit., n. 28, p. 207.

102 L. Zedner, 'Reparation and Retribution: Are they Reconcilable?' [1994] *Modern Law Rev.* 228, 233.

103 id., 561.

104 Frehsee, op. cit., n. 13, p. 242.

common law environment. The fact that inquisitorial proceedings are judge-led, as opposed to party-led, indicates that the participation of a third party would be much less problematic, and would be much less likely to be seen as a factor that could potentially endanger the equality of arms.

Unfortunately, the theoretical potential of the inquisitorial system to accommodate the victim as a party to proceedings is partly impeded by the way in which systems of participation operate in practice. There appears to be an institutional reluctance to use and develop such procedures so as to bring tangible benefits to victims. Victims are still viewed as outsiders to the criminal process in many inquisitorial jurisdictions; as Brienen and Hoegen report, their interests are as still widely viewed as 'strongly subordinate' to the determination of the offender's guilt.[105] In both the adversarial and inquisitorial systems, practitioners and policymakers appear reluctant to alter, develop or resource procedures that are capable of giving the victim a greater role at the trial. The orthodox conception of the criminal trial as a public forum dominated by the state prevails in both systems, and this representation has severely constrained the potential for victim participation.

CONCLUSIONS

There is much that can be learnt from continental systems concerning the type of structures that would need to be put in place before the victim could participate effectively within a criminal hearing. There is, however, an obvious disparity between legal rules and actual practices in the continental systems where participation mechanisms already exist. Thus, even if the structures and processes of the criminal justice system were to continue their current drift into uncharted inquisitorial waters, the attitudes of criminal law purists and the working culture of the Bar could still act as significant barriers to meaningful participation by victims in criminal trials.

It may be the case that, through the much-vaunted process of globalization, the growing international interest in restorative and diversionary processes will eventually exert much greater influence on the development of both inquisitorial and adversarial systems. There has been increasing evidence of an emergence of something approaching an international consensus on best trial practice over the past decade in terms of the values, structures, and procedures that underpin the criminal process.[106] As inter-

105 Brienen and Hoegen, op. cit., n. 8, p. 1069. Brienen and Hoegen made similar findings in relation to Austria, Turkey, and Greece.

106 See, generally, N. Jorg, S. Field, and C. Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in *Criminal Justice in Europe*, eds. C. Harding, P. Fennell, N. Jörg, and B. Swart (1996); D. Amann, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context' (2000) *75 Indiana Law J.* 809. For an overview of convergence in penal policy generally see T. Jones and T. Newburn,

national human rights and criminal justice discourse increasingly converge, the stark delineation of civil and criminal law, as well as 'public' and 'private' interests as discrete entities, is becoming less marked. Traditional power structures and the organization of society are undergoing a sea-change, against the backdrop of increased emphases being placed upon individual rights, public service values, and the concept of a proactive, civil society.[107] As suggested above, the very concept of victim participation would appear to be a direct corollary of a modern, liberal criminal justice system that purports to follow emergent trends in best practice.

In specific relation to victims' rights discourse, there appears to be a consensus that the effective resolution of criminal disputes requires that crime is not only viewed as an offence against society, but also as a dispute between the victim and the offender.[108] Restitution and reconciliation are increasingly being mainstreamed as values that ought to be safeguarded by the criminal process. Punishment, it seems, is being increasingly sidelined in favour of restorative-based models which emphasize reparation and participation,[109] signalling a shift in criminal justice discourse away from the neat dichotomy which has traditionally separated public and private interests.

Of course, such challenges to the traditional punitive paradigm are riddled with priority-based conflicts, concerning, for example, whether compensation ought to take priority over any punitive sanction, or whether (and in what precise circumstances) the victim's interest can prevail over the collective interest. It was noted above, for instance, that the victim's interests in how the criminal trial is conducted may well conflict with those of the prosecution, in which case they will automatically be laid to one side for the public good. In advancing the idea of victim participation in the trial, the need for certainty dictates that such questions are thoroughly addressed, but it does not necessarily assert that entirely separate legal structures are necessary to safeguard public and private interests effectively. As Van Ness has argued, the key question relating to victim participation is not how to avoid conflicts between competing interests, but how to manage them effectively, so that as many of the competing interests as possible are accommodated in a principled manner.[110]

'Policy Convergence and crime control in the USA and the UK: Streams of Influence and Levels of Impact' (2002) 2 *Crim. Justice* 173.

107 Faulkner, op. cit., n. 3, p. 344. See, more generally, M. Ryan, *Penal Policy and Political Culture in England and Wales* (2003), especially 75–107; N. Bardouille, 'The Transformation of Governance Paradigms and Modalities: Insights into the Marketization of the Public Service in Response to Globalisation' (2001) 6 *Georgetown Public Policy Rev.* 155.

108 Doak, op. cit., n. 39, p. 31.

109 See S. Walther, 'Reparation and Criminal Justice: Can they be integrated?' (1996) 30 *Israel Law Rev.* 316, 320–2.

110 D. Van Ness, 'A Reply to Andrew Ashworth' (1993) 4 *Crim. Law Forum* 301, 304.

One of the major challenges for criminal justice in the next decade will be the task of redefining the developing relationships between the victim, the accused, and the state in such a way that takes on board current trends in human rights and criminal justice discourse towards a more inclusive model of criminal justice. While the determination of guilt should always be the focus of criminal trials, since the risks of injustice are not the same for the victim and the defendant, the accused must always be at the centre of proceedings.[111] However, this does not mean the criminal justice system should not take account of other interests or other objectives. Spencer argues that a key subsidiary aim of proceedings should be to inflict 'as little pain as possible ... to everyone concerned'.[112] While the interests of certainty and public policy require that decision-making is always exercised by a non-partisan adjudicator, it does not necessarily follow that any input of the victim should be incapable of being considered as one of many factors in this process. Giving victims of crime the opportunity to tell their story in their own words in a secure and relaxed atmosphere is not only necessary to protect the interests of individual victims, but it also has the potential to act as an indispensable aid to truth-finding. In doing so, this should serve not only the interests of victims, but also the integrity of the criminal justice system as a whole.

111 J. Jackson, 'Putting Victims at the Heart of Criminal Justice? The Gap Between Rhetoric and Reality' in Cape, op. cit., n. 39, p. 70.

112 J. Spencer, 'Criminal Procedure: The Rights of the Victim versus the Rights of the Defendant' in id., p. 37.

McGregor, H., *McGregor on Damages*, Sweet & Maxwell, 20th ed., 2017

CHAPTER 42

ASSAULT AND FALSE IMPRISONMENT

TABLE OF CONTENTS

I. ASSAULT

1. HEADS OF DAMAGE

42-001 In so far as an assault and battery[1] results in physical injury to the claimant, the damages will be calculated as in any other action for personal injury. However, beyond this, the tort of assault affords protection from the insult which may arise from interference with the person. Thus a further important head of damage is the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation that may be caused. Damages may thus be recovered by a claimant for an assault, with or without a technical battery, which has done him no physical injury at all. There may be a basic award of damages for the injury to feelings and if the injury is aggravated by the defendant's conduct an additional award of aggravated damages or, as with many court awards, the two can be run together.[2] For separate awards the horrific case of *AT, NT, ML, AK v Dulghieru*,[3] is usefully illustrative. Four young women, after being induced by fraud to come from Moldova to the United Kingdom, were coerced into unwanted and constant sexual activity, were kept apart and had their and their families' safety threatened, suffered chronic post-traumatic stress disorder and were falsely imprisoned for two months or more. but here there was, as well as assault by way of coerced sexual activity, substantial psychological harm and false imprisonment Treacy J made basic awards which covered injury to the four claimants' feelings as well as the conventional personal injury heads of pain and suffering and loss of amenities, awards which ranged from £125,000 down

---

1 For the difference between assault and battery, see the standard texts on tort.

2 But rather curiously the Court of Appeal has indicated in *Richardson v Howie* [2005] P.I.Q.R. Q3 CA at 48 that aggravated damages should not generally be awarded in assault cases. See the discussion at paras 42-004 to 42-007, below.

3 [2009] EWHC 225 (QB).

to £82,000, and he stated specifically that these did not include aggravated damages.[4] As we shall see below, he then made separate awards not only for aggravated damages but for exemplary damages.[5] The award of general damages was also particularly high, at £78,500, in *Lawson v Glaves-Smith*,[6] where Eady J, being concerned with another horrific case, this time of multiple rape, concentrated in arriving at the damages on assault though there was also false imprisonment by the claimant being detained through fear of violence for nearly three days. Additionally, and unusually for assault cases, there was an award for financial loss, the trauma of the whole incident having affected the claimant's ability to earn; this makes for a further head of damage. Of course much smaller amounts are awarded in the general run of cases, as those cases, dealt with below,[7] where there is aggravation of damage show. And in coming to the appropriate amount to award there has to be taken into account the Court of Appeal ruling in *Simmons v Castle*,[8] that damages for non-pecuniary loss in all types of civil claim are to be increased by 10 per cent.[9]

2. Aggravation and Mitigation

42-002 **(a) Aggravation of damage** Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour. Aggravated damages have been seen to be available in torts affecting land[10] and should be more available when such a tort is combined with an assault. *Loudon v Ryder*,[11] is a good illustration of an assault upon the occupant of premises in the course of breaking into and doing damage to those premises. It is true that that case was overruled in *Rookes v Barnard*,[12] but that was primarily in relation to the separate award for exemplary damages. There is no reason why the case should not represent a proper award of aggravated damages for assault, though not at the level of £1,000 at which the jury arrived; in the currency of today this would be worth not far short of £25,000.[13] Similarly, where a landlord evicting a tenant resorts to the assaulting of that tenant, not only in the proprietary tort claim may aggravated damages be awarded, as very often happens,[14] but also in the action for the personal tort; *Reid*

---

4 [2009] EWHC 225 (QB) at [51] and [52].

5 While assault featured in *Hsu v Commissioner of Police of the Metropolis* [1998] Q.B. 498 CA, the case was primarily concerned with false imprisonment, where again basic, aggravated and exemplary damages were all awarded: see at paras 42-014, 42-026 and 42-028, below, respectively.

6 [2006] EWHC 2865 (QB).

7 See paras 42-002 and following.

8 [2013] 1 W.L.R. 1239 CA.

9 For the procedural history and reasons for this development, stemming from the package of reforms appearing in the *Jackson Report on Civil Litigation Costs*, see para.40-280, below

10 See paras 39-042 and 39-072, above.

11 [1953] 2 Q.B. 202 CA.

12 [1964] A.C. 1129. The only case there overruled: see para.13-004, above.

13 While Lord Devlin in *Rookes* said that *Loudon v Ryder* "ought … to be completely overruled" ([1964] A.C. 1129 at 1229), his concern with the award for the assault, as opposed to the exemplary award, was not as to its existence but as to its size, being "as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case" (at 1229–1230). The jury's verdict on damages is set out in a footnote to para.39-043, above.

14 See paras 39-072 and 39-073, above.

and Reid v Andreou,[15] provides an illustration. And where in *Westwood v Hardy*,[16] a landowner, irritated by the presence of the claimant on his land, started to use a hand scythe with which he managed to strike her, aggravated damages were held to be in order.

42-003 Outside these land-related cases aggravated damages were awarded in *W v Meah*,[17] to two women who had been the victims of serious sexual assaults by the defendant. Woolf J considered that the awards on account of aggravation should be moderate, as compensation for the personal injuries suffered remained the primary purpose of the damages. The total awards came to some £7,000 and a little over £10,000 but it is difficult to say how much lower they would have been had the element of aggravation not been present. In *Hsu v Commissioner of Police of the Metropolis*,[18] the Court of Appeal upheld an award of £20,000 which included aggravated damages to a claimant who suffered more because of a predisposition to depression causing post-traumatic distress disorder and who was also suing for wrongful arrest and false imprisonment. Again it cannot be said how much of the award was attributable to the aggravation, and indeed to the assault. And a somewhat unusual, but entirely proper, application of the rule that assault can attract aggravated damages is to be found in *Appleton v Garrett*.[19] The claimants who were eight young patients of the defendant dentist were held entitled by Dyson J to aggravated damages for the injury to feelings and mental distress suffered, together with the anger and indignation felt,[20] upon learning that much of the treatment given had been completely unnecessary, to a large extent upon perfectly healthy teeth, and that the truth about the actual condition of their teeth had been deliberately and in bad faith concealed from them so as to allow the defendant to carry out the dental work with a view to profit. There being no consent to the treatment of teeth which needed no treatment, a trespass to the person had been made out and aggravated damages were therefore permissible. Dyson J considered that awards of aggravated damages should be moderate, in the event giving to each of the claimants 15 per cent of the amount he awarded them by way of general damages for pain and suffering and loss of amenities.[21] Two of the four claimants in *AT, NT, ML, AK v Dulghieru*,[22] were awarded £35,000 each and the other two £30,000 each by way of aggravated damages, Treacy J considering the defendants' conduct to be "so appalling, so malevolent, and so utterly contemptuous" of the claimants' rights[23] as to justify such an award. This was in addition to the basic awards to the

---

15 [1987] C.L.Y. 2250.

16 [1964] C.L.Y. 994.

17 [1986] 1 All E.R. 935.

18 [1998] Q.B. 498 CA.

19 [1996] P.I.Q.R. P1.

20 Dyson J correctly explained (see at 6) the ambit of the statements in *A.B. v South West Water Services* [1993] Q.B. 507 CA, of Sir Thomas Bingham MR that he knew "of no precedent for awarding damages for indignation aroused by a defendant's conduct" (at 532H) and of Stuart Smith LJ that "anger and indignation is not a proper subject for compensation" (at 528A); they did not apply to the present case.

21 In the curious and exceptional case of *Shah v Gale* [2005] EWHC 1087 (QB), where the terrifying assault brought about the murder of the victim, his near immediate death did not allow the trial judge to award more than £2,750, of which sum £2,000 was expressed to be aggravated damages. Full facts at para.52-048, below.

22 [2009] EWHC 225 (QB). Facts at para.42-001, above.

23 [2009] EWHC 225 (QB) at [62].

four,[24] but here there was, as well as assault by way of coerced sexual activity, substantial psychological harm and false imprisonment.

42-004 In *Richardson v Howie*,[25] the Court of Appeal heralded a change by holding that in cases of assault it is in general inappropriate to award aggravated damages on top of, and in addition to, damages for injured feelings. The assault there took place in this fashion. While a couple described as being in a volatile relationship were holidaying far from home in the Caribbean, the man made a frenzied and spiteful attack on the woman with a glass bottle causing permanent scarring injuries. The trial judge awarded £10,000, which amount included £5,000 by way of aggravated damages. On appeal the defendant contended that any damages for the injury to the claimant's feelings should be encompassed within the award for general damages and that it was wrong in principle to make an award for aggravated damages. The Court of Appeal agreed.

42-005 Thomas LJ, delivering the judgment of the two-man court, recited the details of the various first instance cases cited above, other than the important *Hsu* case, and continued:

> "It is and must be accepted that at least in cases of assault and similar torts, it is appropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack. It is also now clearly accepted that aggravated damages are in essence compensatory in cases of assault. Therefore we consider that a court should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack, as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded. It is, we consider, no longer appropriate to characterise the award of the damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case."[26]

The Court of Appeal considered that an overall award of £10,000, as made by the judge, was far too high and substituted an award of £4,500 general damages.

42-006 It is difficult to follow the progress of the Court of Appeal's reasoning here. The classification of damages given for injured feelings as compensatory and the classification of aggravated damages as compensatory does not mean that the one is not independent of the other and that the one should be subsumed within the other. If the scale or the horror of the assault increases the injury to the claimant's feelings, the damage is aggravated, and hence the damages are aggravated, and the courts have recognised this in their awards. It is true that there does not have to be an amount awarded for aggravated damages separate from the basic award for injury to feelings but the concept of aggravated damages has not only been long recognised but was emphasised and highlighted by Lord Devlin when declaring exemplary damages anomalous in his speech in *Rookes v Barnard*.[27] Aggravated damages should surely be retained in assault cases. This would seem to be ac-

---

24 At para 42-001, above.

25 [2005] P.I.Q.R. Q3 CA at 48.

26 [2005] P.I.Q.R. Q3 CA at [23]. This new approach was adopted and followed at first instance in *Fuk Wan Hau v Jim* [2007] EWHC 3358 (QB) and received support in the harassment case of *Choudhury v Martins* [2007] EWCA Civ 1379.

27 [1964] A.C. 1129. This was the speech with which Thomas LJ said it was necessary to begin: [2005] P.I.Q.R. Q3 CA at 48, [16].

cepted by judge and counsel alike in *Lawson v Glaves-Smith*,[28] and while in the appeal in *Rowlands v Chief Constable of Merseyside Police*,[29] a claim for damages for assault, false imprisonment and malicious prosecution against the police, the Court of Appeal was concentrating on the imprisonment and the prosecution, counsel having been able to agree an award for the assault, it would seem that the court regarded aggravated damages as applying to all three torts.[30]

42-007 The removal of aggravated damages from the tort of assault will create a tension, indeed an inconsistency, between it and other torts where aggravated damages have had judicial blessing by first instance judges and by the Court of Appeal alike. Quite apart from defamation, malicious prosecution, false imprisonment and the statutory torts of discrimination in all of which the writ of aggravated damages undoubtedly runs, if the Court of Appeal is prepared to award aggravated damages against a defendant who damages land[31] and against a defendant who evicts from land[32] how much more should such damages be available where the damage is to the person. In *Manley v Commissioner of Police for the Metropolis*,[33] another claim for damages for assault, false imprisonment and malicious prosecution against the police, the Court of Appeal would appear to have ignored—if it knew of—what was said in *Richardson v Howie* as the aggravated award of £10,000 which it made was for assault as well as false imprisonment and malicious prosecution.[34] As we have seen, separate awards of aggravated damages have also been made by Treacy J in *AT, NT, ML, AK v Dulghieru*.[35] It seems that the Court of Appeal in *Richardson v Howie* is, fortunately, being generally ignored.[36] However, in *KCR v The Scout Association*,[37] the decision in *Richardson v Howie* was relied upon. The claimant had been repeatedly sexually assaulted by his Cub Scout Group Leader but no aggravated damages were awarded. However, Judge McKenna sitting as a High Court judge, following *Richardson v Howie* as he was required to do and approaching the assessment of damages with that decision "very much in mind" ,[38] nevertheless appeared to recognise aggravated damages, *sub silento*, as part of the

---

28 [2006] EWHC 2865 (QB). *Richardson v Howie* was indeed cited by Eady J but he appears to regard it simply as authority for the appropriateness, which has never been denied, of a global award without separate amounts for injury to feelings and for aggravated damages: see at [136].

29 [2007] 1 W.L.R. 1065 CA.

30 See in particular [2007] 1 W.L.R. 1065 CA at [26].

31 See para.39-042, above.

32 See paras 39-072 to 39-073, above.

33 [2006] EWCA Civ 879 CA.

34 [2006] EWCA Civ 879 CA at [31] and [32]. It is also going to be difficult to know at what point we arrive at the exceptional category, which the Court of Appeal rather reluctantly recognises as still allowing aggravated damages. Thomas LJ's recital of the details of the various first instance cases in which aggravated damages have been awarded, all of which involved very serious assaults, does not make it clear whether the Court of Appeal is approving or disapproving of them. Are they within the exceptional category and accordingly endorsed, or are they not and therefore now to be considered as wrongly decided?

35 [2009] EWHC 225 (QB): see para.42-003, above.

36 In *AB v Nugent Care Society* [2010] EWHC 1005 (QB) the award for sexual assault of a child was stated to be for the shame and distress and psychological effects of the abuse with no mention of aggravation but undoubtedly an element of aggravation featured in the award: see the discussion at [87]–[94].

37 [2016] EWHC 587 (QB).

38 [2016] EWHC 587 (QB) at 29.

general damages award. His Honour made a general damages award of £48,000 and said that there would be no "separate" award of aggravated damages.[39]

42-008 The same approach which recognises a substantial award of aggravated damages can be seen in *Mohidin v Commissioner of Police of the Metropolis*.[40] In that case, one of the claimants was held to have been falsely imprisoned and assaulted by the police. His award for false imprisonment was £4,500 and, for the minor assault, £250. However, to these basic awards was added aggravated damages of £7,200 for the racially abusive and intimidating way in which the assault and false imprisonment was committed.

42-009 **(b) Mitigation of damage** Conversely, provocation of the assault by the claimant will lead to mitigation of the damages recoverable under the head of damage concerned with injured feelings. It is in these occasional cases of provocation that the distinction between the damages awarded in respect of medical expenses, loss of earning capacity, pain and suffering and loss of amenities—in sum, the conventional personal injury heads of damage—and the damages awarded for the insult and the injury to feelings is emphasised and well brought out. Such a case was *Lane v Holloway*.[41] Here the Court of Appeal was emphatic that the provocation could not be used to reduce the damages to which the claimant was entitled in respect of the conventional heads of damage for personal injury. "I entirely reject the contention", said Salmon LJ,

> "that because a plaintiff who has suffered a civil wrong has behaved badly, this is a matter which the court may take into account when awarding him compensatory damages for personal injuries which he has sustained as the result of the wrong which has been unlawfully inflicted upon him."[42]

On the other hand, there is no good reason why the amount of the damages awarded to compensate for the insult inflicted should not be affected by the fact of provocation and, although this was not brought out by Salmon LJ in his judgment where only the distinction between compensatory damages and exemplary damages is clearly drawn, it was explicitly recognised by Lord Denning MR who said:

> "Provocation by the plaintiff can properly be used to take away an element of aggravation, but not to reduce the real damages."[43]

42-010 In the only reasoned judgment given in *Murphy v Culhane*,[44] Lord Denning MR indicated a change of mind in relation to the proposition, for which *Lane v Hol-*

---

39 [2016] EWHC 587 (QB) at 92.

40 [2015] EWHC 2740 (QB).

41 [1968] 1 Q.B. 379 CA.

42 [1968] 1 Q.B. 379 CA at 390. The decision is in accord with that of the High Court of Australia in *Fontin v Katapodis* (1962) 108 C.L.R. 177, which the Court of Appeal followed in preference to some earlier, less considered decisions from Canada and New Zealand: see *Griggs v Southside Hotel* [1946] 4 D.L.R. 73 (Ontario High Ct); *Hartlen v Chaddock* (1958) 11 D.L.R. (2d) 705 (Nova Scotia Sup. Ct); *Green v Costello* [1961] N.Z.L.R. 1010 (Sup. Ct). These cases do not appear to be capable of explanation on the basis that the provocation was taken into account in order to reduce only the damages awarded for the aggravation of the injury due to the insult.

43 [1968] 1 Q.B. 379 CA at 387. See, too, *O'Connor v Hewitson* [1979] Crim. L.R. 46 CA, where a detained prisoner provoked a police officer's assault and neither aggravated nor exemplary damages were awarded him.

44 [1977] Q.B. 94 CA.

loway,[45] stands as clear authority, that provocation cannot reduce the damages for the pecuniary loss, saying that this is so only where the conduct of the person injured has been trivial and the conduct of the person inflicting the injury has been savage, and entirely out of proportion to the occasion.[46] In *Lane v Holloway*,[47] the severe blow struck by the young defendant was in obvious contrast to the comparatively minor provocation given him by the elderly claimant; in *Murphy v Culhane*,[48] on the other hand, the claimant's deceased husband—the injury had been fatal and the claim was a Fatal Accidents Act claim by the widow—had himself initiated a criminal affray for the purpose of beating up the defendant. Lord Denning also pointed out that the actions of the person injured, or indeed killed, may be such as to defeat the claim entirely on the ground of ex turpi causa non oritur actio or volenti non fit injuria, or as to reduce the damages on account of contributory negligence.[49] His first point is correct but not his second, being inconsistent with the rule that contributory negligence is not a defence open to a defendant who has intended to harm the claimant, so that Lord Rodger in *Standard Chartered Bank v Pakistan National Shipping Corp*,[50] rightly questioned the correctness of *Murphy* on this.[51]

42-011 After the Court of Appeal decision in *Co-operative Group (CWS) Ltd v Pritchard*,[52] where a female worker in a store had been assaulted and injured by the store manager whom she had provoked by being abusive of him, and the court applied the rule that contributory negligence has no application where the tort is intentional,[53] there must be doubt as to whether there survives the possibility of reducing the damages for non-pecuniary loss on account of provocation by the victim of the assault, making the insult suffered by him or her the less. In his extended judgment Aikens LJ[54] went through what was said in *Lane v Holloway* and in *Murphy v Cullane*, and ended up[55] rejecting the remarks in those cases that damages can be reduced for contributory negligence. Yet in *Lane*, as distinct from *Murphy*, Lord Denning MR, who was in both cases, spoke only of the effect of provocation and did not refer to the defence of contributory negligence at all, as Aikens LJ specifically recognised.[56] Since therefore the Court of Appeal in *Pritchard* was dealing only with contributory negligence, could it not be said that provocation can still be introduced for the purpose of reduction of the damages for the insult inflicted? It is thought that this should be possible. But we shall have to wait and see.

---

45 [1968] 1 Q.B. 379 CA.
46 [1977] Q.B. 94 at 98D.
47 [1968] 1 Q.B. 379 CA.
48 [1977] Q.B. 94.
49 [1977] Q.B. 94 at 98F–99B.
50 [2003] 1 A.C. 959.
51 [2003] 1 A.C. 959 at 45.
52 [2012] Q.B. 320 CA.
53 For the development of this rule see para.7-004, above.
54 At [2012] Q.B. 320 CA at [40] and following.
55 [2012] Q.B. 320 CA at 62.
56 [2012] Q.B. 320 CA at 41.

3. EXEMPLARY DAMAGES

42-012 While it was accepted in *Lane v Holloway*,[57] that provocation would be

> "relevant to the question of whether or not exemplary damages should be awarded, and, if so, how much",[58]

exemplary damages proper can, however, no longer be awarded merely because the defendant has acted insultingly, violently or otherwise disgracefully. The whole approach to exemplary damages was changed by the decision in *Rookes v Barnard*.[59] Exemplary damages are now recoverable only where the circumstances of the case bring it within one of the three categories set out by Lord Devlin there.[60] Assault can come within the first common law category which applies where there is oppressive, arbitrary or unconstitutional conduct by government servants. *Benson v Frederick*,[61] where a colonel in the militia had ordered an innocent soldier to be flogged, could be said to provide a very early example, from the decade when exemplary damages first came into English law,[62] of a case of assault within the first common law category. *Hsu v Commissioner of Police of the Metropolis*,[63] where a householder was assaulted by police officers when he refused them entry, is a modern example.[64] Assault can also come within the second common law category which applies where the defendant has acted wrongfully with a view to profit and an illustration of the use of the second common law category is now provided by *AT, NT, ML, AK v Dulghieru*.[65] The coerced sexual activity of the four claimants brought substantial profits to the defendants and £60,000 was awarded, to be divided equally between the four, by way of exemplary damages.[66] This was in addition to the basic awards and the aggravated damages awards made to the four,[67] but here there was, as well as assault by way of coerced sexual activity, substantial psychological harm and false imprisonment.

---

57 [1968] 1 Q.B. 379 CA; see para.42-009, above.

58 [1968] 1 Q.B. 379 CA at 391, per Salmon LJ.

59 [1964] A.C. 1129. See Ch.13, above, where exemplary damages are treated in detail.

60 See paras 13-017 to 13-030, above. The further restriction introduced by the now overruled *A.B. v South West Services* [1993] Q.B. 507 CA (see para.13-011, above) never applied to assault cases since they were early in evidence as the case in the next footnote indicates.

61 (1766) 3 Burr. 1845.

62 See para.13-002, above.

63 [1998] Q.B. 498 CA.

64 *Hsu* was a claim for wrongful arrest and false imprisonment as well as assault but, since the arrest and imprisonment were over in a matter of hours, the exemplary award of £15,000 allowed by the Court of Appeal must substantially relate to the assault. As for the award of no exemplary damages in *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879 CA (assault together with false imprisonment and malicious prosecution) it would seem that this was because the liability of the commissioner of police was vicarious but *Rowlands v Chief Constable of Merseyside Police* [2007] 1 W.L.R. 1065 CA (false imprisonment and malicious prosecution) has since decided to award exemplary damages although the liability of the chief constable was vicarious. Vicarious liability for exemplary damages is considered at paras 13-045 to 13-047, above

65 [2009] EWHC 225 (QB). Facts at para.42-001, above.

66 See the discussion at [2009] EWHC 225 (QB) at [67]–[75].

67 At paras 42-001 and 42-003, above, respectively.

II. False Imprisonment

1. Heads of Damage

42-013 The details of how the damages are worked out in false imprisonment[68] have for many years been few, but things are changing. Generally it is not a pecuniary loss but a loss of dignity and the like that is in issue, and has been left much to the jury's or judge's discretion.[69] The principal heads of damage arise from the consequences of the deprivation of liberty, i.e. the consequences of the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status and injury to reputation. This will all be included in the general damages which are usually awarded in these cases, with no breakdown.

42-014 In two conjoined appeals, *Thompson v Commissioner of Police of the Metropolis* and *Hsu v Commissioner of Police of the Metropolis*,[70] guidance was given by the Court of Appeal as to the amount to be awarded for the basic damages, these being described as the damages before any element of aggravation and also being the damages before any pecuniary loss, any physical injury or any injury to the reputation should these occur. Effectively the basic damages covered the loss of liberty which would include the injury to feelings following on such loss. For the first hour of imprisonment £500 was held to be appropriate. The sums to be awarded after the first hour should be on a reducing scale and the court gave as a guideline about £3,000 for 24 hours in custody.[71] For subsequent days the daily rate should be on a progressively reducing scale. The Court of Appeal also said that the jury, a normal feature of false imprisonment claims,[72] should be informed of the approximate starting figure and an approximate ceiling figure for the basic award in the particular case.[73] It would seem that these guideline figures should apply where the false imprisonment is other than by the police.

42-015 Several important general points of principle were established by the conjoined appeals in *Thompson* and *Hsu*. As Laws LJ explained in in *R. (on the application of MK (Algeria)) v Secretary of State for the Home Department*,[74] (1) the assessment of damages will depend upon the particular facts and the harm suffered by the particular claimant; (2) damages are not assessed mechanistically; there is no daily

---

68 The tort of false imprisonment is generally also an assault but not necessarily. Frequently too, the detention is begun by a wrongful arrest. Damages can indeed be awarded for wrongful arrest, as in *Sallows v Griffiths* [2001] F.S.R. 188 CA, where recovery was allowed for pecuniary and non-pecuniary loss with aggravation of the damages.

69 Where the false imprisonment also entails an assault, this will probably not affect the damages, as damages for the insult will be recoverable in the action for false imprisonment and possibly also damages for any physical injury. Sometimes, as in *Lawson v Glaves-Smith* [2006] EWHC 2865 (QB) which involved a horrific multiple rape, more prominence is given to the assault than to the false imprisonment.

70 [1998] Q.B. 498 CA.

71 [1998] Q.B. 498 CA at 515D–E. The £1,500 awarded at first instance in *Taylor v Chief Constable of Thames Valley Police* [2004] 1 WL.R. 3155 CA for some four hours of false imprisonment of a 10-year-old boy is not inconsistent with this scale since it covered trespass to the person and assault as well. It had however to be reduced as on appeal there was held to be only one hour of unlawful detention: see at [55].

72 See para.53-002, below.

73 [1998] Q.B. 498 CA at 515C.

74 [2010] EWCA Civ 980 CA at [8].

tariff; (3) the extent to which the damages will increase will decrease as time proceeds because the initial shock of imprisonment will generally lead to larger damages for the earlier period. To these general principles can be added (4) the circumstances of the case can involve conduct by the claimant which leads to a reduction in damages. An example of this is *R. (on the application of NAB) v Secretary of State for the Home Department*,[75]where the claimant chose 82 days of unlawful immigration detention in the United Kingdom over freedom in Iran by refusing to sign the documents which the Iranian authorities required for his lawful deportation. The damages in that case were substantially reduced.

42-016 Although the general principles discussed above continue to apply, the decisions in *Thomson* and *Hsu* were initially used as guidelines from which to structure damages but the utility of those guidelines is now seriously limited for three reasons. One difficulty is that a £3,000 guideline for the first day is likely to be utilised only where the false imprisonment is very short and the suggested progressively reducing scale over the next few days should be steep. A second difficulty is that it is impossible to say what the basic award was in either *Thompson* or *Hsu* since the £20,000 compensatory damages awarded in each included aggravated damages and also damages for malicious prosecution in *Thompson* and for wrongful arrest and assault in *Hsu*. A third difficulty is that, as was recognised in the conjoined appeals of *Thompson v Commissioner of Police of the Metropolis* and *Hsu v Commissioner of Police of the Metropolis*,[76] the guideline figures there set out would need adjustment in the future for inflation.[77] The lapse now of two decades makes that adjustment very significant. Also to be taken into account today, in addition to inflation, is the Court of Appeal ruling in *Simmons v Castle*,[78] that damages for non-pecuniary loss in all types of civil claim are to be increased by 10 per cent.[79]

42-017 In the two decades since *Thompson* and *Hsu*, claims have taken off. In *R. v Governor of Brockhill Prison Ex p. Evans (No.2)*,[80] where the prison governor had miscalculated the release date of a prisoner who as a result was released 59 days after she should have been, the Court of Appeal raised the trial judge's basic award of £2,000 to £5,000 and the House of Lords upheld the Court of Appeal's increase.[81] Not only were aggravated and exemplary damages inappropriate but of the two principal heads of damage that of injury to feelings was absent, leaving only the general consequences of the loss of liberty itself. The Court of Appeal contrasted the unreported *Lunt v Liverpool City Justices*,[82] where that court had increased the trial judge's award of £13,500 to £25,000 for a period of 42 days' imprisonment, the whole of which was unjustified, to a claimant of unblemished reputation. In both of these cases a global figure was awarded and in *Brockhill* the Court of Appeal deprecated the making of a daily, weekly or monthly figure.[83] The global approach was utilised in *R. (on the application of Mehari) v Secretary of State for the Home*

---

75 [2011] EWHC 1191 (Admin).
76 [1998] Q.B. 498 CA.
77 [1998] Q.B. 498 CA at 517E.
78 [2013] 1 W.L.R. 1239 CA.
79 For the procedural history and reasons for this development, stemming from the package of reforms appearing in the *Jackson Report on Civil Litigation Costs*, see para.40-280, below
80 [1999] Q.B. 1043 CA.
81 [2001] 1 A.C. 19; see Lord Hope at 39G–40C.
82 [1991] CA. Transcript No.158.
83 See on all these points Lord Woolf MR at [1999] Q.B. 1043 CA at 1060A–G.

Department[84] and £4,000 was awarded for a week's unlawful detention of an asylum seeker who was a woman of good character.[85] In *Takitota v Attorney General*,[86] where the claimant had been incarcerated for over eight years in appalling prison conditions and the Court of Appeal of The Bahamas had not adopted the global approach but had multiplied the daily amount by as many days as are in eight years, the Privy Council said that this would not do and sent the case back for a reassessment. For a false imprisonment lasting for over three weeks in *R. (on the application of MK (Algeria)) v Secretary of State for the Home Department*[87] the Court of Appeal increased the trial judge's award of £8,500 to £17,500; this included £5,000 of aggravated damages. Even greater than the base award of £12,500 in that case was the award in *Tarakhil v Home Office*,[88] where Mr Tarakhil was unlawfully detained by the government in immigration detention for three weeks. His Honour Judge Thornton QC awarded £14,250 for the detention. It appears that in making this award the judge was influenced by the fact that the claimant was aware of the unlawful nature of the imprisonment and that it had a profound effect on him. Nevertheless, the judge also awarded £3,000 for psychiatric injury and £2,000 for aggravated damages. There appears to be some element of double counting here. A 10 per cent uplift was also then made, apparently applying *Simmons v Castle*.[89] But the comparative cases upon which the award had been based would also have incorporated this uplift so it appears that some double counting occurred. Yet far larger amounts were the awards made to the four claimants in *AT, NT, ML, AK v Dulghieru*,[90] awards which, as we shall see, were supplemented by awards of aggravated and exemplary damages, but in *Dulghieru* there was assault by way of coerced sexual activity and substantial psychological harm as well as false imprisonment.

42-018 In *Okoro v The Commissioner of Police of the Metropolis*,[91] for arrest and a few hours' imprisonment causing physical injury £13,000 was awarded. In *Iqbal v The Prison Officers' Association*,[92] in the circumstances of the claimant being confined to his small prison cell in the course of a day without being let out for exercise and other activities within the prison generally, the Court of Appeal found the *Thompson* guidance on the amount of damages of no real assistance and, had there been held to be false imprisonment which there was not, would have made a relatively modest award of £120 for the six hours of false imprisonment.[93] In *Patel v Secretary of State for the Home Department*,[94] the seriousness of the misconduct of immigration officers, where the false imprisonment was for the comparatively short period of six days, was held to justify an award of £20,000, even before aggravated damages and exemplary damages[95] were brought in. The case was considered under the Human Rights Act as well as under the common law of false imprisonment, the

---

84 [2010] EWHC 636 (Admin).
85 [2010] EWHC 636 (Admin) at [32]–[39].
86 [2009] UKPC 11.
87 [2010] EWCA Civ 980 CA.
88 [2015] EWHC 2845 (QB).
89 [2013] 1 W.L.R. 1239.
90 [2009] EWHC 225 (QB). Facts and amounts at para.40-001, above.
91 [2011] EWHC 3 (QB).
92 [2010] Q.B. 732 CA.
93 [2010] Q.B. 732 CA at [44] and following.
94 [2014] EWHC 501 (Admin).
95 For which, see paras 42-025 and 42-028, below.

breaches of Human Rights Act articles adding significantly to the damages award.[96] As for the unlawful detention for 61 days of an unaccompanied asylum-seeking young person, this led in *AS v Secretary of State for the Home Department*,[97] to an award of £23,000, before aggravated damages were brought in.[98]

42-019 Again, the possibility of a modest award was brushed aside in *AXD v Home Office*,[99] although the differences between the applicant and respondent illustrate the great uncertainty that still exists in this range of damages. The claimant's false imprisonment was for 20 months and 5 days and the primary judge, Jay J, awarded £80,000, noting the irrelevance of the allegation that his claim for refugee status should have been recognised sooner and his diagnosis of paranoid schizophrenia (because he was still fit to be detained and a mental health team is readily accessible). His award was modestly increased by fear of being returned to Somalia, and increased because he was kept in his cell for 21 hours a day and he experienced personal difficulties on account of his sexual orientation. And in *R. (on the application of Belfken) v Secretary of State for the Home Department*,[100] Ms Karen Steyn QC, sitting as a Deputy High Court judge, made an award of £40,000 for a period of 295 days' unlawful detention without any aggravating factors, or any egregious conduct on the part of the Secretary of State; and in circumstances in which the claimant was, to a degree, uncooperative and obstructive.

42-020 Damages may also be given for any injury to reputation, for, as Lawrence LJ said in *Walter v Alltools*,[101] "a false imprisonment does not merely affect a man's liberty; it also affects his reputation". Some cases have allowed the award to run to vindicatory damages, which take us beyond the damages for non-pecuniary loss. While defamation is the principal tort where vindicatory damages are to be found, a need for vindication, to show the world that the claimant's reputation is unsullied, will sometimes make its appearance where there is false imprisonment. It did so in *Hook v Cunard S.S. Co*.[102] The development in modern times of vindicatory damages is explained in a separate chapter to which reference should be made[103] and in which the significance of the *Hook* case is fully explored.

42-021 In the absence of any likely adverse reputation consequences of the false imprisonment any substantial award beyond pecuniary or non-pecuniary loss may need to be explained as exemplary damages. In cases where the claimant has suffered no loss, neither of liberty nor of reputation there will be an entitlement only to nominal damages, false imprisonment being a tort actionable per se. Although some cases continue to make substantial awards to "mark"" the infringement, even where those awards might be justified due to non-pecuniary adverse consequences,[104] the award of nominal damages has happened in a whole series of cases over the last three years, cases involving foreign nationals and asylum-seekers who, though unlawfully detained, could and would have been lawfully detained had the correct procedure for their detention been followed by the Secretary of State for the

---

96 [2014] EWHC 501 (Admin) at [330] and [336]–[342].
97 [2015] EWHC 1331 (QB).
98 For which, see para.42-026, below.
99 [2016] EWHC 1617 (QB).
100 [2017] EWHC 1834 (Admin).
101 (1944) 61 T.L.R. 39 CA at 40.
102 [1953] 1 W.L.R. 682.
103 See Ch.17, above.
104 *Stewart v The Commissioner of Police of the Metropolis* [2017] EWHC 921 (QB) at [11], [13] and [14].

Home Department. With their lengthy and somewhat repetitive titles, they are *R. (on the application of Lumba (Congo)) v Secretary of State for the Home Department*,[105]; *R. (on the application of O) v Secretary of State for the Home Department (Bail for Immigration Detainees)*,[106] *R. (on the application of OM) v Secretary of State for the Home Department*,[107] *R. (on the application of Abdollahi) v Secretary of State for the Home Department*,[108] *R. (on the application of Moussaoui) v Secretary of State for the Home Department*,[109] and *R. (on the application of Pratima Das) v Secretary of State for the Home Department*.[110] Of these cases *Lumba* was taken by the claimants to the Supreme Court seeking, since compensatory damages were out of the question, vindicatory damages. These were damages not of the established type, adverted to in the previous paragraph, given in order to clear reputation, the claimants in *Lumba* not having a reputation, but given to mark the infringement of a right, that is the right to liberty. The Supreme Court was split on this, but fortunately there was a majority of six to three prepared to hold, in line with what has been said in previous editions of this work that it was inappropriate to award vindicatory damages for infringement of a right. *Lumba* is considered in detail in the separate chapter tracing the development in modern times of vindicatory damages.[111]

42-022 In addition there may be recovery for any resultant physical injury, illness or discomfort, as where the imprisonment has a deleterious effect on the claimant's health. This is illustrated by the two very old cases, *Lowden v Goodrick*,[112] and *Pettit v Addington*,[113] where the only reason that the claimant failed to recover for a decline in his health from the imprisonment was that he failed to plead it as special damage. In the present day context the claimant's health appears to have been affected in *Hsu v Commissioner of Police of the Metropolis*,[114] and there was recovery for the post-traumatic stress disorder suffered by the four unfortunate claimants in *AT, NT, ML, AK v Dulghieru*,[115] where there was false imprisonment as well as assault.[116] There was an additional award for psychiatric illness in *AS v Secretary of State for the Home Department*.[117]

42-023 Further, any pecuniary loss which is not too remote is recoverable; there appear to be no modern reported cases. Pecuniary losses fall into two categories in the cases. In the first place, that any loss of general business or employment is recoverable would seem to follow from *Childs v Lewis*,[118] where the claimant, a company

---

105 [2012] 1 A.C. 245.
106 [2016] 1 W.L.R. 1717.
107 [2011] EWCA Civ 909 CA.
108 [2012] EWHC 878 (Admin); affirmed [2013] EWCA Civ 366 CA.
109 [2012] EWHC 126 (Admin).
110 [2013] EWHC 682 (Admin). A further such case is *The Queen (on the application of Mohammed) v The Secretary of State for the Home Department* [2014] EWHC 1898 (Admin). A different type of case in which only nominal damages were awarded for a false imprisonment is *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ. 79 where a mentally disordered patient had been unlawfully detained by an NHS trust.
111 See Ch.17, above; for *Lumba* paras.17-014 and following.
112 (1791) Peake 64.
113 (1791) Peake 87.
114 [1998] Q.B. 498 CA. See this case at paras 42-003 and 42-014, above.
115 [2009] EWHC 225 (QB).
116 See the case at para.42-001, above.
117 [2015] EWHC 1331 (QB), facts at para.42-018, above.
118 (1924) 40 T.L.R. 870.

director, had been wrongfully given into custody by the defendant, and his co-directors had demanded his resignation on learning of his arrest. Lush J directed the jury that they were entitled to hold that the claimant's loss of his director's fees by his acceding to this demand flowed from the false imprisonment. He pointed out that

> "clearly if the plaintiff had not resigned the other directors would have taken steps to remove him",[119]

and that his co-directors would be bound to hear of the claimant's arrest "before the prosecution started, or certainly before the magistrates dealt with it".[120] In the second place, a few 19th century cases show that the claimant's costs incurred in procuring his discharge from the imprisonment may be recoverable as damages. Such costs were recovered in this way in *Pritchet v Boevey*.[121] There had been no adjudication as to these costs by the judge who ordered the claimant's release; he would have given the claimant his costs if he had undertaken not to bring an action, and on the claimant's refusal no order had been made as to costs. Similarly, in *Foxall v Barnett*,[122] where the claimant, committed to prison for manslaughter by a coroner's warrant, had been admitted to bail and had subsequently got the inquisition under which he had been committed quashed, it was held that in an action against the coroner for false imprisonment he might recover the costs of quashing the inquisition. However, where the claimant has been refused costs in the prior action, as opposed to there being no order as to costs, he has failed to recover them as damages: this was the result in *Loton v Devereux*,[123] which was distinguished in *Pritchet v Boevey*,[124] on this ground. So, too, there will be no recovery in respect of costs unreasonably incurred. Thus Lord Campbell in *Foxall v Barnett*,[125] made it clear that the action must have been one which was necessary to gain release, and it is submitted that the jury's refusal in *Bradlaugh v Edwards*,[126] to award the claimant damages in respect of his expenses in procuring bail before the magistrates and in getting together evidence in defence of the charge is properly explained on the ground that the costs were not considered to have been reasonably incurred.[127]

2. REMOTENESS OF DAMAGE: CONTINUATION OF THE IMPRISONMENT BY JUDICIAL ORDER

42-024 Just as an action for false imprisonment will not lie against one who has procured another's imprisonment by obtaining a court judgment against him, even if the judgment is in some way irregular or invalid, so any continuation by a judicial officer

---

119 (1924) 40 T.L.R. 870 at 871.
120 (1924) 40 T.L.R. 870 at 871.
121 (1833) 1 Cr. & M. 775.
122 (1853) 23 L.J.Q.B. 7.
123 (1832) 3 B. & Ad. 343.
124 (1833) 1 Cr. & M. 775.
125 (1853) 23 L.J.Q.B. 7 at 8.
126 (1861) 11 C.B. N.S. 377. These four mid-19th century cases are further analysed in the chapter dealing with costs as damages at para.21-022, above.
127 McCormick, *Damages* (1935), said many years ago that in most states in the USA the notion of liability for expenses is expanded "to include expenses incurred, after the release of plaintiff on bail or recognisance, in the defence of the criminal proceedings or civil action upon the outcome of which the bail or undertaking is conditioned": p.377.

of an imprisonment initiated by the defendant setting a ministerial officer in motion is too remote. A court of justice, unlike a ministerial officer of the law such as a constable, cannot be the agent of the defendant since it acts in the exercise of its own independent judicial discretion, and thus by acting introduces a new cause which relieves the defendant of liability for further damage. Thus in *Lock v Ashton*,[128] where the claimant, wrongly arrested by the defendant's authority, was brought before a magistrate who remanded him in custody, it was held that the claimant could recover damages in an action for false imprisonment only up to the time of the remand; and more recently in *Diamond v Minter*,[129] the same result was reached. This principle was taken further by the House of Lords in *Harnett v Bond*.[130] The claimant, who was detained in a house licensed for the reception of lunatics, was granted leave of absence on trial, with power in the manager of the licensed house to take him back at any time during the trial period should his mental condition require it. During the trial period the claimant went to see a Commissioner in Lunacy, who, after seeing him, informed the manager by telephone that he was not in a fit state of mind to be at large, and detained him for a few hours while the manager sent attendants to take him back to the licensed house. For the next nine years the claimant, who at all material times was sane and fit to be at large, was detained in various institutions; he then escaped and sued the Commissioner for false imprisonment. The House of Lords held that the Commissioner was only liable for the detention until the arrival of the attendants, and that the subsequent detention of the claimant at the various institutions was due to the re-assumption of control over the claimant by the manager of the licensed house.

3. Aggravation and Mitigation

42-025 The manner in which the false imprisonment is effected may lead to aggravation or mitigation of the damage, and hence of the damages. The authorities illustrate in particular the general principle stated by Lawrence LJ in *Walter v Alltools*,[131] that

> "any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."

That case, and the earlier one of *Warwick v Foulkes*,[132] as interpreted therein, establish that, where the false imprisonment has been brought about by the defendant preferring a charge against the claimant, any evidence tending to show that the defendant is persevering in the charge is evidence which may be given for the

---

[128] (1848) 12 Q.B. 871.

[129] [1941] 1 K.B. 656; see especially at 674. For the period subsequent to the remand, damages can only be claimed by the claimant in an action for malicious prosecution (see Ch.44), if at all. This may not be possible since in such an action, unlike in the action for false imprisonment, the claimant must prove malice and lack of reasonable and probable cause. It follows also from this that an action for false imprisonment is no bar to another action for malicious prosecution: *Guest v Warren* (1854) 9 Ex. 379.

[130] [1925] A.C. 669.

[131] (1944) 61 T.L.R. 39 CA at 40.

[132] (1844) 12 M. & W. 507.

purpose of aggravating the damages. By implication, they establish the converse proposition that the defendant is entitled to give evidence in mitigation of damages tending to show that he has withdrawn the charge or has apologised for having made it. In *Walter v Alltools*,[133] the damages were increased because the defendants had not expressed their regret, had not notified the claimant's fellow workmen that he had been exonerated from suspicion, and had written a letter which suggested that the claimant's conduct had been suspicious and which in effect justified the imprisonment. In *Warwick v Foulkes*,[134] the claimant had been falsely imprisoned upon a charge of felony by the defendant, who unsuccessfully pleaded in the action brought against him by the claimant that the latter had indeed been guilty of felony. Lord Abinger CB said:

> "The putting this plea on record is, under the circumstances, evidence of malice, and a great aggravation of the defendant's conduct as shewing an animus of persevering in the charge to the very last. A justification of a false imprisonment, on the ground that the defendant had reasonable and probable cause to suspect that the plaintiff had been guilty of felony, is very different; such a justification is in the nature of an apology for the defendant's conduct. And although it was very proper … to tell the jury that the defendant's counsel apologised for the conduct of his client, still that apology came too late. It was one which seemed to be made for the purpose of screening the defendant from having to pay damages."[135]

However, it is submitted that an unsuccessful plea by the defendant that the claimant is guilty of the offence charged against him by the defendant should not lead to an aggravation of the damages unless it is shown that the defendant made the charge mala fide. Otherwise a bona fide defendant would be in a dilemma: if he fails to plead the truth of the charge he risks losing the action against him, while if he does plead the truth of the charge he risks an award of aggravated damages against him.[136]

42-026 Awards of aggravated damages again appear in the conjoined appeals of *Thompson v Commissioner of Police of the Metropolis* and *Hsu v Commissioner of Police of the Metropolis*,[137] but were more concerned with the injury to liberty and to feelings than injury to reputation. Guidance was given generally as to the amounts to award[138]; as to aggravated damages the Court of Appeal said that it considered that, where they were appropriate, the figure was unlikely to be less than £1,000 but at the same time should not, in the ordinary way, be as much as twice the basic damages, except perhaps where these were modest.[139] Since this guidance on amounts was given, awards of aggravated damages in this field have proliferated. In *Sallows v Griffiths*,[140] a case of procuring a malicious arrest for which a total of £10,000 was awarded, £1,000 of this total was by way of aggravated damages for injury to proper pride and dignity and for humiliation. The award of £10,000 aggravated damages in *Manley v Commissioner of Police for the*

---

133 (1944) 61 T.L.R. 39 CA.
134 (1844) 12 M. & W. 507.
135 (1844) 12 M. & W. 507 at 508 to 509.
136 The position in defamation is analogous and the matter has been given more consideration in the defamation authorities: see para.46-050, below.
137 [1998] Q.B. 498 CA.
138 See para.42-014, above and 42-028, below, as to basic and exemplary damages respectively.
139 [1998] Q.B. 498 CA at 516E–F.
140 [2001] F.S.R. 188 CA.

Metropolis,[141] was also for assault and malicious prosecution by the police and the award of £6,000 in *Rowlands v Chief Constable of Merseyside Police*,[142] was for malicious prosecution in addition to false imprisonment by the police. On the unusual facts of *Ahmed v Shafique*,[143] where the defendants who were in business with the claimant procured his false arrest leading to his detention for 15 hours, the award of £2,000 general damages was supplemented by another £2,000 of aggravated damages to compensate for the humiliation of the arrest and the trauma suffered as a result of it by a man of good character. In *AT, NT, ML, AK v Dulghieru*,[144] already considered when dealing with assault[145] since there was not only false imprisonment but also assault by way of coerced sexual activity and substantial psychological harm, as much as £35,000 was awarded to each of two claimants by way of aggravated damages and £30,000 to each of the other two. In *R. (on the application of MK (Algeria)) v Secretary of State for the Home Department*,[146] an award of £17,500 for false imprisonment only, an unlawful detention of an asylum-seeker lasting for over three weeks, included aggravated damages of £5,000, the Court of Appeal saying that the case was pre-eminently one for aggravated damages as the secretary of state had acted in a high-handed manner. Later cases also involving the false imprisonment of asylum seekers have been heard in the Employment Appeal Tribunal, *R. (on the application of J) v Secretary of State for the Home Department*,[147] where the award of aggravated damages was reduced, *R. (on the application of M) v Secretary of State for the Home Department*,[148] where the award was split between basic damages and aggravated damages, and *R. (on the application of N) v Secretary of State for the Home Department*,[149] where aggravated damages were not in issue.

Aggravated damages of £5,000 were awarded in *AS v Secretary of State for the Home Department*,[150] where an unaccompanied asylum-seeking young person was unlawfully detained for 61 days. Aggravated damages of £30,000 were awarded in light of the aggravating factors in *Patel v Secretary of State for the Home Department*,[151] and aggravated damages of £2,300 (claimant 1) and £7,200 (claimant 2) were awarded in *Mohidin v Commissioner of Police of the Metropolis*,[152] where false imprisonment and assault by police officers was accompanied by racial abuse and humiliation.

Other than the most exceptional case, the outer limits of aggravated damages seem to be around the £35,000 mark for the extreme circumstances in *AT, NT, ML, AK v Dulghieru* (where they were coupled with exemplary damages). In *AXD v Home Office*,[153] aggravated damages of £25,000 were awarded and the absence of bad faith meant that the case fell short of the line for an award of exemplary

---

141 [2006] EWCA Civ 879 CA.
142 [2007] 1 W.L.R. 1065 CA.
143 [2009] EWHC 618 (QB).
144 [2009] EWHC 225 (QB).
145 At paras 42-001 (with the facts), 42-003 and 42-012, above.
146 [2010] EWCA Civ 980 CA.
147 [2011] EWHC 3073 (Admin).
148 [2011] EWHC 3667 (Admin).
149 [2012] EWHC 1031 (Admin).
150 [2015] EWHC 1331 (QB).
151 [2014] EWHC 501 (Admin).
152 [2015] EWHC 2740 (QB).
153 [2016] EWHC 1617 (QB).

damages. The factors justifying aggravated damages included (i) senior officials refraining from taking responsibility for the serious delays that were accumulating with the knowledge that the claimant was suffering from paranoid schizophrenia, (ii) sub-optimal treatment for his schizophrenia for nearly a year, (iii) release of the claimant into the community without a proper welfare plan in place which led to his inevitable institutionalisation, abuse of alcohol, and homelessness, and (iv) failure to provide the claimant with unpublished information relating to returns to Mogadishu.

42-027 It was also held in the conjoined appeals *Thompson* and *Hsu*, which opened the way to this flood of cases, that there should be a separate award for the element of aggravation. The court pointed out that this changed the practice at the time but thought that having separate awards would give greater transparency to the make up of the award.[154] However, concerns over having separate awards have since been expressed.[155]

4. EXEMPLARY DAMAGES

42-028 The whole approach to exemplary damages was changed by the decision in *Rookes v Barnard*,[156] later approved in *Broome v Cassell & Co*,[157] and is treated in detail elsewhere.[158] Exemplary damages are now recoverable only if the circumstances of the case bring it within one of the three categories set out by Lord Devlin there, viz., first, where there is oppressive, arbitrary or unconstitutional conduct by government servants, second, where there is conduct calculated to result in profit and, third, where statute provides.[159] While false imprisonment can come within the second category because a profit-motivated false imprisonment is by no means inconceivable,[160] and an illustration of the use of the second common law category is now provided by *AT, NT, ML, AK v Dulghieru*,[161] with false imprisonment it is the first common law category, involving oppressive, arbitrary or unconstitutional conduct by government servants, which has dominated although it took some time for decisions to appear. First, in *Attorney General for St Christopher, Nevis and Anguilla v Reynolds*,[162] the Privy Council did not call in question the proposition, not disputed by the defendant, that unconstitutional action by the Governor of a group of Caribbean Islands leading to the claimant's ar-

---

154 [1998] Q.B. 498 CA at 516E. Separate awards continue to be made, as in *AS v Secretary of State for the Home Department* [2015] EWHC 1331 (QB) and in *Patel v Secretary of State for the Home Department* [2014] EWHC 501 (Admin): see paras 42-018 and 42-026, above.

155 As, in the different context of a victimisation claim, by Underhill J in the Employment Appeal Tribunal in *Commissioner of Police of the Metropolis v Shaw* [2012] I.C.R. 464; [2012] I.R.L.R. 291 but, it is thought, unnecessarily. See *Shaw* and the discussion at para.43-014, below.

156 [1964] A.C. 1129.

157 [1972] A.C. 1027.

158 See Ch.13, above.

159 See paras 13-017 to 13-030, above. The further restriction introduced by the now overruled *A.B. v South West Services* [1993] Q.B. 507 CA (see para.13-011, above) never applied to false imprisonment cases since exemplary damages were early in evidence as *Huckle v Money* (1763) 2 Wils. K.B. 205 indicates.

160 Contrast the cases at paras 13-022 to 13-025, above. It was assumed in *Sallows v Griffiths* [2001] F.S.R. 188 CA, a case of profit-motivated malicious arrest, that exemplary damages were possible. None were in fact awarded because the compensatory award was considered to be adequate punishment: see at para.13-041, above.

161 [2009] EWHC 225 (QB) (facts at para.42-001 and amounts at para.42-012, above).

162 [1980] A.C. 637.

rest and false imprisonment entitled him to exemplary damages under the first of Lord Devlin's categories.[163] Then, following the false imprisonment example of *Huckle v Money*,[164] one of the two earliest cases of an exemplary award,[165] the Court of Appeal in *Holden v Chief Constable of Lancashire*,[166] held that wrongful arrest by a police officer fell within the category of oppressive, arbitrary or unconstitutional action by servants of the government and that, accordingly, the question whether to award exemplary damages should have been left to the jury. Moreover, an exemplary award might be made where, as there, there was unconstitutional action constituted by the wrongful arrest without the need for additional oppressive behaviour; the three epithets in effect fell to be read disjunctively.[167] Exemplary damages for false imprisonment were also given[168] against the police for oppressive conduct in two combined appeals, *Thompson v Commissioner of Police of the Metropolis* and *Hsu v Commissioner of Police of the Metropolis*.[169] These decisions are particularly valuable as the Court of Appeal gave guidance on the amounts appropriate to award in such cases. Lord Woolf MR, delivering the judgment of the court, said that in this class of action the conduct must be particularly bad to justify as much as £25,000, and £50,000 should be regarded as the absolute maximum; where exemplary damages were appropriate they were unlikely to be less than £5,000.[170] The Court of Appeal endorsed an award of £25,000 in *Thompson* but reduced the jury's award of £200,000 to £15,000 in *Hsu*.[171] Exemplary damages, in the amount of £15,000, have now been awarded for arbitrary and oppressive conduct of immigration officers in *Patel v Secretary of State for the Home Department*.[172]

---

163 [1980] A.C. 637 at 662F–G.

164 (1763) 2 Wils. K.B. 205.

165 See para.13-002, above.

166 [1987] Q.B. 380 CA.

167 [1987] Q.B. 380 CA at 388C. It was also said that exemplary damages did not have to be awarded merely because a case fell within one of Lord Devlin's categories; it was a matter of discretion: at 388D and 389B.

168 And as a separate award: see para.52-047, below.

169 [1998] Q.B. 498 CA.

170 [1998] Q.B. 498 CA at 517C.

171 It would seem that no exemplary damages were awarded in *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879 CA (false imprisonment together with assault and malicious prosecution) because the liability of the commissioner of police was vicarious but *Rowlands v Chief Constable of Merseyside Police* [2007] 1 W.L.R. 1065 CA (false imprisonment and malicious prosecution) has since decided that exemplary damages may be awarded against a chief constable whose liability was vicarious. Vicarious liability for exemplary damages is considered at: paras 13-045 to 13-047, above.

172 [2014] EWHC 501 (Admin) at [343], and the case at para.42-018, above.

Rolf Lüder, S., "The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice", *IRRC,* March 2002 Vol. 84 No. 845

The legal nature of the International Criminal Court and the emergence of supranational elements in international criminal justice

by
SASCHA ROLF LÜDER

To understand how the International Criminal Court (ICC) works, it is important to clarify its legal nature as an institution. In this paper the legal nature of the ICC will be considered in three steps. First, the Court's status as a subject of international law will be addressed. We shall then enquire whether the Court must be classified as an international organization. Finally, some thought will be given to the question whether, and to what extent, the ICC is vested with supranational authority.

The ICC as a subject of international law

An international legal person enjoys rights and carries out duties directly under international law and has the general capacity to act upon the international plane. The concept of international

SASCHA ROLF LÜDER is Counsellor at the General Representative of the Johanniter Order to the European Union, Brussels. Previously he was Research Associate at the Institute for International Law of Peace and Armed Conflict, University of Bochum, Germany.

personality is thus derived from international law. Sovereign independent States are the principal subjects of that law. Conversely, intergovernmental organizations are often seen as derivative subjects of international law with their legal personality stemming from their member States' recognition of them as articulated in the founding charter.[1]

The status of the ICC as a subject of international law is spelled out in Article 4, para. 1, of the Rome Statute of the International Criminal Court, of 17 July 1998 (hereinafter Statute)[2], which determines: "The Court shall have international legal personality."

This is a very helpful clarification, but it should be noted that even without such an explicit recognition the international legal personality of the ICC would follow from a reasoning similar to that which has been applied to the United Nations (UN). Since unlike the Statute, the UN Charter does not contain an explicit recognition of the Organization's international legal personality, in order to determine it, the International Court of Justice (ICJ) referred to the doctrine of implied powers. In its Advisory Opinion on reparation for injuries suffered in the service of the United Nations the ICJ stated:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[3]

If this reasoning is applied to the Court, it is evident that there are a number of provisions in the Statute which presuppose the international treaty-making power of the Court: Article 2 of the Statute refers to a relationship agreement to be concluded between the

1 I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, Oxford, 1998, pp. 57-58; V. Epping, in K. Ipsen, *Völkerrecht*, 4th ed., C. H. Beck'sche Verlagsgesellschaft, Munich, 1999, p. 51; R. Jennings and A. Watts (eds), *Oppenheim's International Law I*, 9th ed., Longman/London/New York, 1996, pp. 119-120.

2 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

3 *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports* 1949, p. 182.

ICC and the UN.[4] In addition to this, the Court is empowered, according to Article 3, para. 2, of the Statute, to enter into a headquarters agreement with the Netherlands, the host State of the ICC.[5] Furthermore, Article 87, para. 5 (a), of the Statute allows the Court to conclude an agreement with any State not party to the Statute on international co-operation and legal assistance.[6] To mention one final example, Rule 16, Sub-rule 4, of the Rules of Procedure and Evidence envisages the conclusion of agreements between the Court and States to protect vulnerable or threatened witnesses. Thus there can be no doubt that, under the ICJ's Reparation rationale, the international subjectivity of the ICC would have to be affirmed even in the absence of Article 4, para. 1, of the Statute.

On the international legal personality of the ICC *ratione personae*

As a general rule, only States Parties are bound by the provisions of a treaty. This basic rule also applies, of course, to the constituent instruments of intergovernmental organizations. Vis-à-vis non-member States, the international legal personality of such organizations depends on their explicit or implicit recognition by those States.[7] This recognition is said to be of a constitutive nature. However, in exceptional cases the international legal personality *erga omnes* of an intergovernmental organization has been recognized.[8] The ICJ, in its aforesaid Advisory Opinion, stated that:

4 See K. Dörmann, "The first and second sessions of the Preparatory Commission for the International Criminal Court", in *YIHL*, Vol. 2, 1999, p. 283; F. Jarasch, "Errichtung, Organisation und Finanzierung des Internationalen Strafgerichtshofs und die Schlußbestimmungen des Statuts", in *HuV-I*, Vol. 12, 1999, p. 10; A. Marchesi, in O. Triffterer (ed.), *Commentary on the Rome Statute for the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, Article 2, note 11.

5 See Dörmann, *op. cit.* (note 4), p. 283; Jarasch, *op. cit.* (note 4), p. 10.; G. A. M. Strijards, in Triffterer, *op. cit.* (note 4), Article 3, note 5.

6 C. Kreß, in Triffterer, *op. cit.* (note 4), Article 86, note 3.

7 Epping, in Ipsen, *op. cit.* (note 1), p. 402.

8 Brownlie, *op. cit.* (note 1), pp. 678-681; Epping, in Ipsen, *op. cit.* (note 1), p. 402; Jennings/Watts, *op. cit.* (note 1), pp. 16-22; I. Seidl-Hohenveldern and G. Loibl, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften*, 7th ed., Carl Heymanns Verlag, Cologne/Berlin/Bonn/Munich, 2000, p. 42.

"...fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone..."[9]

The question arises whether this reasoning can be applied to the ICC *mutatis mutandis*. An affirmative answer does not seem too far-fetched.[10] According to its Article 125, paras 1 and 3, the Statute shall be open for signature or to accession by all States. It is foreseeable that the overwhelming majority of the community of States will ratify it. And, in substance, the ICC clearly complements the UN: the Statute establishes a collective system of criminal justice which augments the collective security system of the UN Charter, and these systems constitute the key components of an international legal order devoted to the maintenance of peace. It should also be noted that the ICC's key function is to deal with crimes which, according to the Preamble, are "... of concern to the international community as a whole". It is thus arguable that the ICC will be another instance of an international legal subject created by a treaty and yet effectively existing *erga omnes*.[11]

The international legal personality of the ICC *ratione materiae*

The first sentence of Article 4, para. 1, of the Statute does not contain any limitation of the international legal personality of the ICC *ratione materiae*. This cannot mean, however, that the ICC has unlimited international legal personality. General international legal personality applies only to sovereign States as the principal subjects of international law. In the other cases the international subjectivity is a partial one, depending on the powers which have been conferred upon the legal person in question.[12] The three essential powers of an

9 *Op. cit.* (note 3), p. 185.

10 W. Rückert, in Triffterer, *op. cit.* (note 4), Article 4, note 5.

11 Compare, with regard to the UN and other large international organizations, R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford, 1994, p. 48.

12 Epping, in Ipsen, *op. cit.* (note 1), p. 53; Jennings/Watts, *op. cit.* (note 1), pp. 16-22, Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 39-42.

international legal person are the treaty-making power, the right to entertain diplomatic relations with other subjects of international law, and active and passive international responsibility. It has been said that these powers are even intrinsically linked with international legal personality.[13]

A number of provisions which presuppose the treaty-making power of the ICC have already been mentioned above. It will also be necessary, or at least highly useful, for the ICC to entertain diplomatic relations. The Statute, starting from the principle of complementarity and extending to the enforcement stage, is based on an intimate interrelation between the national and the international level. In practice, the smooth operation of the new international criminal justice system can be enhanced only by regular contacts between the ICC and States.[14] Thus the entertainment of diplomatic relations would be fully in line with the ICC's functions.

Finally, it is difficult not to recognize the active and passive international responsibility of the ICC, even though this attribute is not dealt with in any great detail in the Statute. Issues of international responsibility will arise above all within the framework of international cooperation and the enforcement regime under Parts 9 and 10 of the Statute. The most important and simultaneously most difficult scenario will be the failure of States to live up to their respective duties. In light of the only rudimentary regulation contained in the Statute itself (cf. Article 87, paras 5 and 7, in connection with Article 112, para. 2(f)), the crucial task will be to intertwine the specifics of the Statute with the general law of international responsibility.[15]

13 Ch. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *RdC*, 1984-IV, p. 163; H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity*, 3rd ed., Kluwer Law International, The Hague/Boston/London, 1995, section 1801.

14 See M. Bergsmo, in Triffterer, *op. cit.* (note 4), Preamble, notes 20-21.

15 For a stimulating first analysis, see C. Kreß and K. Prost, in Triffterer, *op. cit.* (note 4), Article 87, notes 24-27.

The ICC as an international organization

We shall now turn to the question whether the ICC is an international organization, a question which evidently is closely related to the issue of international subjectivity.

Characteristics of an international organization

Under general international law, the criteria for the legal personality of an international governmental organization may be summarized as follows:

- a lasting association of States;
- an organic structure;
- a sufficiently clear distinction between the organization and its member States;
- the existence of legal powers exercisable on the international level; and
- lawful purposes.[16]

The ICC obviously meets all these criteria: the Court is created by virtue of an inter-State treaty and, according to Article 1 of its Statute, is meant to become a permanent institution. Under Article 34, the ICC is endowed with organs: the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division, the Office of the Prosecutor and the Registry. These organs will not be subject to the instruction of States Parties but will operate independently in their respective fields of action. From this it follows that the ICC is itself an international organization and not — as are the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR) — only a subsidiary organ of an international organization.[17]

16 Brownlie, *op. cit.* (note 1), pp. 678-981; Epping, in Ipsen, *op. cit.* (note 1), pp. 391-392; Jennings/Watts, *op. cit.* (note 1), pp. 16-22; Schermers/Blokker, *op. cit.* (note 13), section 34.

17 Rückert, in Triffterer, *op. cit.* (note 4), Article 4, note 3.

The typology of international organizations and the ICC

There are a number of criteria to categorize international organizations. One distinction is made according to the aims pursued. Depending on the historical development of international organizations, traditional international law has in the first place differentiated between international peace organizations and other international organizations, especially those pursuing economic goals.[18] The ICC is an international peace organization if the term peace is, therefore, understood as being intimately linked to that of *justice*. As has been said above, the Court complements the collective security system of the UN with a system of collective criminal justice. The ICC will be an important component of an international order based on the rule of law in that it will strengthen individual criminal responsibility, particularly of individuals in positions of State leadership.

In addition, international organizations are categorized according to their organizational structure. Despite the many differences in detail, some common features have been identified. In particular a distinction is usually drawn between three types of organs: those representing the common interest of the organization, those representing the interests of member States, and, finally, judicial organs.[19] Again on a very general level and starting from the classic three sovereign powers, in the case of international organizations the focus traditionally lies on the legislative and executive area.

The ICC differs sharply from these traditional models. Its organizational structure reflects the peculiarity of the Court as being primarily an international justice organization. All the organs listed in Article 34 of the Statute (so-called *integrated organs*) will act through international personnel not subject to instructions from governments of States Parties. From the perspective of Article 34 of the Statute, the ICC is thus a completely integrated international judicial organization. Its institutional structure can, however, be viewed from a wider

18 Epping, in K. Ipsen, *op. cit.* (note 1), p. 390; Schermers/Blokker, *op. cit.* (note 13), section 48; Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 13-15.

19 Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 104-106.

perspective so as to include the Assembly of States Parties described in Article 112 of the Statute. The Assembly is not an integrated organ, as States Parties will be represented by persons acting on governmental instructions. And the area of competence of the Assembly clearly extends beyond the Court's judicial function, for the Assembly of States Parties is primarily a legislative and executive organ. Of utmost importance is the Assembly's power to adopt recommendations of the Preparatory Commission (Article 112, para. 2 (a), of the Statute), which includes the Draft Rules of Procedure and Evidence.[20] The question whether or not the Assembly of States Parties can be regarded as an organ of the ICC is an interesting one. From a formal point of view it must be answered negatively, as the Assembly is not included among the organs listed in Article 34. Considered thus, the Assembly instead appears to be a treaty organ *sui generis*.

However, it is not impossible to take a different, more substantive approach in analysing the ICC's structure. If the legislative authority of the Assembly of States Parties is deemed to be an essential element of the ICC Statute, much can be said for classifying the Assembly as an organ of the ICC in terms of substance. Viewed thus, the institutional structure of the international organization known as the ICC would be more complex. If the Assembly were to be considered part of its judicial core, consisting of the organs listed in Article 34 of the Statute, the organization would also have an executive and, more importantly, a legislative component to enact norms of a derivative nature. With regard to the principle of the separation of powers, the attribution of the latter function to an organ which is institutionally clearly detached from the judicial component constitutes a major advance compared to the ICTY and ICTR.

20 Compare K. Ambos, "'Verbrechenselemente' sowie Verfahrens- und Beweisregeln des Internationalen Strafgerichtshofs", in *NJW*, Vol. 54, 2001, pp. 407-410; H.-P. Kaul, "Der Aufbau des Internationalen Strafgerichtshofs: Schwierigkeiten und Fortschritte", in *VN*, Vol. 49, 2001, pp. 215-217.

The ICC as an international organization with supranational elements

What does supranational mean?

The authority of an international organization to bind a member State does not entail the exercise of sovereign power: traditional international organizations have authority only over their member States, and not within them.[21] The essential characteristic of supranationality, as the term is understood here, is that enactments by the international organization have direct effect within the respective member States' territory and on individuals.[22] This legal effect, which incidentally can flow from a legislative, executive or judicial act, directly obliges or empowers the individual subjects within a State, without the interposition of any transforming, receiving or *exequatur* act of that State.[23] From the viewpoint of the individual, supranationality thus results in the partial substitution of the sovereign. Supranationality — understood in that sense — has been foreshadowed by a number of international river commissions such as the Mosel Commission or the Central Commission for the Rhine Ship Traffic, but remained largely unknown until the end of World War II.[24]

The European Community as the current example of a supranational organization

Nowadays, the European Community (EC) is the paradigm of supranational cooperation, as evidenced by Article 249,

21 H. Mosler, in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland VII*, C. F. Müller Verlag, Heidelberg, 1992, pp. 609-611; A. Randelzhofer, in Th. Maunz and G. Dürig (eds), *Grundgesetz: Kommentar*, 8th ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1998, Article 24, para. 1, notes 30, 61.

22 M. Baldus, "Übertragung von Hoheitsrechten auf ausländische Staaten im Bereich der Sicherheitsverwaltung", in *Die Verwaltung*, Vol. 32, 1999, pp. 488-489; Randelzhofer, in Maunz/Dürig, *op. cit.* (note 21), Article 24, para. 2, note 30; K. T. Rauser, *Die Übertragung von Hoheitsrechten auf ausländische Staaten*, C. H. Beck'sche Verlagsbuchhandlung, Munich, 1991, p. 34.

23 Epping, in Ipsen, *op. cit.* (note 1), p. 77; R. Geiger, *Grundgesetz und Völkerrecht*, 2nd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1994, p. 139.

24 F. Berber, *Lehrbuch des Völkerrechts III*, 2nd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1977, pp. 318-324; O. Rojahn, in I. von Münch and Ph. Kunig (eds), *Grundgesetz-Kommentar 2*, 3rd ed., C. H. Beck'sche Verlagsbuchhandlung, Munich, 1995, Article 24, note 43, 48; Seidl-Hohenveldern/Loibl, *op. cit.* (note 8), pp. 15-16.

para. 2, of the Treaty establishing the European Community. Under this provision the EC can enact regulations which not only have general application but are each binding in their entirety and directly applicable in every member State. In comparison, directives are binding, as to the result to be achieved, upon each member State to which they are addressed, but must leave to the member State's authority the choice of form and methods. As a corollary to this supranational legislative power, individuals may turn directly to the European Court of Justice, which secures the protection of their rights.

The International Criminal Tribunals for the Former Yugoslavia and for Rwanda: emergence of supranational elements

Traditionally the United Nations has been perceived as a classic international organization.[25] Articles 24 and 25 of the UN Charter have been seen as the legal basis for adopting decisions which are binding upon member States but without having any direct effect in the latter's territory.[26] This position needs reconsideration in light of the UN's subsequent practice, and more particularly the establishment of the two ad hoc Tribunals. The powers of both international criminal tribunals are not confined to States as such, even though States and State-like entities are the primary addressees of the Tribunal's decisions.[27] In *The Prosecutor* v. *Tihomir Blascic* the ICTY has recognized the Tribunal's power in two cases to issue orders which are addressed directly to individuals.[28] The first case is where the respective State allows such direct effect, i.e. the ICTY expresses the desirability of its decisions to have a direct effect, but leaves the States to decide on the permissible extent thereof. An interesting consequence of this view is the possibility of relative supranationality *ratione personae*. The second

25 Ch. Tomuschat, in H.-J. Abraham (ed.), *Bonner Kommentar zum Grundgesetz*, 91st ed., C. F. Müller Verlag, Heidelberg, 1999, Article 24, note 114.

26 Geiger, *op. cit.* (note 23), p. 140.

27 C. Kreß, "Jugoslawien-Strafgerichtshof", in H. Grützner and P.-G. Pötz (eds), *Internationaler Rechtshilfeverkehr in Strafsachen*, 2nd ed., C. F. Müller Verlag, Heidelberg, 2000, note 60.

28 ICTY, Trial Chamber I, Judgment of 29 October 1997, *Blascic*, IT-95-14-AR 108 *bis*, para. 41.

case specifically concerns the States directly involved in the underlying armed conflicts. Vis-à-vis those States the Chamber allows on-site investigations even in the absence of an authorization by the territorial State. In the view of the Chamber it is critical for the efficiency of the international investigation that interviews may be conducted on site without any authority of the territorial State being present.

A further supranational element to which the *Blascic* judgment alludes is the Tribunals' primacy over national criminal jurisdiction, under Article 9, para. 2, of the ICTY Statute and Article 8, para. 2, of the ICTR Statute. On the basis of these provisions the two tribunals can request a national court at any stage of its procedure to defer a case to the international level and the national court would be bound to comply with such a request. A German court experienced such a situation in the Tadic case, where the accused had to be surrendered to the ICTY even though the national proceedings were about to reach the trial stage.[29]

Supranational elements in the ICC Statute

It is interesting to examine the extent to which the "supranationalization" of international criminal law which has surfaced in the practice of the ad hoc tribunals has been maintained in the ICC Statute. The crucial difference between the ICC and the two ad hoc tribunals must be noted at the outset: the ICC Statute is based on the principle of complementarity.[30] Under this regime, the ICC may

29 See R. Griesbaum, "Über die Verfahrensgrundsätze des Jugoslawien-Strafgerichtshofes, auch im Vergleich zum nationalen Recht", in H. Fischer and S. R. Lüder (eds), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof*, Berlin Verlag Arno Spitz, Berlin, 1999, p. 117; J. MacLean, "The enforcement of the sentence in the Tadic case", in H. Fischer, C. Kreß and S. R. Lüder (eds), *International and national prosecution of crimes under international law*, Berlin Verlag Arno Spitz, 2001, p. 729.

30 See P. Benvenuti, "Complementarity of the International Criminal Court to national criminal jurisdictions", in F. Lattanzi and W. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court I*, Editrice il Sirente, Ripa di Fagnano Alto, 2000, p. 21; J. Holmes, "The principle of complementarity", in R. S. Lee (ed.), *The International Criminal Court*, Kluwer Law International, The Hague/Boston/London, 1999, p. 41.

exercise its jurisdiction only on a subsidiary basis. Supranationality and subsidiarity are not, however, mutually exclusive concepts.[31]

According to the ICC Statute the Prosecutor may take specific investigative steps on site: Article 99, para. 4, of the Statute empowers him to carry out certain non-compulsory investigative steps on the territory of a State requested for assistance, and to do so without the presence of the authorities of that State, and Article 57, para. 3 (d), of the Statute gives the Prosecutor wide-ranging investigative power in the special case of a disintegrated State.[32]

Another interesting element can be found in Article 58, para. 7, of the Statute. Under this provision, the Prosecutor is authorized to directly summon a person if there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance.

Third, a warrant of arrest issued pursuant to Article 58, para. 1, of the Statute has direct effects within the national legal system. In particular, the arrest warrant determines with binding force — not to be questioned by national authorities in the course of the arrest proceedings — that the conditions of Article 58, para. 1, of the Statute are fulfilled.[33] As a corollary the individual concerned has the right to challenge the arrest warrant directly at the international level. This right is usefully specified in Rule 117, Sub-rule 3, of the Rules of Procedure and Evidence. Once the person is arrested, the custodial State has to apply Article 59, para. 4, of the Statute and not its national law in deciding whether to grant interim release.

31 Compare O. Lagody, "Legitimation und Bedeutung des Ständigen Internationalen Gerichtshofes", in *ZStW*, Vol. 113, 2001, p. 803.

32 For the details on Article 99, para. 4, of the Statute see H.-P. Kaul and C. Kreß, "Jurisdiction and cooperation in the Statute of the International Criminal Court: Principles and compromises", in *YIHL*, Vol. 2, 1999, pp. 168-169; C. Kreß, "Strafen, Strafvollstreckung und internationale Zusammenarbeit im Statut des Internationalen Strafgerichtshofes", in *HuV-I*, Vol. 11, 1998, pp. 160-161; K. Prost and A. Schlunck, in Triffterer, *op. cit.* (note 4), Article 99, notes 11-29; S. R. Lüder and G. Schotten, "A guide to State practice concerning international humanitarian law: Germany", in *YIHL*, Vol. 3, 2000, in preparation.

33 Compare C. Kreß, "Völkerstrafrecht in Deutschland", in *NStZ*, Vol. 20, 2000, p. 623.

Finally, such direct effects do not end with the surrender of a person to the ICC. Rather, they continue to flow from the transferred judicial powers throughout the whole process before the ICC, including the final judgment over such a person. The judgment constitutes no doubt the most extreme effect of a decision by an international organization upon an individual person.

Conclusions

The International Criminal Court is a subject of international law and has all three core capabilities, i. e. treaty-making power, the right to entertain diplomatic relations, and active and passive international responsibility. Arguably, the ICC's legal personality is valid *erga omnes*.

The ICC is an international organization. It constitutes a new form of integrated international judicial organization. In a wider sense the new international justice system, extending to the Assembly of States Parties, is an even more complex organization which includes executive and above all legislative powers. The exercise of these powers is left to an organ composed of State representatives. Compared to ICTY and ICTR, this institutional arrangement better reflects the principle of the separation of powers.

Notwithstanding the principle of complementarity, the ICC Statute contains a number of supranational elements. First of all there are the powers to conduct on-site investigations. In addition, the summons of a suspect and the issuance of an arrest warrant entail direct effects. Finally, there is some justification for qualifying all orders issued directly by the ICC vis-à-vis individuals in the course of criminal proceedings as supranational.

●

Résumé

La nature juridique de la Cour pénale internationale et l'émergence d'éléments supranationaux dans la justice pénale internationale

PAR SASCHA ROLF LÜDER

Dans cet article, l'auteur examine différentes questions soulevées par la nature juridique de la Cour pénale internationale (CPI). Le Statut de Rome, dans son article 4, précise que cette Cour a « la personnalité juridique internationale ». En se référant à la doctrine développée par la Cour internationale de Justice selon laquelle une organisation internationale doit disposer des attributs indispensables à l'exercice de ses fonctions, on peut donc conclure que la personnalité juridique internationale de la CPI est de toute façon reconnue. Dans le même esprit, on peut déduire que la CPI est une organisation internationale, c'est-à-dire une nouvelle forme d'organisation judiciaire internationale intégrée, dans le sens qu'elle n'est pas assujettie aux instructions émanant des gouvernements des États parties. Selon le Statut de Rome, la Cour est effectivement composée de différents organes qui ont soit des pouvoirs législatifs, soit des pouvoirs exécutifs. Enfin, l'auteur constate que la CPI a des pouvoirs supranationaux, car elle peut, par exemple, délivrer des mandats d'arrêt avec effets directs pour les autorités nationales.

Tetley, W., Q.C., "Attachment, the Mareva Injuction, and saisie conservatoire", ***Lloyds Maritime and Commercial Law*****,**

Attachment, the *Mareva* injunction and *saisie conservatoire*

*By Professor William Tetley, Q.C.**

A. Introduction

Attachment in the United States, the *Mareva* injunction in the United Kingdom and Canada and the *saisie conservatoire* in France and Europe have a common purpose, which is to preserve the rights of the creditor. The three procedures, however, are far from identical in effect or in means of enforcement.

The intention of the present article is to describe attachment, the *Mareva* injunction and *saisie conservatoire*, to explain their differences and similarities and then to describe the possible court challenges to them on grounds of lack of "due process". The law of the U.S., the U.K., Canada and France will be considered.

The story of attachment is intriguing; it was lost in England and retained in the U.S., because the American colonies left the Motherland before attachment disappeared in England. France has the purest form of Admiralty proceeding, the *saisie conservatoire*; it is used in civil and maritime cases without the need for the writ *in rem*, which latter gained importance with the attack of the courts of common law on the jurisdiction of the Admiralty Court. The *Mareva* injunction, a modern procedure, was the culmination of a search by the U.K. courts (not Parliament) for a suitable modern replacement for the lost attachment. Attachment, in reality, lives on in the U.K. (although unused) and in my view was never abolished by statute, as this article will attempt to demonstrate.

The story of the three processes is also intriguing because of the question of human rights, due process considerations having arisen simultaneously in all four countries. Nor has the saga ended; we will hear of it for many years.

The three procedures will now be considered in turn.

B. Attachment and arrest in the U.S.

(1) *Introduction*

American maritime law embraces three modes of taking suit, the last two of which bind the ship: (a) an action *in personam*, (b) an action *in personam* with attachment under Supplemental Admiralty Rule B[1], and (c) the writ *in rem* under Supplemental Admiralty Rule C[2]. American law is distinguishable from the law of other jurisdictions by rules of procedure which are original to the U.S. and in particular by restrictions imposed by the Fifth and Fourteenth (due process) Amendments to the U.S. Constitution.

*McGill University, Montreal.

[1] "Supplemental Rule B": *Attachment and Garnishment*: *Special Provisions*; 28 U.S. Code, *Supplemental Rules for Certain Admiralty and Maritime Claims.*

[2] "Supplemental Rule C": *Actions in rem*: *Special Provisions*; 28 U.S. Code, *Supplemental Rules for Certain Admiralty and Maritime Claims.*

(2) *Attachment in personam—Supplemental Rule B*

In proceedings *in personam* the claimant may at the same time pray for immediate attachment of goods of the defendant inside the district when the defendant cannot be found in the district. The proceeding is brought under Supplemental Rule B, which reads in part:

> "(1) *When available; Complaint, Affidavit, and Process.*—With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found in the district".

Attachment under Rule B is similar in many respects to the *saisie conservatoire* (conservatory attachment)[2a] of the civil law. It also bears some resemblance to the *Mareva* injunction[2b] which developed in the U.K. at the same time as the "due process" attack on Supplemental Rules B and C in the U.S.

(3) *Actions in rem—Supplemental Rule C*

The U.S. action *in rem* against maritime property is similar to the action *in rem* in the U.K., Canada and other common law jurisdictions. Such action is permitted where a maritime lien exists or where a U.S. statute permits. Supplemental Rule C reads in part:

> "(1) When Available.—An action *in rem* may be brought:
>
> (a) to enforce any maritime lien;
> (b) whenever a statute of the United States provides for a maritime action *in rem* or a proceeding analogous thereto."

(4) *Procedures—writs of attachment and writs in rem*

Notice to the defendant is not required before obtaining a writ of attachment or a writ *in rem* or before the seizure or arrest. Under Rule B, the detailed complaint seeking attachment must be accompanied by an affidavit attesting that, to the affiant's knowledge, the defendant cannot be found in the district. No affidavit is necessary under Rule C. However, the complaint must be verified on oath or solemn affirmation and must describe the property that is the subject of the action and its whereabouts. Foreign and U.S. flag ships may be arrested under Rules B and C but only Rule B requires that the owner "not be found in the district".

The plaintiff need not put up a security bond when proceeding under Rule B or C but may be required to do so by the court under Supplemental Rule E(2)(b) on the filing of the complaint or on the appearance of any defendant, claimant or any other party.

Local rules of each Admiralty District Court may of course radically alter the procedure for that district. Whenever a counterclaim is asserted, the plaintiff in the original action may be required to put up security under Supplemental Rule E(7).

[2a] *Post*, section C.

[2b] *Post*, section D.

The attachment under Rule B is used primarily for the security it provides. The action *in rem* under Rule C is used to perfect a lien, to obtain jurisdiction and also to procure security.

(5) *Due process—the Fifth and 14th Amendments*

The Fifth Amendment to the Constitution of the U.S.[3], adopted in 1791, is in respect to Federal matters and reads in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .".

The 14th Amendment, adopted in 1868, is in respect to State matters[4] and reads in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

In effect, the Fifth and 14th Amendments guarantee the "due process" right to appear and be heard whenever liberty and property are at stake.

Seizure before judgment as violating "due process" was first ruled on by the U.S. Supreme Court in civil matters. The most important early judgment was *Ownbey* v. *Morgan*[5] in 1921. The question was revived nearly 50 years later in respect to garnishment of wages in *Sniadach* v. *Family Finance Corpn.*[6], where the Supreme Court declared that the fundamental principles of due process under the 14th Amendment were violated because there had been neither "prior notice" nor "prior hearing". Douglas, J., speaking for court, added however that: "Such summary procedure may well meet the requirements of due process in *extraordinary situations*"[7]. The Supreme Court, in *Fuentes* v. *Shevin*[8], went even further than *Sniadach*, holding that the "extraordinary situations" where notice is not required must be "truly unusual". This meant[9]:

> "First in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force".

The strict pre-arrest notice requirement of *Fuentes* v. *Shevin* was reduced in its severity

[3] The first 10 amendments dealt with the powers of the Federal Government. In consequence, the Fifth Amendment is concerned with due process under Federal law. The word "person" in the Fifth Amendment includes corporations: *Sinking Fund Cases*, 99 U.S. 700, at pp. 718-19 (1879).
[4] The 14th Amendment guarantees due process under State law rather than Federal law. Nevertheless, the jurisprudence under the Fifth and 14th Amendments has merged and cross pollinated from time to time and in various ways. N.B. it has been held that a corporation cannot be deprived of its property without due process of law: *Smyth* v. *Ames* 169 U.S. 466, at pp. 522, 526 (1898); *Kentucky Co.* v. *Paramount Exch.* 262 U.S. 544, at p. 550 (1923); *Ligget Co.* v. *Baldridge* 278 U.S. 105 (1928).
[5] 256 U.S. 94 (1921). A Delaware foreign attachment statute which (at pp. 104, 105) the court found dated back to the Custom of London and early colonial days was held not to violate the 14th Amendment despite the fact that the non-resident defendant did not have sufficient means, aside from the property attached, to put up security. Unable to provide security, as the statute required, he was unable to appeal and to oppose the attachment.
[6] 395 U.S. 337, at p. 342 (1969).
[7] Ibid., at p. 339 (emphasis added).
[8] 407 U.S. 67, at p. 90 (1972).
[9] Ibid., at p. 91.

in *Mitchell* v. *W. T. Grant Co.*[10] and *Calero-Toledo* v. *Pearson Yacht Leasing*[11]. In both cases, the Supreme Court upheld seizure without prior notice because: in *Mitchell*, the seizure was under judicial control from beginning to end; and, in *Calero-Toledo*, the seizure was not initiated by self-interested private parties but by government officials.

Shaffer v. *Heitner*[12] was the third leading civil case in the *Sniadach*, *Fuentes*, *Shaffer* triumvirate on seizure and the 14th Amendment. While *Sniadach* and *Fuentes* dealt with the procedural question of notice, *Shaffer* dealt with substantive due process and jurisdiction. First, the court stipulated that the "fair play and substantial justice" rule of minimum contacts with the jurisdiction, set out in *International Shoe Co.* v. *Washington*[13], applied to property as well as to persons[14], thus referring obliquely to the Admiralty *in rem* action and Rule C. The court also provided an exception to the *International Shoe* substantive due process rule: it did not apply to *in rem* actions[15]. The rule, however, does apply to quasi *in rem* actions where the property purportedly justifying jurisdiction is unrelated to the plaintiff's cause of action[16].

(6) *Due process—Supplemental Rules B and C*

The holdings in the foregoing civil cases appeared to open the door to challenges of attachment in Admiralty and of *in rem* arrest. Admiralty moves slowly, but eventually many test cases were taken against Supplemental Rules B and C, resulting for the most part in decisions upholding the rules.

The Admiralty due process debate has been complicated by the fact that the leading Supreme Court decisions concerned domestic rather than maritime matters. The Admiralty decisions, too, in dealing with the unique nature of Admiralty law and the maritime lien, had to contend with procedural and substantive due process, the personification and procedural theories of maritime liens and the issue of whether a ship was a person. Decisions from various Districts and Circuits seemed at times to be contradictory or at least leading in different directions. Numerous articles were written explaining the findings of the courts and proposing explanations and theories[17]. The Maritime Law Association of the U.S. filed *amicus curiae* briefs.

[10] 416 U.S. 600 (1974). The new test enunciated by the Supreme Court was a balancing of interests and other safeguards. A seller of household goods had those goods sequestered under the Louisiana State Code of Civil Procedure without prior notice or hearing, yet the Supreme Court held that this did not violate due process: "we are convinced the State has reached a constitutional accommodation of the respective interests of buyer and seller": ibid. at p. 610. See also p. 604.
[11] 416 U.S. 663 (1974); [1974] A.M.C. 1895. Seizure without prior notice of a yacht which had been leased and upon which marijuana was subsequently discovered was permitted because the three requirements of the *Fuentes* v. *Shevin* "extraordinary situations" doctrine were met.
[12] 433 U.S. 186 (1977).
[13] 326 U.S. 310 (1945). See *Shaffer* v. *Heitner*, *supra*, at pp. 206, 207.
[14] Ibid., at p. 207.
[15] Ibid., at p. 208.
[16] Ibid., at p. 209. See also Batiza and Patridge, "The Constitutional Challenge to Maritime Seizures", (1980) 26 Loyola L. Rev. 203, at p. 210.
[17] McCreary, "Going for the Jugular Vein: Arrests and Attachments in Admiralty" (1967) 28 Ohio St. L.J. 19; Joshua M. Morse, "The Conflict between the Supreme Court of Admiralty Rules and Sniadach-Fuentes: A Collision Course?" (1975) 3 Fla. St. U. Rev. 1; Angela M. Bohmann, "Application of Shaffer to Admiralty in Rem Jurisdiction" (1978) 53 Tul. L. Rev. 135; Paul M. Batiza and Scott S. Partridge, "The Constitutional Challenge to Maritime Seizures" (1980) 26 Loyola Law Rev. 203; Richard T. Robol, 'Admiralty's Adjudicatory Jurisdiction Over Alien Defendants: A Functional Analysis" (1979-80) 11 JMLC 395; Steven S. Karic, "Admiralty-Procedure For Maritime Action in Rem Found Unconstitutional" (1981) 55 Tul. L. Rev. 936; Christopher J. Duzor, "Constitutionality of Supplemental Admiralty Rule C" (1983) 14 JMLC 281; Charles Schwartz, "Due Process and Traditional Admiralty Arrest and Attachment under the Supplemental Rules" (1983) 8 Maritime Lawyer 229.

The due process testing of Rules B and C was no doubt exhausting to the parties and to the courts and "absorbed much judicial energy"[18]. Beneficial new guidelines emerged, however, in an attempt to respect the due process requirement of the U.S. Constitution while recognizing the need in some cases for attachment and arrest without notice. In particular, Judge Beeks, in *Grand Bahama Petroleum* v. *Canadian Transport Agencies*[19], offered a solution to this due process dilemma, after finding with regret that Rule B was unconstitutional. Accepting the arguments of *amicus curiae* (the Maritime Law Association), Judge Beeks suggested the following procedure: (a) an informal pre-attachment hearing before a judge (without the defendant); (b) there the plaintiff must prove on "reliable hearsay evidence, that reasonable cause exists for the issuance of the writ"; (c) the plaintiff seeking the writ would have to show at least that a *maritime* debt probably exists; (d) he would have to describe his reasonable efforts to locate the defendant in the district; (e) after the attachment, the defendant must be afforded an immediate opportunity to vacate the attachment, through a show cause order.

The issue still remains to be settled and will no doubt require one or more Supreme Court decisions and amendments to Rules B and C themselves. In the meantime, a bare majority of the decisions continue to declare the proceedings under Rules B[20] and C[21] (especially C) to be constitutional.

(7) *New guidelines for Rules B and C*

Certain new guidelines have emerged in respect to attachment and, to a lesser extent, arrest[22]:

[18] *Shaffer* v. *Heitner*, *supra*, at p. 202.
[19] 450 F.Supp. 447, at pp. 459-460, note 84; [1978] A.M.C. 789, at p. 807, note 84 (W.D. Wash. 1978).
[20] Decisions upholding the constitutionality of Supplemental Rule B include: *Amstar Corpn.* v. *Alexandros T*, 431 F.Supp. 328, [1977] A.M.C. 537 (D. Md. 1977), on appeal 664 F.2d 904, [1981] A.M.C. 2697 (4 Cir. 1981); *Amoco Overseas Oil Co.* v. *Compagnie Nationale* 605 F.2d 648, [1979] A.M.C. 1824 (2 Cir. 1979); *Engineering Equipment Co.* v. *SS Selene* 446 F.Supp. 706, [1978] A.M.C. 809 (S.D.N.Y. 1978); *Polar Shipping Ltd.* v. *Oriental Shipping* 680 F.2d 627, [1982] A.M.C. 2330 (9 Cir. 1982); *Astro Carisma S.A.* v. *Ideomar S.A.* [1983] A.M.C. 1110 (S.D. Tex. 1982); *Parcel Tankers Inc.* v. *Formosa Plastics Corpn.* 569 F.Supp. 1459, [1984] A.M.C. 234 (S.D. Tex. 1983); *International Ocean Way Corpn.* v. *Hyde Park Navigation Ltd.* 555 F.Supp. 1047, [1984] A.M.C. 25 (S.D.N.Y. 1983). Decisions holding that proceedings under Supplemental Rule B were unconstitutional include: *Grand Bahama Petroleum Co.* v. *Canadian Transportation Agencies* 450 F.Supp. 447, [1978] A.M.C. 789 (W.D. Wash. 1978); *Cook Industries Inc.* v. *Tokyo Marine Co.* [1978] A.M.C. 1979 (D. Alas. 1978); *Schiffahart Leonhardt* v. *A. Bottachi* 552 F.Supp. 771 (S.D. Ga. 1982); *Cooper Shipping* v. *Century 21* [1983] A.M.C. 244 (M.D. Fla. 1982); *Crysen Shipping Co.* v. *Bona shipping Co.* [1983] A.M.C. 237 (M.D. Fla. 1982). The last four decisions rely on *Grand Bahama*, *supra*.
[21] Decisions upholding Supplemental Rule C include: *Central Soya Co. Inc.* v. *Cox Towing Corpn.* 417 F.Supp. 658, [1980] A.M.C. 459 (N.D. Miss. 1976); *Bethlehem Steel* v. *S/T Valiant King* [1977] A.M.C. 1719 (E.D. Pa. 1977) (due process does not protect inanimate objects such as vessels); *Stoner* v. *Neiska II* [1978] A.M.C. 2650 (D. Alas. 1978); *Amstar Corpn.* v. *Alexandros T*, 431 F.Supp. 328 (D. Md. 1977), [1977] A.M.C. 537, on appeal, 664 F.2d 904, [1981] A.M.C. 2697 (5 Cir. 1981); *Hjalmar Bjorges Rederi* v. *Condor* [1979] A.M.C. 1696 (S.D. Cal. 1979); *Sideris Shipping Co.* v. *Caribbean Arrow* [1980] A.M.C. 1296 (M.D. Fla. 1979); *Merchants National Bank* v. *Dredge General Gillespie* 488 F.Supp. 1302, [1980] A.M.C. 607 (W.D. La. 1980), on appeal 663 F.2d 1338, [1982] A.M.C. 1 (5 Cir. 1981); *Inter-American Shipping* v. *Tula* [1982] A.M.C. 951 (E.D. Va. 1982); *Kodiak Fishing Co.* v. *M/V Pacific Pride* (W.D. Wash. 1982), 535 F.Supp. 915, [1982] A.M.C. 2089. Judge Beeks, of the *Grand Bahama* decision, *supra*, who had concluded that Rule B was unconstitutional, ruled in *Kodiak Fishing* that Rule C was constitutional. Decisions holding that proceedings under Supplemental Rule C were unconstitutional include: *Karl Senner Inc.* v. *M/V Acadian Valor* 485 F.Supp. 287, [1980] A.M.C. 1, (E.D. La. 1980); and *P.C. International* v. *Vessel Susan* [1980] A.M.C. 2062 (S.D. Fla. 1980).
[22] They are not unlike the rules evolved by Lord Denning, M.R., in respect to the *Mareva* injunction in *Third Chandris Shipping Corpn.* v. *Unimarine S.A. (The Genie)* [1979] Q.B. 645, at pp. 668-669. Local rules of each U.S. District Court have been adopted to comply with the constitutional due process requirements as interpreted by that court. See, for example, the amendment to Local Rule 32 of the Eastern District of Louisiana in respect to Supplemental Rules B and C.

(a) it is preferable to have a pre-arrest hearing, without the defendant but before a Judge[23];
(b) a maritime claim probably exists[24];
(c) the affidavit (in respect to a Supplemental Rule B attachment) supporting the application should be detailed and much more supportive of the claim than in the past[25];
(d) the affidavit (in respect to attachment) should describe the plaintiff's reasonable efforts to locate the defendant in the district[26];
(e) post-seizure hearings should be held promptly[27];
(f) in some cases, security should be provided by the claimant[28];
(g) the due process issue must be raised promptly by the defendant[29].

(8) *Conclusion: due process in Admiralty in the U.S.*

The difficult problem of protecting the rights of the individual (in this case the shipowner) and the rights of society (the creditors who may be deprived of any other recourse) has therefore been faced with dignity and understanding in the courts of the U.S. There has been a "balancing of interests", a desire for "fair play" and "substantial justice", yet a recognition of "extraordinary situations" where "other safeguards" could be instituted. Thus has a difficult problem been faced and overcome, which problem many other nations have avoided or have failed to solve.

C. "Saisie conservatoire" and arrest in France

(1) *Introduction*

France has only one procedure or "action" whereby suit may be taken, there being no writs *in rem* or writs *in personam*. To the simple "action", however, may be added the *saisie conservatoire* (conservatory attachment) to prevent assets of the debtor from being dissipated. The right in England to conservatory attachment *in personam* was lost in the course of the struggles between the common law and Admiralty Courts[30]. France did not experience such a conflict and so retained its procedure of attachment without notice, the *saisie conservatoire*. Nor has France apparently been troubled by doubts as to defendants' losing their "due process" rights, as in the U.S.

(2) *Arrest of ships*

Arrest of a ship in France is subject to a single procedure, the *saisie conservatoire* (conservatory attachment), as found in Art. 48 of the Code of Civil Procedure (ancien) and in Decree No. 69-967 as amended by Decree No. 71-161 of 24th February 1971.

[23] *Mitchell* v. *W. T. Grant Co.* 416 U.S. 600, at p. 606 (1974); *Grand Bahama Petroleum* v. *Canadian Transport Agencies* 450 F.Supp. 447, at pp. 459-460 note 84, [1978] A.M.C. 789, at p. 807 note 84 (W.D. Wash. 1978).
[24] *Grand Bahama*, *supra*; *Amstar Corpn.* v. *Alexandros T*, *supra*.
[25] *Mitchell* v. *Grant*, *supra*, at p. 605; *Crysen Shipping Co.* v. *Bone*, *infra*.
[26] *Grand Bahama*, *supra*.
[27] *Mitchell* v. *W. T. Grant Co.*, *supra*, at p. 606; *Crysen Shipping Co.* v. *Bona Shipping Co.* [1983] A.M.C. 237, at p., 242 (M.D. Fla. 1982); *Amstar Corpn.* v. *Alexandros T*, 664 F.2d 904, at p. 912, [1981] A.M.C. 2697, at p. 2708 (5 Cir. 1981).
[28] *Mitchell* v. *W. T. Grant Co.*, *supra*, at p. 606; *Polar Shipping* v. *Oriental Shipping* 680 F.2d 627, at p. 640, [1982] A.M.C. 2330, at p. 2349 (9 Cir. 1982).
[29] *Ocean Recovery Group* v. *Northern Retriever* [1983] A.M.C. 261 (D. Alas. 1982); *P. C. International, Inc.* v. *The Susan* [1980] A.M.C. 2062, at p. 2064 (D. Alas. 1982).
[30] See *post*, section D.

Despite there being one procedure, there are two regimes of ship arrest in France depending on the *type* of ship arrested. The first regime governs the arrest of seagoing ships flying the flag of a State which is a party to the 1952 Convention on the Arrest of Seagoing Ships[31]. This includes the arrest of French seagoing ships when there is an international factor involved (e.g. where the claimant seeking arrest resides in a foreign country which is a party to the Convention). The second, or residuary, regime governs the arrest of ships of States which have not signed the 1952 Arrest Convention[32] and the arrest of French vessels in a French port by a French resident[33]. Ships under this second regime are subject to the general law of France.

The two regimes have distinctive characteristics:

(i) Ships under the first regime may only be arrested for a maritime claim listed in Art. 1(1) in the 1952 Arrest Convention[34]. Ships under the residuary regime may be arrested for any claim, maritime or otherwise[35].

(ii) When the shipowner is personally liable for the claim, both regimes permit sister ship arrest.

(iii) When a charterer is liable in respect to claim under the first regime, the offending ship *or* a ship owned by the charterer may be arrested[36]. Under the residuary regime, only the property of the charterer (as the person liable on the claim) may be arrested[37].

(iv) Only one ship may be seized under the first regime[38]. Under the residuary regime, there is no such constraint[39].

(3) *Saisie conservatoire*

Article 6, para. 2 of the Arrest Convention states that the rules of procedure relating to the arrest of a ship, to the judicial authority to arrest a ship, and to the consequences of arrest, are governed by the law of the contracting State in which the application for arrest is made. Thus the procedure to be followed in France for the arrest or

[31] Article 8(1) of the *International Convention Relating to the Arrest of Seagoing Ships*, signed at Brussels, 10th May 1952. Adopted into the Law of France by Decree No. 58-14 of 4th January 1958.
[32] See, however, *Tribunal de Commerce de Bordeaux*, 28th July 1969, D.M.F. 1970, 111 where the court held that, by virtue of Art. 8(2) of the 1952 Arrest Convention, a ship belonging to a country which is not a party to the Convention could be arrested for a claim listed in Art. 1(1) of the Convention and not just for a claim giving rise to arrest under French domestic law. This has been interpreted as meaning that a judge has the discretion to apply the first regime when only the claimant, and not the ship, belongs to a country which is a party to the 1952 Convention. See J. Villeneau, Note, D.M.F. 1970, at p. 115. See also *Cour d'Appel de Rennes*, 2nd April 1973, Annuaire de Droit maritime et aérien 1974, 290 and E. du Pontavice, *Le Statut des Navires*, 1976, para. 329-330.
[33] Article 8(4) of the 1952 Arrest Convention. See also *Tribunal de Commerce de Bordeaux*, 28th July 1969, D.M.F. 1970, 111.
[34] Article 2 of the 1952 Arrest Convention. See *Cour d'Appel de Rouen*, 15th April 1982, D.M.F. 1982, 744. See also the same distinction in Greece which is also a party to the 1952 Arrest Convention: Gr. J. Timagenis, "Arrest of Ships in Greece" [1984] 1 LMCLQ 90, at p. 92.
[35] This general principle is found at Art. 2092 of the Civil Code of France. See also Art. 8(2) of the 1952 Arrest Convention.
[36] Article 3(4) of the 1952 Arrest Convention.
[37] Article 2092 of the C.C. (France). However, see *Tribunal de Commerce de Rouen*, 30th December 1964, D.M.F. 1965, 303 and note of G.-F. Montier at p. 304. See also Rodière, *Traité, Le Navire*, 1980, at para. 189.
[38] Article 3 of the 1952 Arrest Convention.
[39] Article 2092 of the C.C. (France).

conservatory attachment of a ship under either regime is to be found in Decree No. 71-161 of 24th February 1971 (amending Decree No. 69-967) and in Art. 48 of the Code of Civil Procedure (ancien).

Application for conservatory attachment is made (without the defendant's presence) to the President of the Tribunal de Commerce or, if he is unavailable, to a judge of the Cour d'instance, a lower court. Only they have authority to issue the order for the arrest of a ship[40].

Article 29 of Decree No. 67-967 of 27th October 1967 was amended in 1971[41], authorizing the judge to grant conservatory attachment once the claim appears to be "founded in its principle"[42]. Though fault need not be established, the petitioner must show "a commencement of proof" that the defendant has committed a fault and that a claim for damages would normally ensue against the defendant.[43] Even when such proof is made, the judge may refuse to grant a conservatory attachment if the ship operates on a regular line and thus will return to the jurisdiction at regular intervals[44]. Furthermore, the judge will not grant the motion unless there is an element of urgency or the petitioner is in danger of losing any possibility of recovering what may be due to him[45].

(4) *Code of Civil Procedure, Art.* 48

Article 48 of the French Code of Civil Procedure (ancien) sets out the general scheme for civil and maritime prejudgment arrest (conservatory attachment). It is of interest for a comparison with the U.S. requirements[46] for prejudgment arrest and the prescriptions of Lord Denning, M.R., for the *Mareva* injunction[47]. Article 48, as translated, provides:

> "In case of urgency and if the recovery of the debt would seem to be in peril, the president of the superior trial court or a judge of the lower court in the domicile of the debtor or in the district where the goods to be seized can be found may authorize the creditor, supported by a claim which appears to be founded in its principle, to seize for conservation the moveable goods belonging to the debtor.
>
> The order which will be rendered upon a motion will state the sum for which the seizure will be authorized. The order will fix the delay in which the creditor must take an action before the appropriate court to validate the conservatory attachment or the claim on its merits, in default of which the seizure will be null.
>
> The order may oblige the creditor to prove beforehand that he is sufficiently solvent in the circumstances or to put up security that will be deposited in the court or in the hands of a trustee.[48]

[40] Article 29, para. 1 of the Decree of 24th February 1971, conforming thereby with Art. 4 of the 1952 Arrest Convention, which requires judicial authorization to arrest a ship.
[41] Article 1 of Decree 71-161 of 24th February 1971.
[42] *Cour d'appel de Rouen*, 22nd June 1973, D.M.F. 1974, 91; *Cour d'appel de Rouen*, 26th January 1973, D.M.F. 1973, 544 at p. 548; *Cour d'appel de Rennes*, 30th July 1975, D.M.F. 1976, 223; *Trib. adm. Marseille*, 8th June 1972, D.M.F. 1972, 740; *Cour d'appel de Rouen*, 21st April 1972, D.M.F. 1972, 654.
[43] Rodière, *Traité, Le Navire* (1980) at para. 198.
[44] Ibid., at para. 202.
[45] Article 48 of the Code of Civil Procedure (ancien).
[46] *Ante*.
[47] See *post*, section D.
[48] As amended by Decree No. 75-1122 of 5th December 1975, Art. 19.

The president will only consider cases in which there are difficulties. The order will be executory once rendered in writing, notwithstanding opposition or appeal. The order may be in the formal executory form".

(5) *Summary*

France has, therefore, combined in its *saisie conservatoire* several of the features of the common law arrest *in rem* and Admiralty attachment. To be closer to the truth, it should be said that France, from earliest times, did not permit the two to separate as in England and other common law jurisdictions.

(6) *The Quebec Code of Civil Procedure*

The requirements of the Quebec Code of Civil Procedure[49] for prejudgment arrest also make an interesting civil law comparison with the common law *Mareva* injunction and Supplemental Rule B of American Admiralty practice. Articles 733 to 739 read, in part:

"733. The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.

735. A seizure before judgment is effected in virtue of a writ, issued by the prothonotary upon a written requisition supported by an affidavit affirming the existence of the debt and the facts which give rise to the seizure and, if based on information, indicating the sources thereof".

In the cases provided for in Arts. 733, 734.0.1 and 734.1, the leave of the judge must appear upon the requisition itself.

"736. The writ orders the officer charged with it to seize all the moveable property of the defendant or only the moveable or immoveable property specially described therein . . .".

The writ, moreover, orders the defendant, upon whom it must be served with a copy of the affidavit, to appear to answer the demand made against him and to hear the seizure declared valid.

"737. Seizure before judgment has, as its sole purpose, to place the property in the hands of justice pending suit; it is carried out in the same way and is governed by the same rules as seizure after judgment, so far as they are applicable.

738. The defendant may, within five days of service of the writ, demand that the seizure be quashed because of the insufficiency or the falsity of the allegations of the affidavit on the strength of which the writ was issued. If a proof is necessary, it must take place as soon as possible. The burden is on the seizing party to prove the allegations of his affidavit".

"739. The defendant may prevent the taking of the property seized by giving the seizing officer sufficient guarantee chosen by the defendant".

(7) *The Declaration of the Rights of Man and of the Citizen, 1789*

The French *Declaration of the Rights of Man and of the Citizen* (*Déclaration des droits de l'homme et du citoyen*) of 1789 has been relied on very recently in respect to

[49] Which is in French and English.

seizure of bank property by the Mitterand Government. Articles 2 and 17 of the *Declaration* stipulate:

"2. Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

17. La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité".

That is, in translation:

"2. The goal of every political association is the preservation of the natural and unassailable rights of man. These rights are liberty, property, safety, and resistance to oppression.

17. Property, being an inviolable and sacred right, no one can be deprived of his property except when public necessity, lawfully established, so requires, and on condition of a just and prior indemnity".

On 18th December 1981 the National Assembly of France adopted a law[50], nationalizing a number of large, private, industrial and commercial institutions, including major commercial banks. The law was challenged, and on 16th January 1982[51] the Conseil Constitutionnel declared certain Articles of the law invalid, invoking Arts. 2 and 17 of the *Declaration of Rights of Man and of the Citizen* of 1789. As a result, the nationalization law had to be revised before being upheld in a subsequent decision of the Conseil[52].

This revival of interest in the principle of just and prior indemnity in France could lead one to conclude that *saisie conservatoire* will be contested in the future, particularly in those cases when the affidavits of seizure are based on the flimsiest instructions and information is sent to the affiant by telex or given by telephone.

D. The "Mareva" injunction and the writ "in rem" in the U.K.

(1) *Admiralty attachment in 18th century England*

Up to the beginning of the 19th century, the Admiralty Court was possessed of three distinct proceedings: (a) the writ *in rem*, whereby the ship or cargo was arrested and the action was directed against the *res* or thing itself; (b) the writ *in personam*, where the action was directed against an individual who was arrested[53]; and (c) a decree of attachment of the goods and chattels of the defendant could be added to the writ *in*

[50] Law of 18th December 1981.
[51] *Conseil Constitutionnel* decision No. 81-132 DC of 16th January 1982, *Journal Officiel de la République Française*, 17th January 1982, at p. 299.
[52] *Conseil Constitutionnel* decision No. 82-139 DC of 11th February 1982, *Journal Officiel de la République Française*, 12th February 1982, at p. 560. For a useful discussion, see Andreas Lowenfeld, *International Private Investment International Economic Law*, 2nd edn. (1982), at p. 203. See also J. L. Mestre, "Le Conseil Constitutionnel, la liberté d'entreprendre et la propriété", Dalloz-Sirey (1984), at pp. 1 *et seq.*
[53] In 1841, in *The Alexander* (*Larsen*) (1841) 1 W. Rob. 288, at p. 294; 166 E.R. 580, at p. 582, Dr Lushington noted that the Court of Admiralty still had the power to arrest the person in the exercise of its jurisdiction. See also, F. L. Wiswall, *The Development of Admiralty Jurisdiction and Practice since* 1800 (1970) at p. 16.

personam if the defendant was not to be found in the jurisdiction[54]. Probably, as the actual arrest of a person declined and disappeared, the attachment of his goods came to the fore. Attachment unfortunately fell into disuse, in Admiralty, by the beginning of the 19th century, thereby creating a void[55].

A "foreign attachment" proceeding also existed by virtue of the charters of such cities as London and Dublin and applied to persons not in those cities whose assets were in the possession of a third party within the jurisdiction[56]. Admiralty attachment was different from foreign attachment since the former applied to all the assets of the defendant[57].

The *saisie conservatoire*[58] in France is very similar to Admiralty attachment and is used extensively because France has no writ *in rem*. There is no need for the writ *in rem* because the plaintiff can obtain jurisdiction otherwise. Maritime liens are recognized as substantive rights and do not require a writ *in rem* to be enforced. Supplemental Rule B in the U.S. is a pure maritime attachment, which has persisted from American colonial times to the present, long after the right was lost in England.

(2) *The "Mareva" injunction*

The *Mareva* injunction was granted for the first time in 1975[59] by the Court of Appeal, presided over by Lord Denning, M.R.[60], acting with courage and foresight. It is an *injunction* and is different from either the conservatory attachment of France or the foreign attachment of the City of London. The *Mareva* injunction is not an order to seize goods and put them in the custody of the court, rather it prevents their removal. The effect is nevertheless much the same. The *Mareva* injunction, however, does not give jurisdiction by itself.

For nearly 90 years, *Lister & Co.* v. *Stubbs*[61] was the leading authority preventing creditors from obtaining an injunction to restrain a debtor from disposing of his assets

[54] Arthur Browne, *A Compendious View of the Civil Law and of the Law of Admiralty* (1802), Vol. 2, at p. 435.
[55] Browne, ibid. "This salutary proceeding has in latter times gone into disuse in England, and great is the mischief accruing to commerce from the want of it. It still prevails in many parts of Europe, and gives to foreigners an evident advantage". See *Marriott's Formulare* (1802) at pp. 258 *et seq.* and pp. 350 *et seq.* for the actual form which was used. The procedure is a "Decree of Attachment" in the name of "George the Third, by the Grace of God of Great Britain, *France*, and Ireland, king, defender of the faith . . ." (emphasis added). See also, F. L. Wiswall, op. cit., at pp. 16, 17 and 164-6; and *The Alexander* (*Larsen*), *supra*.
[56] Browne, op. cit., at p. 434, Wiswall, op. cit., at p. 17.
[57] Lord Denning, M.R., in *Rasu Maritima S.A.* v. *Perusahaan Pertambaingan Minyak Dan Gas Bumi Negara* (*Pertamina*) [1978] Q.B. 644, at pp. 657-658, likened the "new procedure" (the *Mareva* injunction) to the attachment of the City of London, ignoring the fact that the latter was an attachment not an injunction and was granted by City charter. He seems to have drawn his references from Pitney, J., of the U.S. Supreme Court in *Ownbey* v. *Morgan* 256 U.S. 94, at p. 104 (1920), who referred to the history of attachment in England and correctly compared it with attachment in the U.S.
[58] Lord Denning, M.R. in *Rasu* v. *Pertamina*, ibid., at p. 658, again improperly concludes that the new procedure "is called in France *saisie conservatoire*".
[59] In *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093.
[60] Lord Denning, M.R., has described the *Mareva* injunction as "the greatest piece of judicial law reform in my time": *The Due Process of Law* (1982) at p. 134. This is reminiscent of Jelly Roll Morton, the great jazz pianist, who, when asked if he knew anything about jazz, said with considerable validity: "Why I invented it!" Credit for the *Mareva* injunction should also go to Geoffrey Brice, Q.C., and M. N. Howard, who pleaded the motion for the injunction.
[61] (1890) 45 Ch. D. 1. Civil rights were not raised in this judgment; rather, the court questioned (at p. 800) whether a pre-judgment injunction could be granted under the "rules by which we are governed". The rights of the creditors and the debtor were consequently decided under the general common law.

or taking them out of the jurisdiction before the final judgment was obtained. In 1975 the Court of Appeal nevertheless granted such an injunction in *Nippon Yusen Kaisha* v. *Karageorgis*[62], relying on s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925[63]. The second decision, also given by Lord Denning, M.R.'s division of the Court of Appeal, was in *Mareva Cia. Naviera S.A.* v. *International Bulkcarriers* (*The Mareva*)[64], which gave the injunction its name. Many decisions[65] followed confirming the principle, many scholars laboured mightily[66], and eventually s. 37(3) of the Supreme Court Act 1981 was adopted, specifically permitting an injunction to prevent the removal of assets from the district.

(3) *The criteria for a "Mareva" injunction*

The right to "due process" *per se* has not arisen in the U.K. but the courts have in effect faced the problem by fixing strict criteria for the issue of a *Mareva* injunction and thus balancing the public good against the rights of the individual debtor. The writ *in rem* has never seemed to have been questioned from a human rights point of view.

The level of proof required for an interlocutory injunction was fixed by the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[67] It was held that, before an injunction could be issued, the court must be satisfied that there is a serious question to be tried, in other words that the claim was neither frivolous nor vexatious. This replaced the stricter requirement of proving a "strong *prima facie* case", stipulated in *Nippon Yusen Kaisha* v. *Karageorgis*[68].

The test for a *Mareva* injunction, however, is somewhat more developed. In *Rasu Maritima S.A.* v. *Pertamina*[69], Lord Denning, M.R., held that "an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case' ". In *Montecchi* v. *Shimco* (*U.K.*) *Ltd.*[70], the plaintiff was obliged to show "a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue". In *Third Chandris Shipping Corpn.* v. *Unimarine S.A.* (*The*

[62] [1975] 1 W.L.R. 1093. Civil rights are not raised in this judgment either.
[63] (1925) 15 & 16 Geo. 5, c. 49, s. 45, which stated that the High Court may grant an injunction in all cases where it appears just or convenient.
[64] [1975] 2 Lloyd's Rep. 509; [1980] 1 All E.R. 213.
[65] See for example the following leading cases: *Rasu Maritima S.A.* v. *Pertamina* [1978] Q.B. 644; *The Siskina* [1979] A.C. 210; *The Assios* [1979] 1 Lloyd's Rep. 331.
[66] A few of the many articles are: David G. Powles, "The Mareva Injunction" [1978] J.B.L. 11; Charles Baker, "La notion de saisie conservatoire en droit anglais, La 'Mareva Injunction' ", D.M.F. 1979, 111; David G. Powles, "Limitations on the Mareva Injunction" [1980] J.B.L. 59; Frank Meisel, "The Mareva Injunction—Recent Developments" [1980] 1 LMCLQ 38; F. D. Rose, "The Mareva Injunction—Attachment in Personam" [1981] 1 LMCLQ 1 and [1981] 2 LMCLQ 177; Robert Gapes, "The Development of the Mareva Injunction" (1981) 4 Auck. U.L.R. 170; David E. Charity, " 'Mareva' Injunctions: A Lesson in Judicial Acrobatics" (1981) 12 J.M.L.C. 349; David G. Powles, "The Mareva Injunction Expanded" [1981] J.B.L. 415; Brian McLeod Rogers and George W. Hately Q.C., "Getting the Pre-Trial Injunction" (1982) 60 Can. Bar Rev. 1; Lord Denning, *The Due Process of Law* (1982), 133-151; Debra M. McAllister, "Mareva Injunction" (1982-83) 28 Carswell's Practice Cases 3; David N. Rogers, "The Action in rem and 'Mareva' Injunction: The Need for a Coherent Whole" (1983) 14 J.M.L.C. 513.
[67] [1975] A.C. 396, at p. 407.
[68] [1975] 1 W.L.R. 1093, at p. 1095.
[69] [1978] Q.B. 644, at p. 661.
[70] [1979] 1 W.L.R. 1180, at p. 1183.

Genie)[71], Lord Denning, M.R., set out five guidelines to ensure that the *Mareva* injunction would not be granted indiscriminately:

(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know[72].

(ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

(iii) The plaintiff should give some grounds for believing that the defendants have assets here . . . In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not.

(iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a *Mareva* injunction simply because it has agreed to London arbitration . . .

(v) The plaintiffs must, of course, give an undertaking in damages—in case they fail in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security: and the injunction only granted on it being given, or undertaken to be given.

A further, sixth, condition precedent to a *Mareva* injunction has emerged and arises from London's central position as a place for foreigners to litigate or to arbitrate disputes with efficiency before persons of unquestioned competence and objectivity[73]. Courts are now asking whether foreigners who have agreed by virtue of a jurisdiction clause to arbitrate or litigate in London should be almost automatically subject to a *Mareva* injunction? The condition is alluded to in Lord Denning, M.R.'s, fourth guideline above and has been taken up in respect of foreign corporations in *The Niedersachsen*[74] by Mustill, J.[75]:

> "It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied upon. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied upon. Or again, the plaintiff may be able to found his case on the fact that enquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend upon the particular circumstances of the case. But the evidence must always be there. Mere proof that the company is incorporated abroad accompanied by the allegation that there are no reachable assets in the United Kingdom apart from those which it is sought to enjoin, will not be enough".

In other words, if the foreign defendant is reliable and has assets outside the jurisdiction, then the *Mareva* injunction will probably not be granted. The key now is

[71] [1979] Q.B. 645, at pp. 668-669.
[72] See *The Assios* [1979] 1 Lloyd's Rep. 331.
[73] This sixth condition will not be the last condition or guideline. Others will no doubt be prescribed while the existing ones will be modified.
[74] *Ninemia Maritime Corporation* v. *Trave Shiffahrtsgesellschaft m.b.H. und Co. K.G., The Niedersachsen* [1983] 2 Lloyd's Rep. 600 (Mustill, J., and C.A.); [1983] 1 W.L.R. 1412 (C.A.).
[75] [1983] 2 Lloyd's Rep. 600, at pp. 606-607.

not merely that assets in the jurisdiction are in peril of being removed or dissipated but that there will be no means in or outside the jurisdiction available to comply with the judgment when rendered. Mustill, J.'s, decision was upheld by the Court of Appeal[76].

(4) *The "Mareva" injunction—the persons affected*

The core of the injunction is that there will be no means available to enforce the final judgment and not that the defendant is a foreigner. The *Mareva* injunction therefore applies to foreign based as well as to local defendants[77].

(5) *Lessening the injunction*

Innocent third parties, such as banks, may be greatly affected by a *Mareva* injunction. In consequence, a bank has been permitted to continue certain banking procedures despite the injunction[78]. In *Searose Ltd.* v. *Seatrain (U.K.) Ltd.*[79], the injunction was granted on the condition that the complainant undertake to pay all reasonable costs of third parties incurred in complying with the injunction. In *Clipper Maritime Co. Ltd. of Monrovia* v. *Mineralimportexport*[80], where cargo was seized on board a ship being loaded, the port authority was given the right to move the ship within or even outside the jurisdiction.

(6) *Supreme Court Act 1981, s. 37(3)*

The common law *Mareva* injunction[81] has been recognized by statute in s. 37(3) of the Supreme Court Act 1981[82]. Section 37(3) reads:

> "The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction".

(7) *Did Admiralty attachment expire in the 18th century?*

An intriguing and important question arises when considering the Admiralty attachment which was in use up to the end of the 18th century[83]. Under this proceeding, an adjunct to the writ *in personam*, any ship or goods of the defendant found in the realm could be seized. Did the Admiralty attachment expire by 1800? If not, it is in principle alive and well in the U.K.[84] and Canada[85] and other jurisdictions[86] which have inherited the jurisdiction of the early Admiralty Court.

[76] [1983] 1 W.L.R. 1412.
[77] *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, Supreme Court Act 1981, s. 37(3).
[78] *Z Ltd.* v. *A-Z and AA-LL* [1982] Q.B. 558.
[79] [1981] 1 W.L.R. 894.
[80] [1981] 1 W.L.R. 1262.
[81] Or should it be called "the general maritime law *Mareva* injunction" in the light of its Admiralty origin?
[82] 1981 U.K., c. 54.
[83] Brown, op. cit., at p. 435.
[84] Ibid.
[85] Ibid.
[86] e.g., the Republic of South Africa. See Gys Hofmeyr, *Admiralty Jurisdiction and Practice*, Acta Juridica, Cape Town, 1982, 30 at pp. 30-31. Australia and New Zealand are other such nations.

Did the Admiralty attachment expire with time or by virtue of the Admiralty Acts of 1840[87] and 1861[88]? Fry, L.J., in *The Heinrich Bjorn*[89], reviewed the history of Admiralty jurisdiction in England, noted that the Admiralty Court was a civil law court and concluded that the writ of attachment still exists. Then, he made a statement which is difficult to contradict[90]:

> "But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised?
>
> The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm"[91].

The Heinrich Bjorn is an important and interesting decision. Necessaries were supplied to a ship, the shipowner went into liquidation, the ship was sold and then seized. The trial judge, Sir James Hannen, held, erroneously, that there was a lien for necessaries which bound the ship[92]. On appeal, Fry, L.J., quite correctly noted that there was no lien for necessaries but added *obiter* that the seizure was proper[93]. Seizure meant "the arrest of any personal property of the defendant within the realm, whether the ship in question, or any other chattel"[94]. The House of Lords (the case was now named *The Henrich Björn*) upheld Fry, L.J., finding there was no maritime lien for necessaries[95]. Unfortunately, the House of Lords seemed to have confused attachment with those *in rem* actions where there is no maritime lien. Lord Fitzgerald concluded, for example[96]:

> "It must now be taken as established that prior to 1840 the Court of Admiralty did exercise a jurisdiction in rem for the purpose of enforcing a claim against the owner though there was no maritime lien, and also in personam, in proper cases".

This merely stands for the proposition that, besides the action *in rem* in cases where there is a maritime lien and the action *in personam* for any claim, there is an action *in rem* for claims against the ship were there is no maritime lien. The House of Lords did not recognize or even adjudicate on the validity of Admiralty attachment.

No attachment in Admiralty appears to have been recorded in post-18th century English law reports until *The Beldis*[97], when a sister ship was arrested *in rem* for overpayment of chartered freight. The trial judge upheld the arrest, relying mistakenly on Fry, L.J.'s statement in *The Heinrich Bjorn*[98] to the effect that in attachment *in personam* "the arrest need not be of the ship in question but may be of any property of

[87] (1840) 3 & 4 Vict. c. 65.
[88] (1861) 24 & 25 Vict. c. 10.
[89] (1885) 10 P.D. 44.
[90] Ibid., at pp. 53-54.
[91] He cited *The Charkieh* (1873) 4 A. & E. 59, 91 and also referred to *The Alexander* (*Larsen*) (1841) 1 W. Rob. 288, 294; 166 E.R. 580, 582, *per* Dr Lushington.
[92] (1883) 8 P.D. 151.
[93] (1885) 10 P.D. 44, at pp. 53-54.
[94] Ibid.
[95] *C. & C. J. Northcote* v. *The Owners of the Henrich Björn* (*The Henrich Björn*) (1886) 11 App. Cas. 270.
[96] Ibid., at p. 286.
[97] [1936] P. 51, at pp. 69-70.
[98] (1885) 10 P.D. 44, at pp. 53-54; *supra*, fn. 90.

the defendant within the realm". The Court of Appeal also misconstrued the quotation in its effort to overturn the judgment at first instance, although Fry, L.J., was referring to the Admiralty attachment and not the action *in rem* in the case at Bar[99]. Sir Boyd Merriman, on appeal, correctly stated the issue before the court in *The Beldis*[100]:

> ". . . there remains the question, . . . whether the action *in rem* can be directed against property of the defendant owner other than that in respect of which the cause of action arose".

He further concluded correctly that Fry, L.J.'s famous statement was really *obiter* and that the House of Lords in *The Henrich Björn* did not uphold or really comment on that portion of Fry, L.J.'s decison.

The attempt in *The Beldis* to distinguish *The Henrich Björn* is itself *obiter*, in that *The Beldis* deals with *in rem* actions. *The Beldis* merely stated the rule that, in an action *in rem*, there can be no arrest of property unrelated to the cause of action. No one has ever dealt squarely with Fry, L.J.'s contention in respect to Admiralty attachment, yet *The Beldis* is taken as having ended the attachment once and for all. Admiralty attachment is not practised today as a result, and sister ship arrest is carried out by virtue of statutue[101].

A final question arises. Had the first *Mareva* injunction[102] been taken as an Admiralty attachment, would Lord Denning, M.R., have granted it? He clearly confused this injunction with the *saisie conservatoire*[103] and the foreign attachment of the City of London[104]. He really had more authority to revive the moribund Admiralty attachment than to reverse or circumnavigate *Lister & Co.* v. *Stubbs*[105] by promoting the invention of a whole new type of injunction with new rules of its own[106].

It is unfortunate that Lord Denning, M.R., did not resuscitate the Admiralty attachment instead of inventing of the *Mareva* injunction. Had he done so, he would have provided the Admiralty Court with a more useful tool, one that would have given jurisdiction to the claimant and would have allowed the U.K. to comply more closely with the 1952 Arrest Convention in respect to seizures for any claim.

E. The "Mareva" injunction in Canada

(1) *Canada follows the U.K.*

Canada has followed the U.K. example in respect to *Mareva* injunctions, but has been a year or two behind. In *Robert Reiser & Co.* v. *Nadore Food Processing Equipment*[107], the *Mareva* injunction was acknowledged in principle but refused, because the defendants were resident in Canada and there was no indication that assets would be removed from the jurisdiction. A similar result was reached a year later in

[99] [1936] P. 51, at p. 84.
[100] Ibid., at p. 63.
[101] Supreme Court Act 1981, s. 21(4)(a) and (b)(ii).
[102] *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 1 W.L.R. 1093.
[103] *Rasu Maritima S.A.* v. *Pertamina* [1978] Q.B. 644, at p. 658.
[104] Ibid., at p. 657.
[105] (1890) 45 Ch. D. 1.
[106] See *Third Chandris Shipping Corpn.* v. *Unimarine S.A.* (*The Genie*) [1979] Q.B. 645, at pp. 668-669.
[107] (1978) 17 O.R. (2d) 717, at p. 720. Although the defendant could sell the object seized, the proceeds were, nevertheless, ordered to be kept in a special trust account.

OSF Industries Ltd. v. *Marc-Jay Investments Inc.*[108], the trial judge preferring to rely on *Halsbury's Laws of England*[109] rather than on the later findings of Lord Denning, M.R., in the first *Mareva* decision.

Since these first two judgments, however, Canadian courts have granted *Mareva* injunctions for all the same reasons and under all the same prescriptions as in the U.K. The first positive decision was in British Columbia in *Manousakis* v. *Manousakis*[110]. A leading decision is the Ontario case of *Liberty National Bank and Trust Co.* v. *Atkin*[111], where the five guidelines of Lord Denning, M.R., in *Third Chandris Shipping Corpn.* v. *Unimarine S.A.* (*The Genie*)[112] were adopted for Canada, or at least Ontario[113].

The principle of the *Mareva* injunction has also been recognized in the Federal Court of Canada in *Elesguro Inc.* v. *Ssangyong Shipping*[114], in the North West Territories in *BP Exploration Co.* (*Libya*) *Ltd.* v. *Hunt*[115] and in New Brunswick in *Buraglia* v. *Humphreys*[116].

(2) *Action "in rem" and the "Mareva" injunction*

A Canadian court has ruled on what should appear obvious to anyone who has studied the history and principle of the *Mareva* injunction—that it can be taken at the same time as the action and arrest *in rem*[117]. It should be noted that the *Mareva* injunction is an especially useful tool in Canada, since there is no provision for sister ship arrest.

(3) *Due process in Canada*

Canadian constitutional law in the past has concerned itself for the most part with the division of powers between the Federal Parliament and the 10 provincial legislatures. Since the Bill of Rights 1960 and the Canadian Charter of Rights and Freedoms 1982, however, such questions as the due process rights of litigants before the law have been raised. And, in the near future, one can expect that *in rem* actions and *Mareva* injunctions will undergo the same severe questioning and testing in Canada that Supplemental Rules B and C have undergone in the U.S.[118]

(4) *The Canadian Bill of Rights* 1960

(*a*) *Introduction*

Canada adopted a Bill of Rights[119] in 1960. The Canadian Bill of Rights, however, is not entrenched in the Constitution, rather it can be amended or even repealed by the

[108] (1978) 20 O.R. (2d) 566, 88 D.L.R. (3d) 446.
[109] 3rd edn., Vol. 21, para. 729.
[110] (1979) 10 B.C. L.R., P-21.
[111] (1981) 31 O.R. (2d) 715. A useful review of the earlier decisions was made in this decision.
[112] *Ante.*
[113] *Liberty National Bank*, *supra*, at pp. 720 and 723.
[114] (1980) 117 D.L.R. (3d) 105.
[115] (1980) 114 D.L.R. (3d) 35.
[116] (1982) 39 N.B.R. (2d) 674.
[117] *Parmar Fisheries Ltd.* v. *Parceria Maritima* (1982) 53 N.S.R. (2d) 338, at pp. 344-346. See also David N. Rogers, "The Action in rem and Mareva Injunction" (1983) 14 J.ML.C 513, at p. 534.
[118] *Ante.*
[119] S.C. 1960 (8-9) Eliz. 2, c. 44.

Parliament of Canada[120]. The Bill of Rights has a second limitation: it is only binding on matters which fall within the competence of the Federal Parliament and not the provincial legislatures[121]. To the surprise of many persons, the Canadian Bill of Rights was not repealed by the Constitution Act 1982[122] and it is therefore necessary to study the effect of the Bill of Rights on the *Mareva* injunction.

Section 1(a) of the Bill of Rights 1960 bears some resemblance to the Fifth and 14th Amendments to the U.S. Constitution. Section 1(a) reads:

> "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms namely,
>
> (a) the right of the individual to life, liberty, security of the person and *enjoyment of property* and the right not to be deprived thereof except by *due process of law*"[123].

(*b*) *Due process of law and the Canadian Bill of Rights*

The reference to "due process of law" in the Bill of Rights would seem to put the *Mareva* injunction in peril. There have, however, been no decisions on the point, although judgments on related matters shed considerable light. In *Curr* v. *The Queen*[124], Laskin, J., noted the English origins of the phrase "except by due process of law" and its American overlay[125], but refused to apply the American due process approach "or monitor the substantive content of legislation . . ."[126]. He pointed to the lack of "objective manageable standards by which a court should be guided if scope is to be found in s. 1(a) due process to silence otherwise competent legislation"[127]. Ritchie, J., was more severe and held that the phrase "due process of law" meant nothing more than "according to the legal processes recognized by Parliament and the courts in Canada"[128]. Since writs *in rem* and writs of attachment have long been legal processes recognized by the Parliament and courts of Canada and of the provinces, one therefore suspects that the *Mareva* injunction will comply with the relatively lax Canadian Bill of Rights "due process" requirements if Laskin and Ritchie, JJ., are followed.

(*c*) *Enjoyment of property under the Bill of Rights*

The "enjoyment of property" provision in s. 1(a) of the Bill of Rights, like the "due process" provision, has remained basically declaratory, with the courts unwilling to apply it in an interventionist manner. In *Regina* v. *Appleby* (*No.* 2), Hughes, C.J., observed[129]:

[120] The Bill of Rights 1960 is no different from any other statute of the Canadian Parliament.
[121] The Bill of Rights 1960, being a creation of the Federal Parliament, has authority only in Federal matters.
[122] U.K. 1982, c. 11. In particular, the Bill of Rights is not listed in the schedule to the Constitution Act 1982, which schedule lists the Acts to be repealed (see s. 53(1)), while s. 26 of the Charter guarantees *existing* rights and freedoms.
[123] Emphasis added.
[124] [1972] S.C.R. 889.
[125] Ibid., at p. 902.
[126] Ibid., at p. 897.
[127] Ibid., at pp. 899-900.
[128] Ibid., at p. 916. See also *Mierins* v. *Mierins* (1973) 31 D.L.R. (3d) 284, at p. 285.
[129] (1976) 76 D.L.R. (3d) 110, at p. 118.

"I do not see how the Bill of Rights can be interpreted as guaranteeing to an individual protection against loss of his property without compensation if the loss is a consequence of legislation of the Parliament of Canada which has validly been enacted".

(*d*) *The right to a hearing under the Bill of Rights*

By s. 2(e) of the Bill of Rights, no Canadian law may "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". It is clear that the principle of *audi alteram partem* as set out in s. 2(e) could be pertinent to maritime remedies and procedures. In a case involving the seizure, without notice, of assets for unpaid taxes[130], however, it was held that *audi alteram partem* was not violated because there was a right to be heard on the merits by objecting to the assessment. The pre-judgment seizure was held to be "merely a means of guaranteeing or assuming the payment of the tax by the taxpayer either before or after the liability for same had been finally established"[131].

(*e*) *Balancing the rights of the individual and of society*

Canadian Bill of Rights cases in the past have rarely weighed the rights of the citizen against the benefit to society. This is unfortunate because the text of the Bill of Rights is so clear. One would hope that in the future the *Mareva* injunction and the action *in rem* would be tested under the Bill of Rights, particularly in respect to "due process" and "enjoyment of property".

(5) *The Charter of Rights and Freedoms* 1982

In 1982 the Canadian Constitution was fundamentally amended by the Constitution Act[132] and the Charter of Rights and Freedoms[133] which forms part of the new Act. The Charter, like the Constitution Act, is entrenched as part of the Canadian Constitution: in other words it cannot be repealed by an ordinary statute of the Federal Parliament or of the provincial legislatures[134].

The Charter overrides all other laws including the Bill of Rights 1960[135]. Nevertheless, it appears unlikely that the Bill of Rights will be superseded since the Charter and the Bill have the same purpose of guaranteeing fundamental rights and freedoms. Moreover, most of the provisions of the Bill of Rights have been reintroduced in similar, if not broader, language in the Charter[136].

The Charter, it should be noted, seems to be less protective in some respects of individual rights and, in particular, does not use the terms "due process of law" or "enjoyment of property".

[130] *Lambert* v. *The Queen* [1975] F.C. 548.
[131] Ibid., at p. 553.
[132] 1982 U.K., c. 11.
[133] Part I, being ss. 1 to 34 of the Constitution Act 1982.
[134] The amending formula is found in ss. 38 to 49 of the Constitution Act 1982.
[135] Ibid., at s. 52(1).
[136] Tarnopolsky & Beaudoin, *Canadian Charter of Rights and Freedoms, Commentary* (1982), at p. 3.

Sections 1, 7 and 8 read:

"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure".

Section 7 refers to "the person", and one expects that neither a ship nor assets are covered. Section 8, however, might cover assets, but does "everyone" and "person" include a corporation? Is a ship covered here?

Despite the differences in language and the vagueness of some of the Charter's provisions, it is stronger than the Bill of Rights in two major areas: first, it is clearly more than a canon of interpretation for ambiguous language in Federal statutes, as some commentators saw the Bill of Rights; and, secondly, by s. 52(1), it has the explicit "teeth" that the Bill of Rights was lacking, since any legislation inconsistent with the Charter is of "no force and effect".

A loophole remains for Charter cases. An attachment before judgment or a *Mareva* injunction or even a writ *in rem* may be valid under the Charter particularly because of the overriding clause in s. 1 of the Charter: "subject only to much reasonable limits prescribed by law . . .". This would seem to encompass the right of creditors to arrest a ship or the debtor's assets without notice, provided that some form of protection is afforded to the debtor. Whatever these safeguards turn out to be, the prerequisites established in cases concerned with American Supplemental Rules B and C and the guidelines of Lord Denning, M.R., in respect to the *Mareva* injunction should have considerable influence.

(6) *Conclusions*

In conclusion, one may note that neither the *Mareva* injunction nor the writ *in rem* has been tested as yet in Canada under the provisions of the Canadian Charter of Rights and Freedoms 1982 or the Bill of Rights 1960. When the test case is eventually taken, it is likely that there will be reliance on both the Bill of Rights and the Charter. It is also expected that the challenge will not be successful if the claimant has followed all the prescriptions of the law and in particular has provided detailed and informed affidavits and other evidence establishing the necessity of the procedure.

(7) *A writ of attachment in Canada?*

If *The Beldis*[137] is binding in the U.K. it may not be binding in Canada, since the decision was rendered after the Admiralty Act 1891[138] and even the Admiralty Act

[137] [1936] P. 51.
[138] 1891 S.C., c. 29 (Canada).

1934[139]. It could also be argued that Fry, L.J.'s judgment in *The Heinrich Bjorn*[140] is still binding in Canada because of ss. 2 and 22(1) of the Federal Court Act 1970[141].

F. Summary

(1) *Introduction*

In general terms, it can be said that Admiralty attachment in the U.S. is very generous to the plaintiff. It establishes jurisdiction in itself and permits the seizure of all the defendant's property in that jurisdiction when the defendant is not to be found there. The plaintiff is under no obligation to prove urgency or the possible depletion of assets.

The *saisie conservatoire* of France is less generous to the plaintiff. It does not provide jurisdiction in itself and only applies in case of urgency and if recovery of the debt is in peril. Nevertheless, it is an attachment of all the property of the defendants and it supplies security and gives a date of priority for the claimant against the security.

The *Mareva* injunction of the U.K. and Canada is even less generous to the claimant. It is an order to freeze assets in the jurisdiction, it does not place the assets in the hands of the court and it does not provide jurisdiction in itself. In addition, the claimant must prove that there are grounds for believing that there is a risk of the assets being depleted or removed from the jurisdiction and that the subsequent award or judgment would not be satisfied in or outside the jurisdiction. The *Mareva* injunction is an equitable procedure whose origins are in Chancery[142].

It is not surprising that the most onerous proceeding, the U.S. Admiralty Attachment, has been questioned on grounds of due process.

(2) *Comparison of the "Mareva" injunction with "saisie conservatoire"*

(a) The *Mareva* injunction only affects assets which are the property of the defendant. The *saisie conservatoire* modified by the 1952 Arrest Convention can immobilize either the property of the defendant or, when the defendant is a demise charterer, the property of a third party, i.e. the offending ship's owner[143].

(b) The *Mareva* injunction would permit the immobilization of any or all of the defendant's assets within the jurisdiction: this would allow the claimant to restrict the movement of more than one ship[144]. The *saisie conservatoire* under the 1952 Convention permits the arrest of no more than one ship[145].

(c) The *Mareva* injunction can be used for any type of claim. The *saisie conservatoire* of a seagoing ship of a contracting State can only be for a maritime claim listed in Art. 1(1) of the 1952 Arrest Convention.

[139] 1934 S.C., c. 31 (Canada).
[140] (1885) 10 P.D. 44.
[141] R.S.C. 1970 (2nd Supp.) c. 10. See the discussion *ante*, section D(7). See also David N. Rogers, "The Action in Rem and Mareva Injunction: The Need for a Coherent Whole" [1983] 14 JMLC 513, at p. 519, who concludes that *The Beldis* was not the law of Canada in 1970 when the Federal Court Act was adopted.
[142] F. D. Rose, "The Mareva Injunction—Attachment in Personam" [1981] 2 LMCLQ 177, at p. 187.
[143] Article 3(4) of the 1952 Arrest Convention.
[144] *The Rena K* [1979] Q.B. 377, at p. 409.
[145] This is also true in the case of the action *in rem*; *The Banco* [1971] 1 Lloyd's Rep. 49.

(d) Neither the *Mareva* injunction nor *saisie conservatoire* provide jurisdiction in themselves.

(3) *Comparison of the "Mareva" injunction with the action "in rem"*

(a) The advantages of the *Mareva* injunction are as follows.

(i) It prevents whatever assets are covered in the injunction from being removed from the jurisdiction or even being dealt with by the defendant. The action *in rem* attaches only to the defendant ship.

(ii) The *Mareva* injunction can prohibit the movement of more than one ship[146]. The action *in rem* can only attach a single ship, although that ship may, in some jurisdictions (such as the U.K.), be the sister ship of the offending ship. The *Mareva* injunction is therefore contrary to the spirit and the letter of the 1952 Arrest Convention.

(iii) In a *Mareva* injunction, the property remains in the possession of the defendant and, consequently, the cost of and the expenses incurred in the exercise of a *Mareva* injunction are not high. In an action *in rem*, the custody of the ship is with the Admiralty Marshal, who has discretion to give orders regarding the ship's safety and movement. The cost of arresting a ship and maintaining her while she is in custody may be considerable[147].

(iv) The plaintiff in an application for a *Mareva* injunction furnishes an undertaking that he will pay damages and expenses if he is eventually so ordered. The plaintiff taking an action *in rem* must put up security for the Marshal's expenses in connection with arrest and custody. (A solicitor's undertaking may, however, be sufficient.)

(v) The *Mareva* injunction may be obtained at any time a judge is available. A writ *in rem* may only be obtained during the hours when the appropriate court office is open. (A warrant for arrest can, however, be issued in advance for execution upon the arrival of the ship.)

(vi) The plaintiff applying for a *Mareva* injunction need only make an undertaking to issue proceedings and to file an affidavit. Taking an action *in rem* requires the plaintiff actually to issue proceedings and file an affidavit.

(b) The advantages of the action *in rem* are:

(i) By an action *in rem*, the ship is taken into the custody of the court and placed with the Marshal. With a *Mareva* injunction, the owner or master is ordered not to move his ship; the only remedy for the breach of this order is proceedings in contempt of court.

(ii) In an action *in rem*, a claimant with a statutory right *in rem* becomes a secured creditor[148] (under U.K., though not Canadian, law) from the date of the issue of the

[146] *The Rena K* [1979] Q.B. 377, at p. 409.
[147] See, however, Federal Court of Canada Rule 1003(4) and (10) in respect to the Marshal's not being put in possession.
[148] *The Zafiro* [1960] P. 1.

writ[149] and his claim will receive its priority as of that date. The *Mareva* injunction does not invest the plaintiff with any security or any priority over other claimants[150].

(iii) The action *in rem* gives the court jurisdiction to deal with the claim on its merits. The *Mareva* injunction requires that the plaintiff establish the court's jurisdiction in respect of the claim[151].

(iv) When the offending ship is under charter and the person who is liable on the claim is the charterer, the claimant in an action *in rem* may arrest either the offending ship (even though her owner is not liable) or a ship owned by the charterer. The *Mareva* injunction can only be taken against the property of the defendant (i.e. the charterer in our example).

(v) Taking an action *in rem* rarely leads to a claim in damages against the arresting claimant. A *Mareva* injunction will entail a damage suit if it is shown to have been unjustified or abusive.

[149] *The Monica S.* [1968] P. 741; *Re Aro Ltd.* [1980] Ch. 196.
[150] See, however, a statement by Brandon, J., in *The Rena K* [1979] Q.B. 377, at p. 407.
[151] *The Siskina* [1979] A.C. 210, at pp. 254 *et seq.*

Economic loss in the maritime context

*By N. J. J. Gaskell.**

1. General introduction

It is well recognized that the common law is in a state of flux (not to say uncertainty) concerning the possibilities of recovery, in an action for negligence, of damages for economic loss (however that is defined)[1]. There is little doubt that practitioners, academics and students in the common law countries are awaiting major decisions of superior courts to open the way for such recovery. Several cases have indicated the likely direction of the law[2] and it seems inherent in the nature of the common law that liability will be extended rather than reduced. That this should be so is hardly ever questioned[3]. Indeed, any commentator who suggests that new liabilities should not be created has to cross what has been described elsewhere as an "intellectual picket line" to cries of abuse about being a defender of the outmoded "floodgates" argument. Discussion of economic loss is often too vague and unrelated to potential claims. It is difficult to formulate rules without seeing the possible consequences across the range of economic activity. It is proposed in this article to consider, in the specific context of maritime law, the impact of widening recovery for economic loss resulting from collisions and groundings and particular reference will be made to a recent Australian case, *The Mineral Transporter*[4]. The rules will be considered in the context of a well defined market where the competing interests are well recognized and finely balanced and in which there is a developed body of case-law. The market to some extent already takes account of various risks involved in maritime transport[5]. Before any decision is

*Institute of Maritime Law, University of Southampton.
[1] The literature is copious but see in particular: Rogers, W. V. (ed.), *Winfield and Jolowicz on Torts* (12th edn., London, Sweet & Maxwell, 1984) especially pp. 76-80; Dias, R. W. (ed.) *Clerk and Lindsell on Torts* (15th edn., London, Sweet & Maxwell, 1982) pp. 371 *et seq.*; Percy, R. A. (ed.), *Charlesworth and Percy on Negligence* (7th edn., London, Sweet & Maxwell, 1983) pp. 43 *et seq.*; Prosser, W., *Law of Torts*, (4th edn. 1971) p. 665; Grubb, A., "A Case for Recognising Economic Loss in Defective Building Cases" [1984] C.L.J. 163; Keeler, J. F., "Paying for Mistakes—Professional Negligence and Economic Loss" (1979) 53 A.L.J. 412; Glass, H. H., "Duty to Avoid Economic Loss" (1977) 51 A. L. J. 373; Craig, P. P., "Negligent Mistatements, Negligent Acts and Economic Loss" (1976) 92 L.Q.R. 213; Marshall, D., "Liability for Pure Economic Loss Negligently Caused—French and English Law Compared" (1975) 24 I.C.L.Q. 748; Stevens, L. L., "Negligent Acts Causing Purely Financial Loss: Policy Factors at Work" (1973) 23 U. of Toronto L.J. 431; Fleming, J., "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal" (1972) 12 J.S.P.T.L. 105; Harvey, C., "Economic Losses and Negligence" (1972) 50 Can. Bar Rev. 580; Note, (1971) 49 Can. Bar Rev. 619; Note, "Negligence and Economic Loss" (1971) 117 S.J. 255; Atiyah, P., "Negligence and Economic Loss" (1967) 83 L.Q.R. 259; Note, "Negligent Interference with Economic Expectancy: The Case for Recovery" (1964) 16 Stanford L.Rev. 664; Note, "Economic Loss and Products Liability Jurisprudence" (1966) 66 Columbia L.Rev. 917. Of particular interest are the as yet unpublished papers presented at the Colston Symposium on "The Law of Tort: Policies and Trends in Liability for Damage to Property and Financial Loss" held in April 1984 at Bristol University.
[2] Such as, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465; *Rivtow Marine Ltd.* v. *Washington Iron Works* [1974] S.C.R. 1189; *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willemstad"* (1976) 136 C.L.R. 529; *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1983] 1 A.C. 520. And see now *Leigh and Sillivan Ltd.* v. *Aliakmon Shipping Co. Ltd. The Times*, 8th December 1984.
[3] But see Atiyah, op. cit., fn., 1, *supra.*
[4] For a similar concentration on specific areas see also Grubb (defective buildings) and Craig (negligent misstatements) op. cit., fn. 1, *supra. The Mineral Transporter* [1983] 2 N.S.W.L.R. 564 (Supreme Court, New South Wales).
[5] See the speech of Lord Diplock in *Federal Commerce and Navigation Co.* v. *Tradax Export S.A.* (*The Maratha Envoy*) [1978] A.C. 1, 7 *et seq.*

Wasserman, R., "Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments" (1992) 67 Wash. L. Rev. 257

EQUITY RENEWED: PRELIMINARY INJUNCTIONS TO SECURE POTENTIAL MONEY JUDGMENTS

Rhonda Wasserman*

Abstract: Whenever a plaintiff sues a defendant for money damages, she runs the risk that the defendant will attempt to render herself unable to satisfy the expected money judgment by hiding or dissipating assets. Although most states have statutes that authorize prejudgment attachment of the defendant's assets to prevent this result, the attachment statutes are poorly designed to reduce the plaintiff's risk. The attachment statutes are both under- and over-inclusive: they do not authorize the attachment of property located outside the state, thereby failing to prevent the dissipation of all of the defendant's property, yet they grant the plaintiff a lien in the attached property (a security interest to which she is not entitled) and authorize the attachment of property in the hands of innocent third parties on the plaintiff's word that the property is the defendant's.

Courts can reduce the risk of harm to plaintiffs more effectively without interfering with the rights of innocent third parties by granting preliminary injunctions to bar the dissipation of assets. Although courts typically have refrained from issuing preliminary equitable relief in actions in which the plaintiff's final remedy is at law, the reasons for this hesitancy do not obtain in this context. Neither precedent nor the "no adequate remedy at law" requirement for equitable relief should dissuade courts from using preliminary injunctions in cases in which the plaintiff can demonstrate that she is likely both to succeed on the merits of her claim and to be unable to collect on her expected money judgment if the defendant is not restrained.

* Associate Professor of Law, University of Pittsburgh School of Law. A.B., Cornell University, 1980; J.D., Yale Law School, 1983. I would like to thank Ron Brand, George Cohen, Harry Flechtner, Susan Koniak, Doug Laycock, Jules Lobel, Dick Seeburger, Howard Stern, and Welsh White for their invaluable comments on an earlier draft of this Article. I would also like to thank Randi Goldman for her diligent research assistance.

Interim relief is very much the creation of equity since, to be effective, it usually needs the equitable weapon of the injunction.[1]

Equity will not be overnice in balancing the efficacy of one remedy against the efficacy of another, when action will baffle, and inaction may confirm, the purpose of the wrongdoer.[2]

INTRODUCTION

Consider three cases. In case one, a riparian landowner commences an action seeking a permanent injunction to bar a chemical company from discharging dangerous chemicals into the stream that runs along her land. The landowner may also seek a preliminary injunction to maintain the status quo pendente lite.[3] The court will grant the preliminary injunction on the theory that money would not compensate for the harm the landowner would suffer if the company were free to continue discharging the chemicals into the stream during the pendency of the action; because it would be irreparable, the harm should be avoided.[4] The preliminary injunction, which would prohibit the company from engaging in the challenged conduct pending trial, would be of the same type as the final relief sought—equitable.

1. Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the* Zenith *Case*, 81 MICH. L. REV. 1571, 1588 (1983).

2. Falk v. Hoffman, 135 N.E. 243, 244 (N.Y. 1922) (Cardozo, J.), *cited in* Deckert v. Independence Shares Corp., 311 U.S. 282, 289 n.3 (1940).

3. *See, e.g.*, Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988) (directing district court to issue a preliminary injunction requiring the county department of education to reinstate plaintiff, a person with AIDS, to his classroom duties pending resolution of his claim for a permanent injunction seeking same relief); Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984) (granting a preliminary injunction to enjoin defendants from terminating plaintiff as a Coca-Cola distributor pending arbitration of plaintiff's claim for wrongful termination); Public Interest Research Group v. CP Chem. Inc., 26 Env't Rep. Cas. (BNA) 2017 (D.N.J. 1987) ("not for publication" opinion granting preliminary injunction to enjoin defendants from discharging chemicals into river in violation of pollutant discharge permit).

4. *See, e.g., Chalk*, 840 F.2d at 709–10 (holding that the emotional and psychological harm plaintiff would suffer if removed from his position as classroom teacher and reassigned to an administrative position would be irreparable); *Roso-Lino Beverage Distribs.*, 749 F.2d at 125–26 (holding that "the loss of Roso-Lino's distributorship, an ongoing business representing many years of effort and the livelihood of its husband and wife owners, constitutes irreparable harm"); *Public Interest Research Group*, 26 Env't Rep. Cas. (BNA) at 2021 (holding that "threat to the health and well being of the citizenry" caused by unabated dumping of highly toxic substances "is certainly a sufficient showing of irreparable harm"). As a general rule, prospective harm to real estate is deemed irreparable. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 38 (1991) (noting that "a wide range of wrongs relating to land are regularly held to inflict irreparable injury").

In case two, a brother sues his sister, seeking the return of an antique painting she obtained from him under false pretenses.[5] As in case one, if the brother states a claim for equitable replevin, he may be entitled to a preliminary equitable remedy that would require his sister to return the painting to him pendente lite, or at least bar her from disposing of the painting until his claim is resolved on the merits.[6] Here, the concern is that the property is irreplaceable, that the sister

5. *See, e.g., In re* IBP Confidential Business Documents Litig., 754 F.2d 787, 789 (8th Cir. 1985) (holding that documents containing "sensitive, confidential information about IBP's internal operations and business strategies . . . constitute the kind of unique property recoverable in an action for equitable replevin"); Cumbest v. Harris, 363 So. 2d 294, 296 (Miss. 1978) (holding that equity will require specific performance of a contract involving "peculiar, sentimental or unique" goods); Coven v. First Sav. & Loan Ass'n, 55 A.2d 244 (N.J. Ch. 1947) (awarding equitable replevin of plaintiff's research files); Chabert v. Robert & Co., 76 N.Y.S.2d 400, 401 (App. Div. 1948) (holding that complaint stated a claim for equitable relief to compel return of "irreplaceable oil of unique quality"); HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 45 (2d ed. 1948); 1 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 185 (5th ed. 1941); M. T. Van Hecke, *Equitable Replevin,* 33 N.C. L. REV. 57, 57 (1954) (discussing situations in which "a plaintiff who needs the article in specie and who fears that the defendant will frustrate the sheriff's efforts may regard equity as likely to be more successful through its *in personam* order that the defendant deliver the chattel to the plaintiff"); *see also* U.C.C. § 2-502 (1987) (permitting a buyer, who has paid for goods identified to the contract, to recover the goods "from the seller if the seller becomes insolvent within ten days after receipt of the first installment of their price"); U.C.C. § 2-716 (1987) (authorizing court to grant specific performance as a remedy for a buyer "where the goods are unique or in other proper circumstances"); JOHN N. POMEROY & JOHN C. MANN, SPECIFIC PERFORMANCE OF CONTRACTS § 12, at 32 (3d ed. 1926) (stating that "where the chattels are . . . unique . . . so that others of a similar nature and equal value could not be procured by means of damages assessed according to legal rules, . . . contracts concerning them will be specifically enforced in equity, and a delivery of them will be decreed, although they might be recovered in the common-law actions of detinue or replevin"); *cf.* Gindin v. Silver, 243 A.2d 354 (Pa. 1968) (reversing equitable decree that ordered return of diamond ring; holding that replevin constituted an adequate remedy at law).

6. *See, e.g.,* Kimberly & European Diamonds, Inc. v. Burbank, 684 F.2d 363 (6th Cir. 1982) (affirming summary judgment in favor of plaintiff, who alleged that diamond had been wrongfully converted by defendants, and noting that district court had granted a preliminary injunction enjoining the defendant in possession of the diamond from disposing of it and ordering him to deliver it to a receiver); Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp. 1308, 1325 (N.D.N.Y. 1979) (holding that replevin was an inadequate remedy to recover materials fabricated for project because some of materials were located outside state and because replevin would permit defendant to reclaim chattels by posting bond; granting preliminary injunction requiring defendant to ship materials); Wilson v. Sandstrom, 317 So. 2d 732, 738 (Fla. 1975) (affirming grant of temporary mandatory injunction requiring kennel owners to produce racing greyhound dogs at the track; viewing dogs as "a unique product, not readily obtainable on the market"); Steggles v. National Discount Corp., 39 N.W.2d 237, 239 (Mich. 1949) (holding that "the status quo could be best preserved by placing plaintiff in possession of the car which had been taken from him by the deceit and trickery of the finance company"; affirming grant of preliminary injunction); Schweber v. Rallye Motors, Inc., 12 U.C.C. Rep. Serv. (Callaghan) 1154 (N.Y. Sup. Ct. 1973) (in action seeking specific performance of contract to sell Rolls Royce, granting preliminary injunction to enjoin defendant from selling or transferring the car pendente lite).

may dispose of it prior to resolution of the brother's claim, and that the loss of the property could not be adequately compensated by money. Hence the harm would be irreparable. Again, equity will intervene, even prior to final judgment, to prevent irreparable harm.

In case three, a businessperson gave money to an attorney to hold as trustee or escrow agent. The businessperson now alleges misappropriation and seeks imposition of a constructive trust.[7] As in cases one and two, the businessperson in this case may also be entitled to a preliminary equitable remedy, here an injunction to "freeze" the fund pending trial, thus assuring its availability at the conclusion of the trial.[8] As in case two, the court will spare the businessperson the potential irreparable harm that would be caused by the attorney's disposal of the disputed property during the pendency of the action.

These three cases illustrate the general proposition that "equitable powers . . . are definitely available to secure future equitable remedies when the movant can demonstrate all the requirements for a preliminary injunction . . . . [O]nce a plaintiff establishes an equitable cause of action, the district court may use its full equitable powers to grant appropriate preliminary relief as well."[9]

---

7. *See, e.g.*, RESTATEMENT (SECOND) OF RESTITUTION, introductory note to Chapter on Remedies at 88 (Tentative Draft No. 1, 1983); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.5 (1973) (noting that "we expect to see equity involved in claims against fiduciaries"); *id.* § 5.16 (stating that "[w]here money is taken from the owner by a conscious wrongdoer the owner may enforce either a constructive trust or an equitable lien on the fund"); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) (holding that FSLIC, as receiver for savings and loan association, had right to pursue equitable causes of action, including constructive trust, accounting and restitution, against officers and directors of S & L, who allegedly had defrauded it).

8. *See, e.g.*, Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (holding that plaintiffs were entitled to a preliminary injunction to restrain defendants from transferring assets during the pendency of the action where plaintiffs stated a claim for final equitable relief and demonstrated a risk of dissipation of assets by defendants); *Dixon*, 835 F.2d at 566 (affirming district court order granting a preliminary injunction to enjoin defendants from disposing of property or assets in an action by FSLIC as receiver alleging fraud, gross mismanagement and self-dealing, and seeking both legal and equitable relief; limiting reach of preliminary injunction to those assets subject to equitable remedies); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97–98 (6th Cir. 1982) (holding that a promoter who uses funds obtained in breach of a fiduciary duty to acquire property holds that property as constructive trustee, and that the district court had authority to preliminarily enjoin the promoter from transferring assets outside the country to secure plaintiffs' equitable remedy); Heckmann v. Ahmanson, 214 Cal. Rptr. 177, 189 (Ct. App. 1985) (affirming grant of preliminary injunction to enjoin transfer of money as to which a constructive trust was sought in action alleging breach of fiduciary duty); Greenspan v. Mesirow, 485 N.E.2d 1196 (Ill. App. Ct. 1985) (holding that a preliminary injunction should have been granted in action by settlors and beneficiaries of trust against the trustees to preliminarily enjoin the trustees from using trust assets to pay their own litigation expenses).

9. *Dixon*, 835 F.2d at 560 n.1, 562.

Now consider a fourth case. A widower seeks advice from a stockbroker when deciding how to invest the insurance proceeds he received upon his wife's death. The broker, who has a financial interest in a new, high-risk venture, fails to mention this personal stake to the widower and grossly misrepresents the financial security of an investment in this new company. The broker convinces the widower to invest all of his money in the new venture. When the venture fails and the widower learns that he has been defrauded, he sues the broker for money damages to compensate him for the broker's past wrongful conduct. He fears that the broker has or is about to render herself judgment-proof by transferring all of her assets to a Swiss bank account in her husband's name, so the widower seeks a preliminary injunction to bar the broker from dissipating the assets pendente lite.

Like the businessperson in case three, the widower seeks to collect money from the defendant. Like the businessperson in case three, the widower may have reason to believe that the defendant, unless restrained, will attempt to render herself judgment-proof by transferring the assets outside the jurisdiction or to a third party. Like the plaintiff in all of the earlier cases, the widower seeks a preliminary equitable remedy to preserve the efficacy of his final remedy. But the widower will probably lose on his motion for a preliminary injunction. Why?

Unlike the remedies sought by the first three plaintiffs, the widower's final remedy, money damages, is undoubtedly "at law."[10] Furthermore, a legal remedy—prejudgment attachment—exists to secure the plaintiff's damages remedy during the pendency of the action. Thus, courts invoke the adage that equity will not intervene where the plaintiff has an "adequate remedy at law" and deny plaintiffs in such cases any kind of preliminary equitable relief.[11] As the Fifth Circuit has stated, "as a general rule, [a preliminary injunction to freeze

10. In classifying a remedy as legal or equitable, courts typically rely on history and the nature of the remedy, asking whether the relief would have been issued by the common law courts or the chancellor prior to the merger of law and equity, and whether it merely declares the law, relying on the execution process for enforcement (in which case it will be deemed legal), or whether it issues in personam, backed by the contempt power (in which case it will be deemed equitable). DOBBS, *supra* note 7, §§ 2.1, 2.2, 2.6. Money judgments, which historically issued from the law courts and which impose no personal obligations on the defendant, are considered the quintessential legal remedy. *See, e.g.,* Curtis v. Loether, 415 U.S. 189, 196 (1974) (noting that "the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law"); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962) (stating that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal"); *see also* Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money,* 70 B.U. L. REV. 623, 658 n.133 (1990).

11. *See* cases cited *infra* note 187.

assets] is not permissible to secure post-judgment legal relief in the form of damages."[12]

This Article takes issue with the law's general preference for attachment over a preliminary injunction to secure a future damages remedy, and challenges the underlying principle that preliminary equitable relief should be available only to secure a permanent equitable remedy of the same type.[13] It argues that a preliminary injunction to restrain the dissipation of assets should be available in cases like the widower's in case four to the same extent that it is available to the businessperson in case three.

This Article is divided into five parts. Part I identifies the three kinds of harm a plaintiff may suffer, paying particular attention to the harm a plaintiff will suffer if she cannot collect immediately upon a money judgment, or what this Article calls tertiary harm.[14] Part II describes prejudgment attachment, the legal remedy courts currently use in an effort to prevent tertiary harm. It demonstrates that prejudgment attachment was initially designed to obtain quasi-in-rem jurisdiction over an absent defendant, and only incidentally protected the plaintiff from tertiary harm. Part II then explains why modern-day attachment is a poor vehicle for preventing such harm. Part III offers

12. *Dixon,* 835 F.2d at 560 (citing DeBeers Consol. Mines v. United States, 325 U.S. 212, 219–20 (1944) and ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1360–61 (5th Cir. 1978)).

13. This Article does not address the availability of preliminary injunctive relief in actions in which injunctive relief is specifically authorized by statute. *See* Federal Deposit Ins. Corp. v. Antonio, 843 F.2d 1311 (10th Cir. 1988) (affirming grant of preliminary injunction pursuant to state RICO statute); Federal Trade Comm'n v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir. 1982) (holding that the Federal Trade Commission Act authorizes the district court to "exercise the full range of equitable remedies traditionally available to it," including the issuance of "temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case"); Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296, 1300 (5th Cir. 1978) (noting that Commodity Futures Trading Commission Act of 1974 authorizes temporary injunctive relief without a showing of irreparable harm or inadequacy of legal remedy; affirming grant of preliminary injunction to bar defendant "from further dissipating the funds he allegedly has already misappropriated . . . in order to preserve the status quo so that an ultimate decision for the Commission could be effective"); *cf.* Carol L. Dunne, Note, In re Fredeman Litigation: *The Fifth Circuit Joins the Ninth—No Injunctive Relief for Private RICO Plaintiffs,* 63 TUL. L. REV. 421 (1988) (discussing Fifth Circuit's opinion); Donald R. Lee, Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO,* 59 NOTRE DAME L. REV. 945, 957 n.67 (1984) (arguing that plaintiffs in civil RICO actions should be able to seek preliminary injunctive relief and "the full range of ultimate equity relief" under 18 U.S.C. § 1964). Nor does this article address in any detail the forfeiture provisions under RICO and the continuing criminal enterprise statute. *See* 18 U.S.C.A. §§ 1963(a), 1963(d) (West Supp. 1991) (authorizing pre-conviction restraining orders to preserve forfeitable property); 21 U.S.C.A. §§ 853(a), 853(e) (West Supp. 1991) (authorizing same in continuing criminal enterprise (CCE) drug-related prosecutions); *infra* notes 155 and 182.

14. *See infra* notes 26–28 and accompanying text.

the preliminary injunction as an alternative to prejudgment attachment, and establishes that a plaintiff seeking money damages as her final remedy may be able to satisfy the traditional requirements for a preliminary injunction. It also demonstrates the many advantages such injunctions have in preventing tertiary harm.

Part IV considers the reasons why many courts have refrained from granting such relief. Part IV first demonstrates that the Supreme Court precedent lower courts cite in concluding they lack authority to issue preliminary injunctions to freeze assets[15] actually supports, rather than undermines, the availability of such relief in money damages cases. Part IV then defuses the argument that courts should not grant preliminary injunctions to freeze assets where an adequate remedy at law exists by demonstrating the futility of even requiring a showing of inadequacy. Part IV concludes by considering whether courts should refrain from issuing preliminary injunctions on the theory that doing so would permit plaintiffs to evade carefully crafted legislative policies and protections reflected in the attachment statutes. Finally, Part V presents and analyzes the American experience with preliminary injunctions to freeze assets in two discrete contexts as well as England's recent experience with *Mareva* injunctions, preliminary injunctions that secure assets for the satisfaction of a potential money judgment.

I. THREE KINDS OF HARM

A plaintiff who sues to collect money damages potentially faces three kinds of harm: primary, secondary, and tertiary.[16] Primary harm "includes all of the harm proximately caused by the defendant's conduct that the plaintiff will suffer even if the ultimate relief she seeks is available immediately upon commencement of the suit."[17] Thus, if a plaintiff has an accident, incurs medical bills, and endures pain and suffering, the amount of her primary harm is the amount she would be

15. United States v. First Nat'l City Bank, 379 U.S. 378 (1965); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940).

16. This schema classifies harm temporally: primary harm results from actions taken before commencement of the suit; secondary harm results from delay between commencement of the suit and entry of judgment; tertiary harm results from delay between entry of judgment and satisfaction. The actual harm suffered as primary harm, related secondary harm and related tertiary harm is identical. *See infra* notes 22 and 27 and accompanying text. Likewise, the actual harm suffered as unrelated secondary harm and unrelated tertiary harm is identical. For a more thorough discussion of the differences between primary and secondary harm, see Wasserman, *supra* note 10, at 627–30.

17. *Id.* at 628.

entitled to collect if she could recover the day she commenced her suit.[18] Similarly, if a defendant breaches a contract for the sale of widgets and the plaintiff "covers" with more expensive replacement goods and suffers some consequential and incidental damages as well,[19] the amount of the plaintiff's primary harm is the amount she would be entitled to collect if she could recover immediately upon commencement of the action. Because the full amount of the plaintiff's primary harm is determined upon impact or breach, it cannot be avoided or abated by equitable relief, and a remedy at law for damages should be adequate.[20]

Secondary harm is "harm that results from delay in receiving relief for primary harm."[21] Thus, if the personal injury plaintiff must wait years to obtain a money judgment for her primary harm and lacks the resources to seek appropriate medical care, her physical injuries may actually worsen while she awaits judgment. Or, if she diverts all available funds to pay for the medical care needed, she may incur late penalties on bills or lose her home. All of this additional delay-caused harm is secondary.[22]

The contract claimant, too, may suffer secondary harm if she is delayed in obtaining judgment for the primary harm suffered: most obviously, she loses the interest on the amount owed (unless prejudgment interest is available).[23] If she could have invested the amount of

18. *Id.*

19. *See* U.C.C. § 2-712 (1987) (permitting buyer to "cover" by purchasing goods in substitution for those due from the seller, and permitting recovery of difference between cost of cover and the contract price together with incidental or consequential damages, less expenses saved as a result of seller's breach); U.C.C. § 2-715 (1987) (defining incidental and consequential damages).

20. Wasserman, *supra* note 10, at 628.

21. *Id.* at 629.

22. *Id.* at 629–30 (distinguishing between related secondary harm and unrelated secondary harm).

23. Traditionally, prejudgment interest was available only on liquidated claims or claims based on a formula from which the amount due could be ascertained, DOBBS, *supra* note 7, § 3.5; it was not allowed on nonpecuniary claims or unliquidated pecuniary claims. *Id.* Some states have modified the traditional rules by statute. *See, e.g.,* CAL. CIV. CODE §§ 3287, 3291 (West 1970 & Supp. 1991) (allowing prejudgment interest in contract actions for unliquidated claims, and in personal injury actions if defendant rejects plaintiff's settlement offer and plaintiff obtains a more favorable judgment); N.Y. CIV. PRAC. L. & R. § 5001 (McKinney 1963) (permitting prejudgment interest as of right in all contract and property damage actions brought at law); TEX. REV. CIV. STAT. ANN. art. 5069-1.05 (West 1987 & Supp. 1992) (requiring that "[j]udgments in wrongful death, personal injury, and property damage cases . . . include prejudgment interest"); UTAH CODE ANN. § 78-27-44 (1987) (allowing prejudgment interest in personal injury actions). *See generally* John C. Keir & Robin C. Keir, *Opportunity Cost: A Measure of Prejudgment Interest,* 39 BUS. LAW. 129 (1983); Kenneth Ross & Donna M. Goelz, *The Availability of Prejudgment Interest in Tort Actions,* 8 J. PROD. LIAB. 79 (1985); James D.

the judgment in her business and could have realized a higher rate of return on the money than the statutory rate of interest, then she suffers secondary harm even if she receives prejudgment interest.[24] Furthermore, in cases in which the recovery is needed for living expenses, the contract claimant suffers the same kinds of secondary harm as the personal injury claimant.[25]

Finally, a plaintiff who proceeds to trial and prevails may obtain a judgment in her favor but may not be able to collect on that judgment for some time, if ever. Any harm the plaintiff suffers as a result of her inability to collect immediately upon her judgment is tertiary harm.[26] Like secondary harm suffered prior to entry of the judgment, tertiary harm may be related or unrelated to the kinds of harm the plaintiff suffers as her primary harm.[27] Thus, a personal injury plaintiff who must wait months before collecting on her judgment may suffer from exacerbated physical injuries (related tertiary harm), or she may lose her home if she diverts all her income to pay for medical care (unrelated tertiary harm).

Tertiary harm can be caused by different factors, and can be more or less severe depending upon its duration. In discussing these alternatives, some additional terminology may prove helpful. For example,

---

Wilson et al., *Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions,* 30 TRIAL LAW. GUIDE 105 (1986); Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion,* 77 NW. U.L. REV. 192 (1982).

"In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). Although the Court has since intimated, in a 5-4 decision, that the Eleventh Amendment does not provide the states with similar immunity from interest awards, Missouri v. Jenkins, 491 U.S. 274, 281 n.3 (1989) (dicta), at least one of the courts of appeals has questioned whether "the dispute in the Supreme Court over the reach of the Eleventh Amendment has been finally resolved." Reopell v. Massachusetts, 936 F.2d 12, 15 (1st Cir. 1991). The retirement of Justice Brennan, the author of the majority opinion in *Jenkins,* underscores the possibility that *Jenkins'* dicta will be rejected, and *Shaw's* reasoning will be extended to protect the states from awards of interest.

24. Even if the contract claimant could borrow the amount owed or assign her claim, she would still suffer some secondary harm in the form of transaction costs, the difference between the amount of prejudgment interest she eventually receives and the amount paid on the loan, the difference between the full value of the claim and the discounted amount she receives upon assignment, and the like. *Cf.* Wasserman, *supra* note 10, at 627 n.18.

25. For a discussion of the kinds of secondary harm a contract claimant might suffer and an explanation of why such harm is less likely to be irreparable than the personal injury plaintiff's secondary harm, see *id.* at 627 n.18, 629 n.21, 630 n.22, and 642 n.62.

26. Theoretically, tertiary harm is a subset of secondary harm, in that it is suffered as a result of the plaintiff's inability to collect immediately upon commencement of her action. For purposes of this Article, secondary harm will refer to the harm suffered as a result of delay between commencement of the action and entry of the judgment, and tertiary harm will refer to the harm suffered as a result of delay after entry of the judgment.

27. *See supra* note 22 and accompanying text.

passive tertiary harm, which results from mere delay or inaction on the part of one or both parties in obtaining satisfaction of the judgment, may be distinguished from active tertiary harm, which results from actions the defendant takes to avoid the judgment, for example, by dissipating or hiding her assets.[28] Similarly, temporary tertiary harm, which the plaintiff suffers if she is eventually able to collect on her judgment, may be distinguished from permanent tertiary harm, which she suffers if she can never collect. In some cases of permanent tertiary harm, the defendant never had assets to satisfy the plaintiff's claim and the permanent harm is thus passive; in other cases, the defendant had assets but transferred them to others without sufficient consideration or otherwise dissipated them in an effort to avoid payment on the judgment. In this class of cases, the tertiary harm is both active and permanent.

Unlike primary harm, both secondary and tertiary harm can be avoided, at least some of the time, if the trial court grants preliminary relief.[29] This Article advocates the use of preliminary injunctions to prevent active tertiary harm.[30] In cases in which the defendant has

28. This terminology is a shorthand way of describing the conduct that gives rise to the harm. Whether the product of action or inaction, misfeasance or nonfeasance, the delay-related harm itself is identical. *Cf.* Wasserman, *supra* note 10, at 629 n.21 (distinguishing between quasi-primary secondary harm and true related secondary harm).

Taking an appeal may cause active tertiary harm because the appeal may delay plaintiff's recovery on the judgment. *See* Gary Stein, Note, *Expanding the Due Process Rights of Indigent Litigants: Will* Texaco *Trickle Down,* 61 N.Y.U. L. REV. 463, 500 (1986) (noting that "[a]ppeals represents one powerful tool in the judgment debtor's arsenal of delaying tactics") (citing PAUL D. CARRINGTON et al., JUSTICE ON APPEAL 134 (1976)). Under Rule 38 of the Federal Rules of Appellate Procedure, the court of appeals "may award just damages and single or double costs to the appellee" if it determines "that an appeal is frivolous." FED. R. APP. P. 38; *see also infra* note 31.

29. A previous work addresses the problem of secondary harm in the personal injury context, and advocates the use of mandatory preliminary injunctions to require defendants to pay some money to plaintiffs in advance of trial on the merits in cases in which plaintiffs can satisfy the traditional requirements for preliminary injunctive relief. Wasserman, *supra* note 10.

30. This Article is not advocating any preliminary equitable relief to prevent passive tertiary harm. Before issuance of the judgment, the court will have no way of knowing whether the defendant will promptly offer to satisfy the judgment, whether she will "lie low" and wait for the plaintiff to take action to enforce the judgment, or whether the plaintiff will do so expeditiously. Simply put, the court will not know whether the plaintiff will suffer passive tertiary harm, and therefore preliminary relief to avoid it would be speculative. Even if a court could foresee passive tertiary harm, the only preliminary equitable relief that it conceivably could issue to prevent it would be an injunction requiring the plaintiff to seek prompt enforcement of her judgment or an order requiring the defendant to pay the judgment expeditiously upon entry. But a court could not enjoin the plaintiff to grant relief to the plaintiff, and even if it could, the prospect of jailing her for failing to enforce her own judgment seems ludicrous. The prospect of jailing a defendant for failing to satisfy a judgment she lacks assets to satisfy smacks of imprisonment for debt, a remedy that offends public policy. *See* Wasserman, *supra* note 10, at 655 (citing Dan B. Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?,* 52 N.C. L. REV.

assets at the commencement of the action and plaintiff can establish a demonstrable risk that the defendant will dissipate those assets unless restrained, a court can and should prevent the plaintiff's active tertiary harm by freezing that portion of the defendant's assets necessary to satisfy the plaintiff's anticipated money judgment.[31]

II. PREJUDGMENT ATTACHMENT AND ITS LIMITATIONS IN PREVENTING TERTIARY HARM

A defendant intent upon rendering worthless a future money judgment against her may attempt to rid herself of assets that could be levied upon in execution. Assuming the defendant does not want to lose complete control of the assets, she will not give them away. Instead, she will want to make the assets unreachable for purposes of satisfying the judgment, but within her control for her own purposes. To this end, she may move assets outside the state or country;[32] transfer possession of the assets to a third party; grant an interest in the assets to a third party; or conceal the assets within the state or country. All of these actions will cause the plaintiff active tertiary harm.

1091, 1109 (1974); Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement,* 81 COLUM. L. REV. 111, 123 (1981)). Even if the defendant had assets with which to satisfy the judgment, it would be troubling to jail her for mere inaction in failing to offer those assets to satisfy the judgment.

31. This Article also argues that if, prior to a ruling on the plaintiff's motion, the defendant has already transferred assets beyond the reach of the court, the court may restrain the defendant from dissipating those assets or actually require her to return the assets to the state in which the court sits. *See infra* notes 177–81 and accompanying text.

The state and federal courts currently protect plaintiffs from active tertiary harm if the defendant appeals from the judgment by requiring a supersedeas bond to stay execution. *See* FED. R. APP. P. 8(b) (stating that "[r]elief available in the court of appeals under this rule [for a stay of the judgment] may be conditioned upon the filing of a bond"); Stein, *supra* note 28, at 468–69, 500–01 (citing authorities; noting that "[s]upersedeas bonds protect judgment creditors . . . by eliminating the effect of dissipation of assets"). A supersedeas bond is "[a] bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." BLACK'S LAW DICTIONARY 1438 (6th ed. 1991). A supersedeas bond and post-judgment interest should compensate the plaintiff for most of her appeal-related tertiary harm if her financial need is not great. *See infra* notes 135 and 144 and accompanying text.

32. *See, e.g.,* Charles M. Bruce et al., *Protection of Assets Trusts: Fallout From Litigation Explosion,* N.Y. L.J., Sept. 13, 1991, at 1 (discussing use of "a trust created under the laws of a non-U.S. jurisdiction . . . to protect assets against future creditors"; noting that in suits against the settlor, "[t]here would be no pre-judgment lien 'freezing' the assets [i.e., attachment] because a U.S. court order ordinarily could not reach the assets . . . in the hands of a non-U.S. custodian"); Marcia Chambers, *Little Guys Give Much Protection,* THE NAT'L L. J., July 1, 1991, at 13–14 (discussing decision by small Colorado law firm to place its assets in a Manx Trust, formed under the laws of the Isle of Man, to protect them from creditors; the Isle of Man does not enforce judgments of foreign countries).

The prejudgment remedy most commonly used to prevent this tertiary harm is attachment.[33] Part A describes the common features of the states' prejudgment attachment statutes. Part B reviews the history of prejudgment attachment, and demonstrates that the remedy was not designed to prevent tertiary harm. Part C then establishes that prejudgment attachment is a poor vehicle for preventing tertiary harm because it causes the defendant unnecessary harm, fails to adequately protect the plaintiff, and has several negative collateral consequences, including harm to innocent third parties and increased satellite litigation.

33. Prejudgment attachment is a preventative, rather than a restorative, measure. If the defendant has already transferred her assets to a third party before issuance of the attachment order, the plaintiff will have to invoke fraudulent conveyance law to reach the property in the hands of the third-party transferee. *See generally* UNIFORM FRAUDULENT CONVEYANCE ACT §§ 4–7, 10, 7A U.L.A. 427 (1985 & Supp. 1991) (defining as fraudulent all conveyances by persons who are or will be thereby rendered insolvent, conveyances without fair consideration when the person making them is engaged in business and is left with "unreasonably small capital," conveyances without fair consideration when the person making them intends to incur debts beyond her ability to pay as they mature, and conveyances made with actual intent to hinder, delay or defraud present or future creditors; providing that in an action by a creditor whose claim has not matured, the court may "restrain the defendant [transferee] from disposing of his property, appoint a receiver to take charge of the property, set aside the conveyance or annul the obligation, or make any order which the circumstances of the case may require"); UNIFORM FRAUDULENT TRANSFER ACT, 7A U.L.A. 639 (1985 & Supp. 1991) (expanding the remedies available to creditors and harmonizing definitions with the Bankruptcy Code); FED. R. CIV. P. 18(b) (permitting a plaintiff to "state a claim for money and a claim to have set aside a conveyance fraudulent as to that plaintiff, without first having obtained a judgment establishing the claim for money").

Because the remedies available under fraudulent conveyance law require jurisdiction over the property at issue or personal jurisdiction over the transferee, the plaintiff may have difficulty pursuing her underlying claim against the transferor and her fraudulent conveyance claim against the transferee in the same forum. *See generally* Cosmopolitan Health Spa, Inc. v. Health Indus., Inc., 362 So. 2d 367 (Fla. Dist. Ct. App. 1978) (reversing trial court order, which denied defendant's motion to dismiss for lack of personal jurisdiction in fraudulent conveyance action against third-party transferee); Poplar Grove State Bank v. Powers, 578 N.E.2d 588 (Ill. App. Ct. 1991) (holding that Illinois court lacked personal jurisdiction over Iowa-domiciled transferee in fraudulent conveyance action); Jahner v. Jacob, 252 N.W.2d 1 (N.D. 1977) (reversing judgment against third-party transferees in fraudulent conveyance action who were not subject to personal jurisdiction in North Dakota); Malis v. Zinman, 261 A.2d 875 (Pa. 1970) (holding that fraudulent conveyance action to set aside transfer of real property in Pennsylvania was an in rem action, and that Pennsylvania court had jurisdiction to proceed even if the transferor and the third party transferee were both domiciled in Massachusetts); 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 92a, at 159 (2d ed. 1940) (noting that "the court will not entertain the suit unless the property is within the State and subject to its control"; "when . . . personal property is so located outside of the State, that it will not be within the court's control, then the case is like that of land, and a suit attacking the fraudulent transfer will not be entertained"). *Cf. infra* part II.C.2 (describing the limited geographic reach of an attachment order).

A. Anatomy of a Prejudgment Attachment Statute

All states except Pennsylvania[34] have enacted statutes authorizing prejudgment attachment, a remedy generally characterized as legal as opposed to equitable.[35] Although the state statutes vary, they can be described collectively for present purposes.

The statutes permit a plaintiff, upon the filing of a bond,[36] to obtain a prejudgment order for the attachment of the defendant's property in a wide variety of circumstances, such as in cases in which the defendant is a nonresident of the state or a foreign corporation,[37] the defendant threatens to remove property from the state with intent to hinder, defraud or delay creditors,[38] and in contract cases for the payment of money in which the contract is unsecured or the security has become valueless.[39] In all cases the plaintiff must establish the probable validity of her claim.[40] The statutes typically permit the court to issue the attachment order on an ex parte basis.[41] With a few exceptions (most

34. *See infra* note 78.

35. *See supra* note 10; *see also, e.g.*, EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 334–35 (6th Cir.) (noting that "Ohio state courts have held that the attachment provisions provide a legal, as distinguished from an equitable, prejudgment remedy"), *cert. denied*, 488 U.S. 825 (1988); Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 32 (Minn. App. 1987) (holding that plaintiff "did not show it lacked an adequate legal remedy in the attachment statute").

36. *See, e.g.*, CAL. CIV. PROC. CODE § 489.210 (West 1979 & Supp. 1991); D.C. CODE ANN. § 16-501(e) (1989); FLA. STAT. ANN. §§ 76.12, 77.031 (West 1987); ILL. ANN. STAT. ch. 110, ¶¶ 4-107, 4-108 (Smith-Hurd 1983 & Supp. 1991); N.Y. CIV. PRAC. L. & R. § 6212 (McKinney 1980); TEX. CIV. PRAC. & REM. CODE ANN. § 61.023 (West 1986); TEX. R. CIV. P. 592, 592a.

37. *See, e.g.*, ARK. CODE ANN. §§ 16-110-101, 16-110-103 (Michie 1987); CAL. CIV. PROC. CODE § 492.010 (West 1979 & Supp. 1991); ILL. ANN. STAT. ch. 110, ¶ 4-101 (Smith-Hurd 1983); OHIO REV. CODE ANN. § 2715.01 (Page Supp. 1990); TEX. CIV. PRAC. & REM. CODE ANN. §§ 61.002, 61.005 (West 1986).

38. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2402 (Supp. 1990); COLO. R. CIV. P. 102(c); ILL. ANN. STAT. ch. 110, ¶ 4-101 (Smith-Hurd 1983); KY. REV. STAT. ANN. § 425.301 (Baldwin 1979); MD. CTS. & JUD. PROC. CODE ANN. § 3-303 (1989); N.M. STAT. ANN. § 42-9-1 (Michie 1978).

39. *See, e.g.*, IDAHO CODE § 8-501 (1990); MONT. CODE ANN. § 27-18-101 (1991); OR. R. CIV. P. 84A.(2)(a); UTAH R. CIV. P. 64C; WYO. STAT. § 1-15-201 (1988).

40. *See, e.g.*, ALASKA CIV. R. 89(d); CAL. CIV. PROC. CODE § 484.090 (West Supp. 1991); D.C. CODE ANN. § 16-501(c) (1989) (plaintiff must aver that she has "a just right to recover what is claimed in [her] complaint"); FLA. STAT. ANN. § 76.24 (West 1987) (if defendant moves to dissolve the writ, plaintiff must prove "the grounds upon which the writ was issued and a reasonable probability that the final judgment in the underlying action will be rendered in his favor"); N.J. CIV. PRAC. R. 4:60-5(a) (court must find that there is "a probability that final judgment will be rendered in favor of the plaintiff").

41. *See, e.g.*, ALA. R. CIV. P. 64(b); ARIZ. REV. STAT. ANN. § 12-2402 (Supp. 1990); CAL. CIV. PROC. CODE § 485.010 (West 1979 & Supp. 1991); N.Y. CIV. PRAC. L. & R. §§ 6210, 6211 (McKinney 1980 & Supp. 1991); TEX. R. CIV. P. 592.

commonly for wages and property exempt from execution),[42] virtually all of the defendant's real and personal property is subject to prejudgment attachment, whether tangible or not.[43] Even property in the hands of third-party garnishees may be subject to prejudgment attachment.[44] The prejudgment attachment order directs the sheriff to seize tangible property, and to attach constructively the rest of the defendant's property.[45] The statutes usually permit the defendant (or the garnishee) to post a bond to obtain the return of the attached property, and often permit the defendant to obtain its return without posting a bond upon a showing that the attachment order issued improperly.[46]

B. The History of Prejudgment Attachment

1. Prejudgment Attachment in the Common Law Courts

The common law did not authorize a default judgment,[47] so if a defendant did not respond to the original writ, the court would issue a series of successive writs to coerce his appearance.[48] The least coercive writ, after the summons, was a writ of attachment against his property.[49] If the attachment did not produce the defendant's appearance, the court would issue writs of *distringas* or "distress infinite" for the seizure of additional property and for the profits of the defendant's

42. *See, e.g.*, ALASKA STAT. § 09.40.030 (1983); CAL. CIV. PROC. CODE §§ 487.010, 487.020 (West 1979 & Supp. 1991); HAWAII REV. STAT. §§ 651-92, 651-121, 651-124 (1988); IND. R. TRIAL PRO. 64(B); MICH. COMP. LAWS ANN. § 600.4031 (West 1987).

43. *See, e.g.*, ALA. CODE § 6-6-70 (1975); DEL. CODE ANN. tit. 10, § 3508 (1975); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-302, 3-305 (1989); MO. ANN. STAT. §§ 521.050, 521.240, 521.250 (Vernon 1953 & Supp. 1991); N.M. STAT. ANN. § 42-9-4 (Michie 1978).

44. *See, e.g.*, COLO. R. CIV. P. 102(e); DEL. CODE ANN. tit. 10, §§ 3502, 3509 (1975 & Supp. 1990); D.C. CODE ANN. § 16-502(a) (1989); FLA. STAT. ANN. § 77.031 (West 1987); ILL. ANN. STAT. ch. 110, ¶¶ 4-115, 4-126 (Smith-Hurd Supp. 1991); N.Y. CIV. PRAC. L. & R. § 6214 (McKinney 1980).

45. *See, e.g.*, ALA. CODE §§ 6-6-70, 6-6-73 (1975); D.C. CODE §§ 16-508, 16-509 (1989); ILL. ANN. STAT. ch. 110, ¶¶ 4-110, 4-113, 4-119, 4-124 (Smith-Hurd 1983 & Supp. 1991); OHIO REV. CODE ANN. § 2715.09 (Page Supp. 1990); TEX. CIV. PRAC. & REM. CODE § 61.042 (West 1986).

46. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1536 (1982 & Supp. 1990); ARK. CODE ANN. § 16-110-130 (1987); DEL. CIV. R. 4(3)(B); FLA. STAT. ANN. §§ 76.18, 77.24 (West 1987); ILL. ANN. STAT. ch. 110, ¶¶ 4-119, 4-120 (Smith-Hurd Supp. 1991); N.Y. CIV. PRAC. L. & R. §§ 6222, 6223 (McKinney 1980); TEX. R. CIV. P. 592, 599.

47. It was not until 1725 that a statute authorized the plaintiff "to enter a common appearance or file common bail for the defendant . . . and to proceed thereon, as if such defendant . . . had entred [sic] his, her or their appearance, or filed common bail" if the defendant did not "appear at the return of the process or within four days after such return." 12 Geo., ch. 29, § 1 (Eng.).

48. ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 74 (1952).

49. *Id.* at 75, 487 n.29; 3 WILLIAM BLACKSTONE, COMMENTARIES *280.

land.[50] The attachment and early distresses seized only so much of the defendant's property as was reasonable or likely to compel his appearance.[51] Succeeding distresses attached increasing amounts of property, until the defendant, in the words of Blackstone, was "gradually stripped of it all by repeated distresses."[52]

The sole purpose of the attachment or distress was to compel the defendant's appearance; it did not provide security for the plaintiff's claim.[53] In fact, if the defendant appeared in the action after an attachment, his property was discharged.[54] If the defendant did not appear, the seized property was forfeited to the Crown.[55] Before 1769 or so, the attached property could not be used even to pay the plaintiff's costs.[56] Even after 1769, however, it was not contemplated that the property could be used to satisfy the plaintiff's claim.[57] Thus, the attachment remedy in the common law courts was not designed to prevent tertiary harm and did not accomplish that result.

---

50. 3 BLACKSTONE, *supra* note 49, at *280; MILLAR, *supra* note 48, at 74–75, 487 n.29; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 385 (5th ed. 1956).

51. MILLAR, *supra* note 48, at 487 n.29.

52. 3 BLACKSTONE, *supra* note 49, at *281, *quoted in* MILLAR, *supra* note 48, at 487 n.29. As in the common law courts, the chancery employed a series of increasingly severe measures to compel the defendant's appearance, including a subpoena, an attachment, an attachment with proclamations, a commission of rebellion, a sergeant at arms, and finally, sequestration. 3 BLACKSTONE, *supra* note 49, at *443–44; 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 349–50 (3d ed. 1944); MILLAR, *supra* note 48, at 362.

53. MILLAR, *supra* note 48, at 481; Nathan Levy Jr., *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience,* 5 CONN. L. REV. 399, 405 (1972–73) (noting that foreign attachment in early Law Merchant and by custom in the Mayor's Court and the Sheriff's Court of London developed "at least partly [in] response to the failure of the common law courts to provide plaintiffs' remedies which were as efficient"); William E. Mussman & Stefan A. Riesenfeld, *Garnishment and Bankruptcy,* 27 MINN. L. REV. 1, 10 n.33 (1942) (noting that "[c]ommon law attachment in contrast to foreign attachment according to the customs of London did not permit any satisfaction of plaintiff out of the attached chattels but they were forfeited to the king").

54. MILLAR, *supra* note 48, at 75 (quoting RICHARD BOOTE, A HISTORICAL TREATISE OF AN ACTION OR SUIT AT LAW 26 (4th ed. 1805)); JOSEPH H. KOFFLER & ALLISON REPPY, HANDBOOK OF COMMON LAW PLEADING 74 (1969); *see also* Hubbard v. Hamilton Bank, 48 Mass. (1 Met.) 340, 342 (1844) (noting that "[o]riginally, an attachment on mesne process seems to have been instituted merely for the purpose of compelling the appearance of the defendant in court to answer to the suit"); Penoyar v. Kelsey, 44 N.E. 788 (N.Y. 1896) (noting that original purpose of common law attachment "was to acquire jurisdiction of the defendant by compelling him to appear in court through the seizure of his property").

55. *Penoyar,* 44 N.E. 788; 3 BLACKSTONE, *supra* note 49, at *280; MILLAR, *supra* note 48, at 487 n.29; Levy, *supra* note 53, at 423; Mussman & Riesenfeld, *supra* note 53, at 10 n.33.

56. 3 BLACKSTONE, *supra* note 49, at *280 (citing 10 Geo. 3, ch. 50, §§ 3, 4 (1769)); MILLAR, *supra* note 48, at 487 n.29 (citing same).

57. *Penoyar,* 44 N.E. at 789 (noting that " '[t]he practice of attaching the effects of a defendant and holding them to satisfy a judgment, which the plaintiff may recover, when, perhaps, judgment may be for the defendant, is unknown to the common law' ") (quoting Bond v. Ward, 7 Mass. 123, 128 (1810)); MILLAR, *supra* note 48, at 487 n.29.

2. *Foreign Attachment Under the Custom of London*

Prejudgment attachment was used as a jurisdictional tool in the local courts as well. As early as 1287 under the early Law Merchant,[58] and later under the Custom of London in the Lord Mayor's Court and the Sheriff's Court,[59] prejudgment attachment was available to obtain quasi-in-rem jurisdiction over the defendant. Designed specifically to force the defendant into court to defend his property, this early foreign attachment, like the attachment in the common law courts, was dissolved if the defendant appeared.[60] Unlike common law attachment, however, the foreign attachment under the Custom of London permitted the plaintiff to satisfy her claim out of the attached property if the attachment did not accomplish its objective and coerce the defendant's appearance.[61]

The phrase "foreign attachment" was not literally accurate, as the procedure was never limited to "foreign" defendants,[62] and the "attachment" authorized was really a garnishment, or attachment of the debtor's property in the hands of a third party.[63] Either the

58. Levy, *supra* note 53, at 405 (citing Howell v. Mules, Fair Court of St. Ives, A.D. 1287, 1 *Select Cases Concerning the Law Merchant* 28–29 (Selden Society 1908)); *see also* PLUCKNETT, *supra* note 50, at 392–93 (discussing the Statute of Merchants of 1285, which authorized the seizure of defendant's property and the sale of his chattels to satisfy mercantile debts).

59. Connecticut v. Doehr, 111 S. Ct. 2105, 2115 (1991) (citing Ownbey v. Morgan, 256 U.S. 94, 104 (1921)); WILLIAM BOHUN, PRIVILEGIA LONDINI: OR, THE LAWS, CUSTOMS AND PRIVILEDGES OF THE CITY OF LONDON 189 (1702) [hereinafter BOHUN]; MILLAR, *supra* note 48, at 480; Levy, *supra* note 53, at 405. Customs were practices that the citizens of London developed, which the King and Parliament ultimately recognized as privileges even though they were not enjoyed elsewhere. Levy, *supra* note 53, at 406 (citing WILLIAM BOHUN, PRIVILEGIA LONDINI: OR, THE LAWS, CUSTOMS AND PRIVILEDGES OF THE CITY OF LONDON 80 (3d ed. 1723)); CHARLES D. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENT IN THE UNITED STATES 1–2 (7th ed. 1891). By the close of the fourteenth century, foreign attachment was well established in many other English cities and on the Continent. Levy, *supra* note 53, at 405–06. But it was the Custom of London that influenced the development of attachment in the United States. Levy, *supra* note 53, at 406; MILLAR, *supra* note 48, at 481.

60. MILLAR, *supra* note 48, at 482–83; ALEXANDER PULLING, THE LAWS, CUSTOMS, USAGES, AND REGULATIONS OF THE CITY AND PORT OF LONDON 189 (2d ed. 1854); Levy, *supra* note 53, at 405, 423.

61. Levy, *supra* note 53, at 423. Thus, under common law attachment, the property seized was forfeited to the Crown if the defendant failed to appear; under foreign attachment, the property seized was paid to the plaintiff in the event of default.

62. *Id.* at 408. According to Professor Levy, the word "foreign" meant "not civic." *Id.* (citing The Mayor and Aldermen of London v. Cox, 2 L.R.-E.&.I. App. 239, 265 (H.L. 1867)). Professor Millar suggests that a foreigner was "one dwelling outside the city" of London. MILLAR, *supra* note 48, at 481.

63. *Id.* at 483; PULLING, *supra* note 60, at 187–88; Levy, *supra* note 53, at 408–09. Foreign attachment also included a procedure known as "sequestration," pursuant to which goods belonging to the defendant, found in a warehouse or house with no attendant, could be attached. BOHUN, *supra* note 59, at 218; MILLAR, *supra* note 48, at 483; PULLING, *supra* note 60, at 192; Levy, *supra* note 53, at 418.

defendant or the garnishee could dissolve the attachment by posting bail for the defendant's appearance.[64] There is no evidence that this form of pretrial attachment was ever intended or used to secure a plaintiff's judgment against a defendant who in fact appeared but threatened to waste his assets.[65] Thus, like the common law attachment, foreign attachment under the Custom of London was designed for purposes other than the prevention of tertiary harm.

3. *The Transformation of Prejudgment Attachment in Early America*

The colonists drew on both English traditions of attachment in setting up their own judicial systems. The colonists used "common attachment" to attach tangible property in the defendant's own possession[66] to coerce his appearance without furnishing any security for the plaintiff's claim.[67] They also adopted foreign attachment[68] as early as the late 1600's to permit the prejudgment attachment of the defendant's property in the hands of third parties,[69] or what the New England colonies called "trustee process."[70]

While both forms of prejudgment attachment were designed as jurisdictional tools,[71] they were transformed by the colonies into rather blunt tools for preventing tertiary harm. In 1659, for example,

64. MILLAR, *supra* note 48, at 482; Levy, *supra* note 53, at 411.

65. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles,* 1978 DUKE L.J. 1147, 1159 (noting that "if the defendant appeared the attachment was dissolved, which meant that a dishonest defendant could appear and then use the time between the entry of the judgment and the issuance of a writ of execution to dispose of the property that had been under attachment").

66. MILLAR, *supra* note 48, at 486.

67. *Id.* at 486–87; Kalo, *supra* note 65, at 1157–59.

68. Levy, *supra* note 53, at 401 (noting that foreign attachment "suited the needs of an expanding credit economy and of a people, averse to imprisonment for debt, who travelled at will among 'limitedly sovereign' states spread over a large territory"); *see also* Mills v. Findlay, 14 Ga. 230, 232 (1853) (noting that custom of London was "the foundation of all of our Attachment Laws"); DRAKE, *supra* note 59, at 1–3; MILLAR, *supra* note 48, at 485; Julius Goebel Jr., *King's Law and Local Custom in Seventeenth Century New England,* 31 COLUM. L. REV. 416, 417, 420–21 (1931) (stating that "at the outset of the seventeenth century local custom and local courts were still an immensely important part of the law administration in England," and noting that the colonists resorted to the customary law with which they had grown up when they developed a civil order in America).

69. Ownbey v. Morgan, 256 U.S. 94, 104 (1921) (noting that Delaware's attachment statute, like the attachment statutes of other states, "traces its origin to the Custom of London, under which a creditor might attach money or goods of the defendant either in plaintiff's own hands or in the custody of a third person, by proceedings in the mayor's court or in the sheriff's court"); MILLAR, *supra* note 48, at 486; Kalo, *supra* note 65, at 1161.

70. MILLAR, *supra* note 48, at 486–87.

71. *See supra* parts II.B.1–2.

the Massachusetts colony adopted a statute, which revolutionized the common attachment remedy. It provided that goods attached would not be released upon the defendant's appearance, but "shall stand engaged until the judgment or execution granted upon the said judgment be discharged."[72] Another Massachusetts statute, enacted in 1701, provided that attached property should not be released until 30 days after the judgment was entered for plaintiff, "that he may take the same by execution, for satisfying of such judgment in whole or in part, so far as the value thereof can extend, if he think fit, unless the judgment be sooner or otherwise satisfied, any law, usage or custom to the contrary notwithstanding."[73] All of the New England jurisdictions ultimately followed Massachusetts's lead in transforming common attachment from a means of compelling the defendant's appearance into a method of assuring the plaintiff's satisfaction.[74]

Similarly, although trustee process, like the foreign attachment from which it derived, was originally restricted to cases against absent or absconding debtors, in 1795 Massachusetts made it available against debtor-defendants generally,[75] and the other New England jurisdictions followed suit.[76] This change, together with the transformation of common attachment, completed the metamorphosis of prejudgment attachment from a jurisdictional tool to a rather heavy-handed means of preventing tertiary harm.[77]

---

72. Colonial Laws of Massachusetts 144 (1887) and Charter & General Laws of the Colony and Province of Massachusetts Bay 192 (1814), *quoted in* MILLAR, *supra* note 48, at 488. According to the court in Hubbard v. Hamilton Bank, 48 Mass. (1 Met.) 340, 342–43 (1844), the provision was first enacted in a colonial ordinance of 1650 and was reenacted in 1659 (citing Anc. Chart. 51, 193). Professor Kalo also concludes that the statute was enacted in 1650. Kalo, *supra* note 65, at 1160.

73. Acts of 1701–02, c. 5, § 11, 1 Acts & Resolves of the Province of Massachusetts Bay (1869), *quoted in* MILLAR, *supra* note 48, at 488.

74. MILLAR, *supra* note 48, at 488; Owenby v. Morgan, 256 U.S. 94, 105 (1921) (noting that "it naturally came about that the American colonies and States, in adopting foreign attachment as a remedy for collecting debts due from non-resident or absconding debtors, in many instances made it a part of the procedure that if defendant desired to enter an appearance and contest plaintiff's demand he must first give substantial security, usually in the form of special bail").

75. Mass. Laws 1794, ch. 65 (Act of Feb. 28, 1795), 1 Mass. Gen. Laws to 1822, 464 (1823), *cited in* MILLAR, *supra* note 48, at 489.

76. MILLAR, *supra* note 48, at 489.

77. Attachment was used primarily in aid of debt collection, as 90 percent of all civil suits in the eighteenth century were debt cases. BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 12 (1987); *see also* Kalo, *supra* note 65, at 1150 (stating that "[t]he most significant factor influencing the course of development of jurisdictional principles in colonial America was the problem of debt collection in an economy heavily dependent on credit"); Thomas D. Russell, *Historical Study of Personal Injury Litigation: A Comment on Method,* 1 GA. J. S. LEGAL HIST. 109, 117–19 (1991) (noting the paucity of tort actions, and the predominance of contract and debt actions, during the nineteenth century).

C. *The Limited Utility of Prejudgment Attachment in Preventing Tertiary Harm*

Conceivably, a remedy designed for one purpose might actually serve another purpose as well. Thus, that prejudgment attachment was not originally designed to prevent tertiary harm does not in itself compel the conclusion that attachment is ill-equipped to prevent tertiary harm. But the variance between its historical purpose and its current use at least raises the question of the efficacy of the remedy today. In fact, prejudgment attachment has proven to be a poor vehicle for preventing tertiary harm.

1. Subject Matter Restrictions on Attachment

Most obviously, prejudgment attachment fails to protect the plaintiff from tertiary harm if it is unavailable in the kind of case the plaintiff has commenced, or does not reach the only property the defendant has that would be available to satisfy the plaintiff's judgment. For example, Pennsylvania has rescinded all of its statutory provisions for attachment,[78] so the prejudgment remedy at law is not available in any action brought in federal or state court in Pennsylvania. Many states authorize attachment only in certain kinds of cases—in contract actions,[79] for example. Other states vary the availability of the remedy

78. PA. R. CIV. P. 1251–79 explanatory comment 1989 (noting rescission of rules governing foreign attachment); PA. R. CIV. P. 1285–92 (noting rescission of rules governing fraudulent debtor's attachment); PA. R. CIV. P. 1462 (suspending Acts of Assembly that applied to practice and procedure in fraudulent debtor's attachment); PA. R. CIV. P. 1480 (abolishing the action of domestic attachment); 42 PA. CONS. STAT. ANN. (Supp. 1991).

In 1976, the Third Circuit Court of Appeals held that Pennsylvania's foreign attachment procedures, then codified at PA. R. CIV. P. 1251–79, were unconstitutional. *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976). Following *Jonnet,* the legislature concluded that:

> [N]either foreign attachment nor fraudulent debtor's attachment serve well their original functions of acquiring jurisdiction over the defendant and immobilizing property from which an eventual judgment might be satisfied. In light of the modern long-arm statute which has extended in personam jurisdiction over nonresident defendants to the broadest extent permissible under the Constitution and the incorporation of the minimum contacts required for in personam jurisdiction into the in rem and quasi-in-rem theories, there seems little need for the jurisdictional function of the remedies. In addition, the procedural complexities of fraudulent debtor's attachment have rendered it almost useless and the potential for misuse of the writ when the grounds of fraud are not actually present make the second function of sequestering property dubious at best.

PA. R. CIV. P. 1251–79 explanatory comment 1989. This comment echoes the argument made here that the attachment remedy, initially designed to coerce the defendant's appearance in court, is a poor vehicle for preventing tertiary harm.

79. *See, e.g.,* ALASKA STAT. § 09.40.010 (1983) (authorizing attachment only in actions upon contracts or for collection of state tax or license fees); CAL. CIV. PROC. CODE §§ 483.010, 492.010 (West Supp. 1991) (authorizing attachment only in actions on claims for money based upon contract where the amount of the claim is a "fixed or readily ascertainable amount," or in

depending upon the residency status of the defendant (probably a vestige of the jurisdictional roots of attachment).[80] Moreover, some states limit the kinds of property that may be subject to attachment.[81] In these cases and others in which prejudgment attachment is unavailable, it does not protect the plaintiff from tertiary harm.[82]

2. *Limited Geographic Reach of Attachment*

Like state statutes that authorize issuance of subpoenas[83] and writs of execution upon judgments,[84] state statutes that authorize the issu-

---

actions for the recovery of money against nonresident defendants who are natural persons or foreign corporations or foreign partnerships not registered with the state; limiting availability of attachment against individuals to claims arising out of their business conduct); D.C. CODE ANN. § 16-501(a) (Michie 1989) (permitting attachment only in actions for recovery of specific personal property, a debt, or damages for breach of contract); HAW. REV. STAT. § 651-2 (1988) (permitting attachment only in actions "upon a contract, express or implied"); MONT. CODE ANN. § 27-18-101 (1991) (authorizing attachment only in actions upon contracts for the direct payment of money and actions upon a statutory stockholders' liability); OR. R. CIV. P. 84A (authorizing attachment against resident defendants only in contract actions); WIS. STAT. ANN. § 811.03 (West 1977 & Supp. 1991) (authorizing prejudgment attachment in specified actions on contracts or judgments, and in tort actions only against nonresident defendants, foreign corporations, and defendants whose addresses are unknown and unascertainable).

80. *See, e.g.*, ARK. CODE ANN. § 16-110-103 (Michie 1987) (authorizing attachment in actions for torts committed in the state only against nonresident defendants); N.D. CENT. CODE § 32-08.1-03 (Supp. 1991) (limiting cases in which attachment may issue against resident defendant, and authorizing attachment in tort actions only if defendant is a nonresident, a foreign corporation, or a person whose residence is unknown and unascertainable); OHIO REV. CODE ANN. § 2715.01 (Page Supp. 1990) (distinguishing between resident and nonresident defendants in authorizing attachment).

See also In re Fredeman Litig., 843 F.2d 821, 826 (5th Cir. 1988) (holding that attachment under Texas law was unavailable because defendants were subject to personal service in Texas and because plaintiffs' claims were entirely unliquidated); Anderson Foreign Motors, Inc. v. New England Toyota Distrib. Inc., 492 F. Supp. 1383, 1389 (D. Mass. 1980) (noting that state laws "vary widely" in the extent to which they limit the availability of attachment to specified classes of cases).

81. The most common (and sensible) limitation is the exemption from attachment of property that would be exempt from execution. *See, e.g.*, ALASKA STAT. § 09.40.030 (1983); ME. REV. STAT. ANN. tit. 14, §§ 4151, 4422, 4451 (West 1980 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 223, § 42 (West 1985); NEV. REV. STAT. § 31.020(h) (1987); N.D. CENT. CODE § 32-08.1-10 (Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 61.041 (West 1986). Other limitations exist, however. *See, e.g.*, USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98–99 (6th Cir. 1982) (concluding that attachment and lis pendens under state law would not adequately protect plaintiffs because the statutes probably did not reach mineral properties severed from the earth).

82. *See infra* part IV.C for a discussion of limitations on the plaintiff's ability to evade statutory limitations by seeking injunctive relief.

83. *See* Rhonda Wasserman, *The Subpoena Power:* Pennoyer*'s Last Vestige,* 74 MINN. L. REV. 37, 68–78 (1989).

84. *See, e.g.*, CAL. CIV. PROC. CODE §§ 699.510, 699.520 (West 1987) (writ of execution directs "levying officer in the county where the levy is to be made" to enforce money judgment); FLA. STAT. ANN. § 56.031 (West 1969) (execution directed to "the sheriffs of the state and shall

ance of writs of attachment limit the geographic reach of the judicial process. In many states, the attachment order directs the sheriff to attach only property found within the county in which she serves.[85] Although many state statutes permit the issuance of several writs of attachment to sheriffs in several counties within the state,[86] and some permit the sheriff of one county to attach property in another county if the defendant has moved it there after the attachment order issued,[87] no state statute purports to authorize the attachment of property outside the territory of the state.

The limited territorial reach of the state attachment statutes has hampered both state and federal courts in preserving defendants' assets to satisfy an expected future judgment. State courts have held that they cannot attach stock owned by a defendant unless the certificates are physically present within the state,[88] that they cannot attach a bank account maintained by the defendant at a branch outside the state,[89] that they cannot attach a debt owed to the defendant by a

be in full force throughout the state"); ILL. ANN. STAT. ch. 110, ¶ 12-106 (Smith-Hurd 1984) (judgment may be enforced "by the proper officer of any county, in this State"); N.Y. CIV. PRAC. L. & R. § 5230(b) (McKinney 1978) (execution issues "to the sheriffs of one or more counties of the state"); PA. R. CIV. P. 3103 (writ of execution "may be directed to the sheriff of any county within the Commonwealth"); *see also* Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963) (noting that "[i]n the absence of a statute providing for the registration or summary enforcement of foreign judgment, . . . it is usually necessary to bring an action of debt on a foreign money judgment and to obtain a new judgment of the forum before execution will issue").

85. *See, e.g.*, IDAHO CODE § 8-504 (1990); ILL. ANN. STAT. ch. 110, ¶¶ 4-110, 4-112 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 34-1-11-6 (Burns 1986); N.Y. CIV. PRAC. L. & R. § 6211 (McKinney 1980); TEX. R. CIV. P. 593, 597.

86. *See, e.g.*, FLA. STAT. ANN. §§ 76.16, 76.17 (West 1987); IDAHO CODE § 8-504 (1990); IND. CODE ANN. § 34-1-11-7 (Burns 1986); MO. R. CIV. P. 85.06; MONT. CODE ANN. §§ 27-18-206 (1991); R.I. R. CIV. P. 4(j)(2).

87. *See, e.g.*, GA. CODE ANN. § 18-3-30 (Michie 1991); ILL. ANN. STAT. ch. 110, ¶ 4-116 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 34-1-11-11 (Burns 1986); WASH. REV. CODE ANN. § 6.25.150 (West Supp. 1991).

88. *See, e.g.*, Giroir v. Giroir, 536 So. 2d 830, 833 (La. Ct. App. 1988) (holding that "since . . . the stock certificates . . . were not in Louisiana when . . . the writ issued, they were not subject to attachment"; attachment attempted to obtain quasi-in-rem jurisdiction over nonresident defendant); Johnson v. Wood, 189 A. 613, 618 (N.J. Cir. Ct. 1936) (holding that because stock certificates were located in New Hampshire, "there is not present in this state [New Jersey] any property of the defendant which can be attached").

89. *See, e.g.*, Land Mfg., Inc. v. Highland Park State Bank, 470 P.2d 782, 784 (Kan. 1970) (holding that where individual had a sum on deposit in Chase Manhattan Bank in New York, "the monies or credits were not located or attached in Kansas"); McCloskey v. Chase Manhattan Bank, 183 N.E.2d 227 (N.Y. 1962) (holding that "balances maintained by the individual [defendant] in the German branch [of Chase Manhattan Bank] were payable only in Germany at that branch and that the funds were not subject to attachment in New York"), *cited in* Gavilanes v. Matavosian, 475 N.Y.S.2d 987, 990 (N.Y. Civ. Ct. 1984); Therm-X-Chemical & Oil Corp. v. Extebank, 444 N.Y.S.2d 26, 27 (App. Div. 1981) (noting that "[t]he general rule in New York is

garnishee under a contract negotiated outside the state,[90] or, more generally, that they cannot attach property found outside the state,[91] or garnish property held by the garnishee outside the state.[92] Federal courts that have attempted to use state attachment remedies pursuant

---

that in order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained"; holding that such rule is not obsolete "where the . . . bank does not have high speed computers with central indexing capabilities to keep track of its depositors' accounts"); Cronan v. Schilling, 100 N.Y.S.2d 474, 476 (Sup. Ct. 1950) (noting that "the law seems well established that a warrant of attachment served upon a branch bank does not reach assets held for, or accounts maintained by, the defendant in other branches or in the home office"), *aff'd,* 126 N.Y.S.2d 192 (1953), *app. denied,* 127 N.Y.S.2d 809 (1954); Bluebird Undergarment Corp. v. Gomez, 249 N.Y.S. 319, 322 (City Ct. of N.Y. 1931) (holding that "the debt owed by a branch finds its situs within the territorial jurisdiction of such branch"; money on deposit in Puerto Rican branch of bank could not be attached by service on New York branch); *see also* Thomas S. Erickson, Comment, *Creditor's Rights—Garnishment—Garnishment of Branch Banks,* 56 MICH. L. REV. 90, 96 (1957) (concluding that "[i]n the foreign branch area, . . . even without a statute, garnishment is effective only as to the branch served"); R.F. Chase, Annotation, *Attachment and Garnishment of Funds in Branch Bank or Main Office of Bank Having Branches,* 12 A.L.R.3D 1088, 1089 (1967) (concluding that "when it comes to attachment or garnishment, . . . 'each branch . . . is a separate entity . . .,' and accounts or deposits may be seized only by serving the writ at the branch . . . supposedly holding the funds for the debtor").

90. Apollo Metals, Inc. v. Standard Mirror Co., 231 N.E.2d 655, 658 (Ill. 1967) (holding that "for the purpose of the execution of the writ [of attachment against a garnishee] there must be actual property in the possession of the garnishee within the jurisdiction of the court authorizing the writ"; "the contract debt which Apollo sought to attach came into being pursuant to negotiations held outside of Illinois"; "payment under the contract was to be made outside of Illinois"; holding that attaching creditor failed to meet burden of proving that debt was subject to attachment in Illinois; attachment for purposes of obtaining quasi-in-rem jurisdiction).

91. *See, e.g.,* Saltzman v. Indemnity Ins. Co., 274 N.Y.S. 806, 807 (Sup. Ct. 1934) (German resident "had no property on which a levy could be made within this jurisdiction"); Stricklin v. Hodgen, 172 S.E. 770, 772 (S.C. 1934) (holding that "funds of the defendant . . . which the attachment sought to reach, had been forwarded by telegraphic transmission beyond the limits of this state, to a point in Florida, before the attempted execution of the attachment warrant"; vacating attachment); *see also, e.g.,* Allstate Sales and Leasing Co. v. Geis, 412 N.W.2d 30, 32–33 (Minn. Ct. App. 1987) (noting that "[a] state court cannot attach assets located outside the state"); ABKCO Indus., Inc. v. Apple Films, Inc., 350 N.E.2d 899, 901 (N.Y. 1976) (noting that "[t]angible personal property obviously has a unique location and can only be attached where it is . . . . [S]ome intangibles are deemed to have become embodied in formal paper writings . . . and in such instances attachment depends on the physical presence of the written instrument within the attaching jurisdiction."); Gavilanes v. Matavosian, 475 N.Y.S.2d 987, 989 (N.Y. Civ. Ct. 1984) (stating that "[i]t is well established that a New York court can not attach property not within its jurisdiction"); Buckeye Pipe-Line Co. v. Fee, 57 N.E. 446, 448 (Ohio 1900) (stating that "[n]o question is or could be made that property without the state, can by virtue of a process of attachment, be seized by an Ohio officer, and, of course, such property could not be delivered into court"); Bruce et al., *supra* note 32 (discussing inability to attach assets placed in a trust created under foreign law); 7 C.J.S. *Attachment* § 65 (1980) ("the court cannot attach property which is not within the territorial limits of its jurisdiction").

92. *See, e.g., Buckeye Pipe-Line,* 57 N.E. at 448 (stating that "property which may be sequestered in the hands of a garnishee must be within the state in order that it may be taken . . . for it is in contemplation that the officer will seize the property in the possession of the garnishee"); *see supra* note 33 (discussing the jurisdictional principles that limit the availability of remedies under fraudulent conveyance law to set aside transfers after the fact).

to Federal Rule 64 of Civil Procedure[93] also have noted that attachment applies only against property found within the state in which the federal court sits.[94] Thus, in cases in which the defendant has property in several states, or has already moved her property outside the state in which the action is pending, the attachment remedy will be ineffectual. To take advantage of it, the plaintiff would have to initiate multiple proceedings in the several states in which the defendant had property.[95]

93. *See infra* note 309.

94. *See, e.g.,* EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir.) (finding that attachment remedy was inadequate because it could not reach assets located outside state), *cert. denied,* 488 U.S. 825 (1988); Federal Deposit Ins. Corp. v. Rodenberg, 622 F. Supp. 286, 288 (D. Md. 1985) (rejecting plaintiff's argument that a federal court sitting in Maryland may "apply Maryland's attachment procedures extraterritorially to accomplish the objectives of Rule 64"; interpreting Maryland's attachment statute as authorizing attachment only within the territorial limits of the state); Fleming v. Gray Mfg. Co., 352 F. Supp. 724, 726 (D. Conn. 1973) (holding that under Connecticut law, attachment of a security requires seizure); Lantz Int'l Corp. v. Industria Termotecnica Campana, 358 F. Supp. 510, 514 (E.D. Pa. 1973) (noting that under Pennsylvania law, "the basis for the writ of foreign attachment is the presence of property of the defendant *within the jurisdiction of the court*") (emphasis added); Nederlandsche Handel-Maatschappij, N.V. v. Sentry Corp., 163 F. Supp. 800, 803 (E.D. Pa. 1958) (holding that "the securities cannot be attached because they are without the geographical limits of this Court and therefore beyond the jurisdiction"); Westerman v. Gilbert, 119 F. Supp. 355, 358–59 (D.R.I. 1953) (holding that defendant's interest in shares of stock of a Rhode Island corporation was not subject to attachment in Rhode Island unless the certificates themselves were physically present in the state and actually seized).

Rule 64 could be amended to permit nationwide attachment in federal actions. But the problem of the limited geographic reach of attachment would continue to exist in state courts and in all actions in which the property is located abroad.

95. *See, e.g., EBSCO,* 840 F.2d at 336 (finding attachment remedy inadequate because it could not reach assets located outside state, and plaintiff would have to initiate attachment proceedings in several states); Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) (upholding preliminary injunction to require defendant to assemble and make available to plaintiff collateral, which was located in five states; noting that "no one possessory action would provide an adequate remedy"), *cert. denied,* 402 U.S. 909 (1971); Wilkerson v. Sullivan, 727 F. Supp. 925, 936 (E.D. Pa. 1989) (stating that "a legal remedy is normally considered inadequate if it would result in a multiplicity of lawsuits"); Northeast Women's Center, Inc. v. McMonagle, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) (in granting permanent injunction, stating that "[t]he legal remedy is inadequate if the plaintiff's injury is a continuing one, where the best available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew"); Howell Pipeline Co. v. Terra Resources, Inc., 454 So. 2d 1353, 1357 (Ala. 1984) (affirming grant of preliminary injunction to enjoin defendant from failing to honor contract because in absence of injunction, plaintiff would have to sue monthly for damages); State *ex rel.* Missouri Highway and Transp. Comm'n v. Marcum Oil Co., 697 S.W.2d 580, 581 (Mo. Ct. App. 1985) (stating that "where an injury committed by one against another is continuous or is being constantly repeated, so that plaintiff's remedy at law requires the bringing of successive actions, that remedy is inadequate").

3. *Intrusiveness of Attachment*

The word attachment, which derives from the Latin term *attingo* and the French term *attacher*, meaning to take or touch, implies seizure.[96] In fact, virtually all of the state attachment statutes authorize the sheriff to physically seize the defendant's tangible property, whether found in the possession of the defendant or in the possession of a third party.[97] Most states permit the sheriff to sell the property—before the plaintiff's claim against the defendant is finally heard on the merits—if the property attached is perishable, likely to depreciate significantly, or is expensive to keep.[98] Moreover, the sheriff may be authorized to use necessary force to attach the property.[99] Although the attachment of real property is constructive,[100] the attachment lien nevertheless encumbers the property, affects the defendant's credit rat-

96. *Buckeye Pipe-Line*, 57 N.E. at 448 (citing Hollister v. Goodale, 8 Conn. 332 (1831)).

97. *See, e.g.*, CAL. CIV. PROC. CODE §§ 482.080, 488.050, 488.090, 488.335 (West Supp. 1991) (court issuing writ of attachment may also issue an order directing defendant to transfer possession of the property attached to the levying officer; officer may take property into custody if plaintiff has paid officer sum to cover costs of taking and keeping property); D.C. CODE ANN. §§ 16-508, 16-509 (1989 replacement volume) (authorizing attachment of personal property by taking it into officer's possession and custody); FLA. STAT. ANN. §§ 76.13, 76.22 (West 1987) (writ of attachment commands sheriff "to attach and take into custody so much of the lands, tenements, goods, and chattels of the party against whose property the writ is issued as is sufficient to satisfy the debt demanded with costs"; officer attaching property retains custody of it); ILL. ANN. STAT. ch. 110, ¶¶ 4-110, 4-119 (Smith-Hurd 1983 & Supp. 1991) (property "shall be . . . attached in the possession of the officer "; officer "shall take and retain the custody and possession of the property attached"); N.Y. CIV. PRAC. L. & R. §§ 6214(c), 6215 (McKinney 1980) (personal property or debt is attached by serving order of attachment on defendant or garnishee; person served transfers property into actual custody of sheriff or pays debts, upon maturity, to sheriff; levy by seizure, as opposed to service, is an alternative).

98. *See, e.g.*, ALA. CODE § 6-6-77 (1975); CAL. CIV. PROC. CODE § 488.700 (West Supp. 1991); FLA. STAT. ANN. § 76.22 (West 1987); ILL. ANN. STAT. ch. 110, ¶¶ 4-125, 4-145 (Smith-Hurd 1983 & Supp. 1991); N.Y. CIV. PRAC. L. & R. § 6218 (McKinney 1980); TEX. R. CIV. P. 600–05. *See generally* D.C. Barrett, Annotation, *Construction and Effect of Provision for Execution Sale on Short Notice, or Sale in Advance of Judgment Under Writ of Attachment, Where Property Involved Is Subject to Decay or Depreciation*, 3 A.L.R.3D 593 (1965 & Supp. 1990) (discussing statutory provisions that authorize sale of attached property prior to judgment).

99. Carples v. Cumberland Coal & Iron Co., 148 N.E. 185, 185 (N.Y. 1925) (confirming sheriff's authority to "break open a safe deposit box of the defendant in aid of the attachment"); LEO O. MYERS, DEBTOR-CREDITOR RELATIONS, MANUAL AND FORMS 248 (1986) (citing Burton v. Wilkinson, 18 Vt. 186 (1846)); *cf.* W.D.M., Annotation, *Right of Officer to Break Into Building to Levy Under Execution*, 57 A.L.R. 210 (1928) (discussing officer's limited right to use force to levy under an execution).

100. *See, e.g.*, ALASKA STAT. § 09.40.050 (1991) (peace officer files a certificate with recorder of the recording district in which the real property is situated and a lien in plaintiff's favor attaches to the property); COLO. R. CIV. P. 102(h) (real property is attached by filing copy of the writ with recorder of the county); FLA. STAT. ANN. § 76.16 (West 1987) (when real property is attached, written notice of levy is filed with clerk of the circuit court for the county in which the property is located).

ing and may even place her mortgage in technical default.[101] Thus, attachment deprives the defendant of possession and use of her personal property as well as unencumbered title to her real estate. The severity of these deprivations has caused some commentators and courts to note that an attachment order dramatically changes the bargaining power between plaintiff and defendant, giving the plaintiff substantial leverage over the defendant.[102]

4. Creation of Attachment Lien

If the goal of the prejudgment remedy is to preserve the status quo—to prevent the defendant from hiding or transferring assets with fraudulent intent—but otherwise not to give the plaintiff any interest in defendant's property until final judgment, the attachment order is not well-tailored to meet this goal. An attachment order actually improves the plaintiff's position in the event that the defendant's assets are subject to competing claims, both within and outside the bankruptcy setting.[103]

During the pendency of most tort cases and many contract cases, the plaintiff has no security interest in any of the defendant's property. As an unsecured creditor, she is subordinate to claimants who obtain a lien (by agreement, statute or judicial process) before she can enforce her judgment against the defendant's property. In a bankruptcy proceeding, unless the unsecured creditor falls into one of the priority

101. Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991) (noting that "[a]ttachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause").

102. *See, e.g., Doehr,* 111 S. Ct. at 2118 (commenting on "the use of attachments as a tactical device to pressure an opponent to capitulate"); DAVID G. EPSTEIN, DEBTOR-CREDITOR LAW IN A NUTSHELL 24 (4th ed. 1991) (listing "leverage" as fourth advantage that attachment provides creditor; "[b]y directing the sheriff to levy on property essential to the defendant/debtor, the creditor greatly strengthens its bargaining position. Deprivation of property used daily or essential to a business may induce the debtor to pay even if the claim is of questionable validity."); Barry L. Zaretsky, *Attachment Without Seizure: A Proposal for a New Creditors' Remedy,* 1978 U. ILL. L.F. 819, 825, 837 (noting that "[a]ttachment also provides creditors with a strong leverage device for inducing debtors to settle . . . "); Dean Gloster, Comment, *Abuse of Process and Attachment: Toward a Balance of Power,* 30 UCLA L. REV. 1218, 1218–19 (1983) (noting that "[t]he settlement leverage created by the seizure of a debtor's assets allows for significant creditor abuse").

103. *See* Zaretsky, *supra* note 102, at 825 (identifying, as one of the benefits of prejudgment attachment, that a creditor may, "prior to judgment, . . . obtain absolute security for the satisfaction of an eventual judgment").

classes,[104] she is the low person on the totem pole when the defendant's assets are distributed.[105]

If, however, the plaintiff obtains a prejudgment attachment against a defendant, she acquires an attachment lien in the attached property.[106] Her attachment lien gives her priority over unsecured creditors and claimants who obtain liens on the same property that were created or perfected later than the attachment.[107] Because this attachment lien also constitutes a "judicial lien" in a bankruptcy proceeding,[108] the plaintiff is treated as a secured creditor with a substantially

104. Section 507 of the Bankruptcy Code identifies certain expenses and claims that have priority, including administrative expenses of preserving the estate, unsecured claims for wages or contributions to employee benefit plans, and unsecured claims for certain taxes. 11 U.S.C. § 507 (1988).

105. HARVEY M. LEBOWITZ, BANKRUPTCY DESKBOOK 16, 329–34 (1986).

106. Many states have statutory provisions that detail when the attachment lien attaches. *See, e.g.,* CAL. CIV. PROC. CODE § 488.500 (West Supp. 1991) (the levy of writ of attachment creates an attachment lien); TEX. CIV. PRAC. & REM. CODE ANN. § 61.061 (West 1986) ("an executed writ of attachment creates a lien"); VA. CODE ANN. § 8.01-557 (Michie 1984) ("the plaintiff shall have a lien from the time of the levying of such attachment").

In early England, on the other hand, the foreign attachment "created no security interest such as [would] survive the bankruptcy of the defendant prior to execution under the Custom of London." Levy, *supra* note 53, at 412.

107. THOMAS S. CRANDALL et al., DEBTOR-CREDITOR LAW MANUAL ¶ 6.04[1][f] (1985) (noting that "[t]he property subject to the lien serves as security for the judgment . . . . From a priority standpoint, interests obtained by third parties subsequent to the acquisition of the attachment lien are usually subordinate to the attaching creditor's lien due to the standard priority rule of 'first in time, first in right.' "); 6 THEODORE EISENBERG et al., DEBTOR-CREDITOR LAW ¶ 26.02[D][2] (1990) (stating that "ordinarily, a prior valid lien, one that is 'first in time' regarding other liens, gives a prior legal right which is entitled to prior satisfaction out of the property affected"); MYERS, *supra* note 99, at 248 (stating that "attachment . . . becomes an attachment lien from the time of the levy of the writ and priority as between attachment liens and other liens or claims is determined by priority in time"). Under Article 9 of the Uniform Commercial Code, a creditor with an attachment lien has priority over a secured party if the lien arises prior to the perfection of the security interest. *See* U.C.C. § 9-301(1)(b); ARNOLD B. COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS ¶¶ 21-601 n.9, 21-607.1 n.1, 21-608.21 (1981).

108. The term "judicial lien" is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36) (Supp. 1991). A prejudgment attachment creates a judicial lien within the meaning of § 101. *See, e.g., In re* Coston, 65 B.R. 224, 226 (Bankr. D.N.M. 1986) (holding that "the lien acquired as a result of the attachment by the creditor is a judicial lien, as defined in § 101 . . . ."); *In re* Blondheim Modular Mfg., 65 B.R. 856, 865 (Bankr. D.N.H. 1986) (holding that creditor "had a valid and effective prejudgment attachment lien on the debtor's personal property . . . and . . . is thus a secured creditor in the instant bankruptcy proceeding . . . ."); *In re* McNeely, 51 B.R. 816, 819 (Bankr. D. Utah 1985) (noting that "the lien acquired by attachment is a vested interest of the attaching creditor, which affords specific security for the satisfaction of the debt" and that the term "judicial lien" in § 101 "encompasses a lien established by attachment or garnishment"); *In re* Eichorn, 11 B.R. 81, 82 (Bankr. D. Mass. 1981) (holding that an

improved position on the totem pole of claims when distributions are made in bankruptcy.[109]

Because the attachment lien benefits the plaintiff vis-à-vis other creditors of the defendant and because these other creditors cannot obtain superior liens after the fact, they may feel constrained to protect themselves by forcing the debtor into involuntary bankruptcy.[110] In fact, they have incentive to do so promptly, because they may be able to have the attachment lien avoided if they file the bankruptcy petition within 90 days of the levy on the attachment order.[111] Thus, even if the plaintiff seeks an attachment order for the sole purpose of preventing dissipation, she may unwittingly alarm the defendant's other creditors and ultimately, albeit indirectly, force the defendant into bankruptcy.

5. *Direct Effect on Third Parties*

An attachment order not only indirectly affects the rights and actions of third-party creditors as a practical matter, but it may directly affect the interests of other third parties by requiring them to

---

attachment is a "transfer," which would "enable the creditor to be a secured creditor rather than an unsecured creditor . . . .").

Because the attachment typically is obtained under state law, the creditor's "secured" status in the bankruptcy proceeding depends initially on whether she has a valid attachment under state law. COHEN, *supra* note 107, at ¶ 21-100; GEORGE M. TREISTER et al., FUNDAMENTALS OF BANKRUPTCY LAW § 6.03 (2d ed. 1988).

109. *See* cases cited *supra* note 108; *see also* COHEN, *supra* note 107, ¶ 21-400, at 335; LEBOWITZ, *supra* note 105, at 18. In fact, if the amount of the plaintiff's claim is less than the value of the property securing it, the plaintiff may even obtain interest on the claim (unless the lien can be avoided). 11 U.S.C. § 506(b) (1988 & Supp. 1991).

110. EPSTEIN, *supra* note 102, at 26; Zaretsky, *supra* note 102, at 835 (noting that "[t]hose creditors who cannot get priority will have incentive to force the debtor into involuntary bankruptcy, so that the trustee in bankruptcy can invalidate some or all of the prior liens and distribute the assets pro rata among creditors"). *But see infra* note 171.

111. The trustee in bankruptcy's authority to avoid transfers by the debtor on account of an antecedent debt made while the debtor was insolvent within 90 days of the filing of the petition (or within one year if the creditor was an insider), 11 U.S.C. § 547(b) (1988 & Supp. 1991), includes the authority to avoid attachment liens obtained during that period. *See, e.g., In re* Corporacion de Servicios Medico-Hospitalarios de Fajardo, 98 B.R. 639, 642 (Bankr. D.P.R. 1989) (holding that attachment of funds could be avoided in bankruptcy as a preferential transfer); *In re* Coastal Fisheries, Inc., 57 B.R. 657 (Bankr. D. Mass. 1986) (holding that attachment of real estate could be avoided); *In re* Eichorn, 11 B.R. 81 (Bankr. D. Mass. 1981) (same). Thus, even a plaintiff who has obtained an attachment under state law may lose her secured status in the bankruptcy. *See generally* 2 DANIEL R. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE §§ 10.7, 10.8 (1989) (outlining trustee's power to avoid preferences under § 547); COHEN, *supra* note 107, ¶ 22-206.4 (same); Mussman & Riesenfeld, *supra* note 53 (arguing that party obtaining writ of garnishment should be able to retain priority over other creditors in bankruptcy proceeding if service of garnishment summons was made four months before the filing of the petition).

participate in the litigation as third-party garnishees. Most state attachment statutes contain special provisions for attaching the defendant's property or credits in the hands of a third-party garnishee.[112] Although these provisions vary, they typically recognize that the garnishee may deny that the property in her hands belongs to the defendant or that she owes the defendant a debt. Thus, the statutes adopt often detailed procedures for resolving these issues before compelling the garnishee to relinquish the property in question.[113]

As a means of preventing active tertiary harm to the plaintiff, these garnishment provisions are overbroad and unduly cumbersome. They fail to distinguish between third parties who are in complicity with a defendant attempting to avoid a judgment and totally innocent third parties. Garnishment provisions thus permit a plaintiff to force an innocent third party into the lawsuit and require the third party to defend against a claim the defendant might not have brought against her. Although this effect on innocent third parties may be justified once the plaintiff has reduced her claim to judgment (at least then we can be sure of the merits of the plaintiff's claim against the defendant),[114] before then it seems like a rather singleminded and harsh means of reducing the plaintiff's risk of tertiary harm at the expense of innocent third parties.

III. THE PRELIMINARY INJUNCTION AND ITS EFFICACY IN PREVENTING TERTIARY HARM

Given the many problems with prejudgment attachment as a means of preventing tertiary harm, courts should consider alternative reme-

112. *See, e.g.*, FLA. STAT. ANN. §§ 77.01-77.031 (West 1987); MO. ANN. STAT. §§ 525.010-525.310 (Vernon 1953 & Supp. 1991); N.C. GEN. STAT. § 1-440.21 (1983); OHIO REV. CODE ANN. § 2715.09.1 (Anderson Supp. 1990); TEX. R. CIV. P. ANN. R. 658–79 (West 1991).

113. *See, e.g.*, FLA. STAT. ANN. §§ 77.04, 77.07 (West 1987) (requiring garnishee to answer the writ, and permitting garnishee to move to dissolve the writ; providing for trial of disputed issues of fact); MO. ANN. STAT. §§ 525.130, 525.140, 525.180, 525.190 (Vernon Supp. 1991) (permitting discovery against garnishee; requiring garnishee to file answer; permitting plaintiff to except or deny the garnishee's answer; authorizing trial of disputed issues); N.C. GEN. STAT. §§ 1-440.23, 1-440.28, 1-440.29 (1983) (requiring garnishee to file answer; permitting garnishee to assert lien or other interest in property; authorizing trial of disputed issues); OHIO REV. CODE ANN. §§ 2715.09.1, 2715.13, 2715.29 (Anderson Supp. 1990) (requiring garnishee to file answer; permitting a "special examination" of the garnishee; requiring garnishee to answer questions under oath); TEX. R. CIV. P. ANN. R. 664a, 665, 666 (West 1991) (permitting garnishee to move to dissolve the writ; requiring that garnishee's answer be under oath; permitting discharge of garnishee).

114. *See, e.g.*, FLA. STAT. ANN. § 77.03 (West 1987); MINN. STAT. ANN. § 571.71 (West Supp. 1991); MO. ANN. STAT. § 525.440 (Vernon 1949 & Supp. 1991); N.C. GEN. STAT. § 1-440.46 (1983); OHIO REV. CODE ANN. §§ 2715.37, 2716.01 (Anderson Supp. 1991) (all permitting post-judgment garnishment).

dies. This Article advocates the use of preliminary injunctions to bar the defendant from dissipating assets during the pendency of the action.

In deciding whether to grant preliminary injunctive relief in any context, courts typically require the plaintiff to satisfy four criteria: that she is likely to succeed on the merits of her claim; that she will suffer irreparable harm if preliminary relief is denied; that this harm outweighs the harm the defendant will suffer if the preliminary injunction is granted; and that the public interest will be furthered (or at least not harmed) by the grant of the preliminary injunction.[115] As this section of the Article will demonstrate, a plaintiff who seeks money damages at trial may satisfy these criteria if the defendant has or is about to dissipate assets in an effort to frustrate a future money judgment. If, as Professors Wright and Miller have suggested, "the most compelling reason in favor of entering [a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act,"[116] then the case in favor of preliminary injunctions to enjoin the dissipation of assets is compelling indeed.[117]

A. Likelihood of Success on the Merits

A plaintiff seeking money damages as her final remedy should have no greater difficulty demonstrating a likelihood of success on the merits than a plaintiff who seeks the kind of ultimate relief that, under current jurisprudence, entitles her to a preliminary injunction freezing assets.[118] Thus, while trial courts may (and should) decline to grant

115. DOBBS, *supra* note 7, at 108–09; Susan H. Black, *A New Look at Preliminary Injunctions: Can Principles From the Past Offer Any Guidelines to Decisionmakers in the Future,* 36 ALA. L. REV. 1, 26 (1984); Arthur D. Wolf, *Preliminary Injunctions: the Varying Standards,* 7 W. NEW ENG. L. REV. 173, 182 (1984). Often courts will balance the four factors, so that a stronger showing on one prong may compensate for a weaker showing on another. Black, *supra,* at 30; *see also* LAYCOCK, *supra* note 4, at 118–23 (discussing different formulations of the standard).

116. 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947, at 424 (1973); *accord* Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (noting that "[i]n issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits"); Placid Oil Co. v. United States Dep't of the Interior, 491 F. Supp. 895, 903 (N.D. Tex. 1980) (noting that "a Federal District Court may issue a preliminary injunction to . . . preserve the Court's power to render a meaningful decision after a trial on the merits").

117. *See, e.g.,* USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 99 (6th Cir. 1982) (noting that "[t]he harm that the district court sought to prevent by means of the injunction was the dissipation and concealment of defendants' assets that would render the litigation meaningless").

118. *Accord* Wasserman, *supra* note 10, at 636.

interim equitable relief to plaintiffs with weak claims, there is no *a priori* reason why a plaintiff seeking money damages should be unable to satisfy the "likelihood of success on the merits" requirement for preliminary injunctive relief.

B. Irreparable Harm[119]

By necessity, courts make decisions regarding requests for preliminary injunctions and other interim relief on less than full information. Thus, when a plaintiff comes into court seeking interim relief and alleges that she will suffer harm during the pendency of the action, the court must inquire into both the *likelihood* that the harm will occur, and the *nature* of the harm the plaintiff will suffer.[120]

A plaintiff's unsubstantiated allegation that a defendant is about to dissipate assets will be insufficient to justify issuance of a preliminary injunction. The plaintiff will have to offer some proof that a genuine risk of such dissipation exists.[121] But it will be difficult, if not impossible, for the plaintiff to obtain direct evidence of fraudulent intent on the part of the defendant. Thus, courts will have to infer an intent to dissipate assets from other actions by or characteristics of the defendant.

In the case three class of cases referred to in the Introduction and in other cases in which courts have granted preliminary injunctions to freeze assets, the courts have based their finding of irreparable harm on evidence that the defendant was a foreigner with few ties to the United States;[122] that the defendant refused to disclose the location of

119. For a thorough discussion of the irreparable injury rule, the argument that the rule does not control most cases in which specific relief is sought, and an explanation of the distinctive role the irreparable injury requirement plays in the context of preliminary injunctions, see LAYCOCK, *supra* note 4, at 110–32; Douglas Laycock, *The Death of the Irreparable Injury Rule,* 103 HARV. L. REV. 688, 728–32 (1990).

120. *See, e.g.,* 11 WRIGHT & MILLER, *supra* note 116, § 2948 (stating that an applicant must demonstrate that she "is *likely* to suffer irreparable harm" and that she has no "adequate alternative remedy in the form of money damages or other relief") (emphasis added).

121. *Id.* (stating that "[t]here must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.").

122. *See, e.g.,* United States v. First Nat'l City Bank, 379 U.S. 378, 385 (1965) (upholding authority to issue preliminary injunction; "[i]f such relief were beyond the authority of the District Court, foreign taxpayers facing jeopardy assessments might either transfer assets abroad or dissipate those in foreign accounts under control of American institutions before personal service on the foreign taxpayer could be made."); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98 (6th Cir. 1982) (finding irreparable harm given "that defendant . . . has no ties to the United States except the property and assets held by the defendant companies, companies that he owns or controls"); International Controls Corp. v. Vesco, 490 F.2d 1334, 1354 (2d Cir. 1974) (enjoining removal of yacht from jurisdiction in light of fact that defendants were

her assets;[123] that she had engaged in prior questionable or fraudulent dealings;[124] that the assets in question were the product of wrongdoing;[125] that the defendant was insolvent and threatened with multiple lawsuits;[126] or that the defendant had actually announced a plan to sell or transfer assets and to distribute the proceeds to others without making adequate provision for the plaintiff and other creditors.[127] In Eng-

"effectively immunized from execution because they both are beyond the reach of the court, enjoying the protection of the Bahamanian government").

123. *See, e.g.,* EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir.) (affirming grant of preliminary injunction on showing that "the defendant had taken specific steps to conceal assets and had refused to disclose what assets he has or where they are located"), *cert. denied,* 488 U.S. 825 (1988).

124. *See, e.g., id.* at 336 (affirming grant of preliminary injunction on showing that "the defendant had taken specific steps to conceal assets"); *In re* Feit & Drexler, Inc., 760 F.2d 406, 416 (2d Cir. 1985) (upholding preliminary injunction on basis of finding that defendant had engaged in numerous and substantial efforts to hide and secrete assets); *USACO Coal,* 689 F.2d at 98 (finding risk of dissipation given defendant's "previous questionable dealings in matters connected to the present lawsuit"); Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980) (finding irreparable harm given that defendant "once attempted to transfer the beef [in issue] to a fictitious trading company, that [defendant] may have altered documents while the beef was in San Salvador, and that [a] bank account in Ft. Lauderdale, Florida, was closed and over $300,000 withdrawn"); American Sav. Bank v. Cheshire Management Co., 693 F. Supp. 42, 49 (S.D.N.Y. 1988) (granting preliminary injunction given the likelihood that defendant had converted property in which plaintiff had an interest); Federal Deposit Ins. Corp. v. Antonio, 649 F. Supp. 1352, 1355 (D. Colo. 1986) (granting preliminary injunction in light of defendant's "apparently . . . systematic effort to hide his assets in secret bank accounts," to obtain a sham divorce from his wife, and then to convey assets to her); Mishkin v. Kenney & Branisel, Inc., 609 F. Supp. 1254, 1256 (S.D.N.Y. 1985) (noting that defendants' "past fraudulent conduct and their current actions indicate an intent to defeat and defraud the rights of . . . its creditors").

125. *See, e.g.,* Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) (affirming authority to fashion preliminary equitable remedy "where the evidence strongly indicates that the assets were ill-gotten gains at the expense of an interest of the public protected by law"); *Antonio,* 649 F. Supp. at 1355 (granting preliminary injunction in light of defendant's "central role in the heist money scheme").

126. *See, e.g.,* Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (upholding preliminary injunction issued on basis of "allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion"); Taxpayers Against Fraud v. Link Flight Simulation Corp., 722 F. Supp. 1248, 1255 (D. Md. 1989) (noting that "Singer is threatened by [many] lawsuits, preferences to creditors[,] . . . and its assets are in danger of dissipation and depletion"); *American Sav. Bank,* 693 F. Supp. at 49 (granting preliminary injunction "[g]iven the company's troubled financial state" and its past questionable dealings); Fleet Nat'l Bank v. Rapid Processing Co., 643 F. Supp. 1065, 1066 (D. Mass. 1986) (granting preliminary injunction in light of plaintiffs' "claim that [defendants] are insolvent and their assets in danger of dissipation" and contested proof regarding the defendants' financial status); Atlantic Wool Combing Co. v. Fibre Corp., 306 F. Supp. 69, 71 (D.R.I. 1969) (granting preliminary injunction in light of proof "that the defendant is insolvent and that the plaintiff may be unable to recover damages from it if this Court should issue a final decree in its favor").

127. *See, e.g.,* Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989) (granting preliminary injunction in light of proof that assets in issue had already been "advanced" to the company's parent corporation, and that the parent could not "trace the funds to a single account

land, where preliminary injunctions of this type are more readily available,[128] courts consider evidence regarding the defendant's character, often gleaned from facts about the defendant's business, its domicile, the location of its known assets, and the circumstances in which the underlying dispute arose.[129]

If, on the basis of such evidence, the court concludes that the defendant is likely to dissipate assets, it must then inquire into the nature of the harm the plaintiff will suffer as a result of this dissipation. If the harm would be compensable with money at the conclusion of the trial or could be prevented by a final remedy, the court need not "run the risk of making an erroneous decision based on less than full information at a preliminary hearing."[130] Only if the plaintiff's injury would be "irreparable"—only if it is "of a peculiar nature, so that compensation in money cannot atone for it"[131]—should the court run the risk of an erroneous interim decision and grant preliminary injunctive relief.[132]

---

or demonstrate the continued existence of the surplus"); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52 (1st Cir. 1986) (affirming grant of preliminary injunction, given findings that defendant "was in the process of winding down after selling the bulk of its assets, that it had failed to provide adequate assurances to alleviate [plaintiff's] concerns, and that it could at any time make itself judgment proof"); *In re* Uranium Antitrust Litig., 617 F.2d 1248, 1259 (7th Cir. 1980) (affirming preliminary injunction enjoining defendants against whom a default judgment had been rendered from transferring assets outside the country; one defendant already had "instructed its American subsidiaries to transfer their assets to Canada"); *Taxpayers Against Fraud,* 722 F. Supp. at 1255 (noting that "Singer's current management has engaged in a calculated and drastic process of depletion of the corporation's assets, and has evinced no intention to maintain the corporation as an ongoing business enterprise"); *In re* Poole, 15 B.R. 422, 433 (Bankr. N.D. Ohio 1981) (granting preliminary injunction on showing that principal asset was the subject of an option to purchase, and that if sold, the proceeds might be dissipated); Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust, 423 N.W.2d 407, 409 (Minn. App. 1988) (reversing denial of preliminary injunction on showing that "[i]f the trustees distribute assets, pursuant to the express trust purpose of liquidation, any judgment against the Trust would be impossible to collect").

128. *See infra* part V.B.

129. *See infra* notes 372–74 and accompanying text.

130. Wasserman, *supra* note 10, at 638 (citing John Leubsdorf, *The Standard for Preliminary Injunctions,* 91 HARV. L. REV. 525, 551–52 (1978)); *accord* Laycock, *supra* note 119, at 691–92 (stating that "denying relief at the preliminary stage protects defendant's right to a full hearing, and a stringent variation of the irreparable injury rule lets the court openly balance the risks to each side").

131. A.O. Smith Corp. v. Federal Trade Comm'n, 530 F.2d 515, 525 (3d Cir. 1976) (quoting Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728 (1857)); *accord, e.g.,* Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (stating that "injury is generally not irreparable if compensatory relief would be adequate"); Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 472 (5th Cir. 1985) (noting that "an injury is 'irreparable' only if it cannot be undone through monetary remedies").

132. *See* Laycock, *supra* note 119, at 728–31 (noting that "[the] court . . . awarding preliminary relief . . . must act without a full trial, sometimes with only sketchy motion papers

The question, then, is whether active tertiary harm, or the harm the plaintiff will suffer as a result of actions that will frustrate her ability to collect immediately on her judgment,[133] would be compensable at the conclusion of the trial or whether it is irreparable. This Article will address the irreparability of permanent tertiary harm first, and then temporary tertiary harm.

Depending upon the peculiar facts of the cases, courts will have differing degrees of difficulty in determining, at the time the preliminary relief is sought, whether the threatened tertiary harm will be permanent or temporary. Assume, for example, that a defendant benignly announces an intention to seek a stay of any judgment against her pending appeal. In anticipation of both entry of a judgment and the defendant's application for a stay pending appeal, the plaintiff theoretically could seek a preliminary injunction to enjoin the defendant from seeking a stay, which would cause her tertiary harm. Although this example is highly improbable, it illustrates the ease with which a court could characterize the anticipated tertiary harm as temporary: the plaintiff would suffer harm during the pendency of the appeal in that she would not be able to collect immediately on her judgment,[134] but would probably be able to recover eventually (assuming her judgment is affirmed).[135]

If, on the other hand, the defendant is about to transfer substantial assets to a third party without adequate consideration, the characterization of the harm will be less obvious. It will be difficult to tell at that time whether the defendant will retake possession of the assets at a later date, will acquire other assets subject to levy to satisfy the judg-

---

and affidavits to guide its decision. . . . Acting without a full presentation from either side and without time for reflection, the court is more likely to err"; thus, at the preliminary injunction stage, "the only injury that counts is injury that cannot be prevented after a more complete hearing at the next stage of the litigation"; even injury that would be considered "irreparable" if plaintiff were seeking permanent relief may not be deemed "severe enough to justify a preliminary injunction in light of the costs to defendants and the uncertain probability of success on the merits").

133. *See supra* note 30.

134. In considering requests for stays of judgments pending appeal, appellate courts typically consider the harm the stay will cause to the appellee. *See, e.g.,* United States v. Baylor Univ. Medical Ctr., 711 F.2d 38, 39 (5th Cir. 1983) (stating that in determining whether to stay a district court order pending appeal, the appellate court should consider "whether the granting of the stay would substantially harm the other parties"), *cert. denied,* 469 U.S. 1189 (1985); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (stating that a court considering an application for a stay pending appeal should consider whether "the issuance of a stay [would] substantially harm other parties interested in the proceedings").

135. Courts may condition the grant of the stay upon the posting of a supersedeas bond, which protects the plaintiff from tertiary harm. *See supra* note 31.

ment, or will remain judgment-proof for an indefinite period. Given that the nature and duration of the tertiary harm will be within the knowledge and control of the defendant, it would seem reasonable in these cases for a court to adopt a rebuttable presumption of permanent tertiary harm once the plaintiff establishes that the defendant is about to take action that threatens active, potentially permanent, tertiary harm.[136] Such a presumption (and the proof it elicits from defendants) should aid courts in differentiating between permanent and temporary tertiary harm and enable them to consider the question of irreparability.

Permanent tertiary harm is, by definition, irreparable: regardless of whether the plaintiff desperately needs the money for subsistence or not, no remedy, at law or equity, will ever compensate her for the permanent loss of her right to recover.[137] Thus, in actions by the government to collect back taxes where the government feared the defendant would dissipate its assets unless restrained;[138] in actions to enjoin governmental conduct, where later suits for money damages caused by such conduct would be barred by sovereign immunity;[139] in an action

136. *See* Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 12 (1959) (discussing "fairness" as a consideration in allocating burdens of proof).

137. *Accord* Laycock, *supra* note 119, at 716 (noting that "[d]amages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy"); Rules of the Supreme Court 1965 (O.29, r.1), note 29/1/3 *in* 1 SUPREME COURT PRACTICE (1991) (Eng.) (stating that "damages will seldom be a sufficient remedy if the wrongdoer is unlikely to be able to pay them").

138. United States v. Ross, 302 F.2d 831, 833–34 (2d Cir. 1962) (in action by government to collect back taxes, upholding district court order enjoining transfer of property and appointing receiver); United States v. Omar, S.A., 210 F. Supp. 773, 774–75 (S.D.N.Y. 1962) (in action by government to collect back taxes, the government claimed that "disposition of the . . . assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court"; holding that "[s]uch injury clearly authorizes the court to exercise its equitable power", the court granted a preliminary injunction to enjoin garnishee banks and brokerage firms from transferring defendant's property *pendente lite*), *rev'd sub nom.* United States v. First Nat'l City Bank, 321 F.2d 14 (2d Cir. 1963) and 325 F.2d 1020 (2d Cir. 1964) (en banc) (per curiam), *rev'd,* 379 U.S. 378 (1965). *See infra* part IV.A.3.

139. Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929) (per curiam) (holding that plaintiff, who sought preliminary injunction to enjoin enforcement of tax statute, demonstrated irreparable harm where no remedy existed for plaintiff to recoup taxes paid if statute were later declared invalid); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1527 (D.C. Cir. 1984) (en banc) (holding that a plaintiff who states a claim for money damages against the government but who may not be able to collect because of governmental immunity or who might receive inadequate compensation under the Tucker Act is entitled to injunctive relief; stating that "the gross inadequacy of money damages could justify injunctive relief when money alone would not constitute just compensation"), *vacated mem.,* 471 U.S. 1113 (1985), *on remand,* 788 F.2d 762 (D.C. Cir. 1986) (per curiam); Placid Oil Co. v. United States Dep't of the Interior, 491 F. Supp. 895, 906 (N.D. Tex. 1980) (noting that costs plaintiffs would have to incur to comply with

under ERISA against a profit-sharing plan that was in the process of distributing all its assets;[140] in an action against a cooperative that, unless restrained, would distribute all its assets to its members;[141] and in other actions in which the plaintiff established a genuine risk that the defendant would dissipate its assets in an effort to frustrate the judgment or otherwise would be unable to satisfy the plaintiff's judgment,[142] the courts have held that the permanent loss of money is

---

challenged agency directive, which required them to recalculate royalties and submit amounts owed under new formula, would not be recoverable if plaintiffs prevailed; "[a]lthough an adequate remedy exists for the recovery of royalty payments made to Interior, there is no provision for the recovery of costs that will necessarily be incurred by Plaintiffs in order to comply . . . "; thus, "plaintiffs will incur irreparable injury"); *see also* Laycock, *supra* note 119, at 718 (noting that "[t]he nonexistent damage remedy against an immune [governmental] defendant is plainly inadequate, and the cases so hold. The immune defendant is just like an insolvent defendant.").

140. Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985). In an action by former employees against a profit-sharing plan and others, where the plan intended to distribute all its assets to current employees, the D.C. Circuit held that:

> [I]t is clear beyond cavil that any cause of action under ERISA against the Plan . . . would forever be lost. Irrevocable loss of a cause of action created by Congress for the remedial and humane purpose of protecting beneficiaries and participants of ERISA-covered plans could, in our judgment, well work irreparable injury warranting the fashioning of equitable relief under the well-settled standards articulated by this court.

Id. at 1308.

141. Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986) (in action by cooperative to enjoin sale by member of its assets to a private utility, noting that unless preliminary injunction issued to prevent sale, defendant would distribute proceeds of sale to its members and would have no assets with which to satisfy a money judgment; stating that "[d]ifficulty in collecting a damage judgment may support a claim of irreparable injury"); *see also* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52–53 (1st Cir. 1986) (concluding that plaintiff had established irreparable harm by demonstrating that defendant was "winding down" its affairs and distributing its assets, and that "no assurances were given that [defendant] would be able to pay a . . . judgment"); Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust, 423 N.W.2d 407, 409–10 (Minn. Ct. App. 1988) (noting that "inability to satisfy a monetary judgment has been recognized as irreparable harm sufficient to justify injunctive relief" and that "difficulty in collecting a judgment is sufficient to establish irreparable injury"; reversing denial of preliminary injunction to enjoin trust from distributing its assets to beneficiaries where trust would have no remaining assets with which to satisfy any judgment plaintiff might obtain against it for indemnity).

142. Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940) (in action in which defendant "was insolvent and its assets in danger of dissipation or depletion," holding that the remedy against it, without preliminary relief to secure assets, would be "inadequate"); Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 206 (3d Cir. 1990) (concluding that "the unsatisfiability of a money judgment can constitute irreparable injury"); Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989) (concluding that plaintiff employees, who sought to recover surplus benefits of terminated pension plan under ERISA, faced irreparable harm where employer's parent company, to whom surplus had been advanced by employer, could not "trace the funds to a single account or demonstrate the continued existence of the surplus"); *In re* Feit & Drexler, Inc., 760 F.2d 406, 416 (2d Cir. 1985) (noting that "even where the ultimate relief sought is money damages, federal courts have found preliminary injunctions appropriate where it has been shown that the defendant 'intended to frustrate any judgment on the merits' by

irreparable. Thus, in cases in which the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate her assets to frustrate the potential money judgment, the plaintiff's active permanent tertiary harm should be considered irreparable.[143]

The irreparability of temporary tertiary harm is a more difficult question because it requires consideration of two variables: the time lag between judgment and satisfaction (a guesstimate *ex ante*), and the severity of the plaintiff's need. Assuming that temporary tertiary

---

'transfer[ring its assets] out of the jurisdiction' "; affirming grant of preliminary injunction in action by trustee in bankruptcy against person to whom party in bankruptcy allegedly had made improper payments); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984) (noting that a damages remedy may be inadequate and plaintiff may face irreparable harm if "damages [are] unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected"); Itek Corp. v. First Nat'l Bank, 730 F.2d 19, 22–23 (1st Cir. 1984) (granting a preliminary injunction to enjoin payment on a letter of credit to the Iranian government because plaintiff's only remedy to recover the money—to sue in Iranian courts—would be inadequate; holding that inability to recover the money paid constituted irreparable harm).

143. Not all courts have agreed. Some courts have taken the position that the adequacy of the money judgment sought is gauged not by the likelihood of its satisfiability, but by its mere availability. As long as a money judgment is theoretically available, no irreparable harm exists and no injunctive relief can issue. *See, e.g.*, Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 474–75 (5th Cir. 1985) (reversing order that granted preliminary injunction to enjoin party from demanding payment on a letter of credit and to prohibit bank from honoring demand; notwithstanding the district court's finding that "Ecuador is not an impartial forum and that [plaintiff] would 'encounter significant resistance to a recovery of judgment against the Ecuadorian national oil company,' " concluding that plaintiff had an adequate remedy at law because it could sue in Ecuador to recover payments made on letter of credit); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that "[i]t is questionable whether the sort of harm plaintiff points to—frustration of enforcement of a money judgment—can ever constitute irreparable harm for purposes of preliminary injunctive relief"; declining to preliminarily enjoin defendants in civil RICO action from dissipating assets); Oxford Int'l Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 374 So. 2d 54, 56 (Fla. Dist. Ct. App. 1979) (rejecting plaintiff's argument that "it had no adequate remedy at law because the monies allegedly owed to it could not from a practical standpoint be recovered unless the funds were impounded . . . . [T]his confuses the question of the ability to obtain a judgment with the question of the ability to satisfy a judgment."), *cert. dismissed*, 383 So. 2d 1199 (Fla. 1980); Stewart v. Manget, 181 So. 370 (Fla. 1938), stating that:

> [T]he inadequacy of a remedy at law to produce money is not the test of the applicability of the rule. All remedies, whether at law or in equity, frequently fail to do that; and to make that the test of equity jurisdiction would be substituting the result of a proceeding for the proceeding which is invoked to produce the result. The true test is, could a judgment be obtained in a proceeding at law, and not, would the judgment procure pecuniary compensation.

Id. at 374.

If the plaintiff can prove that the defendant is about to dissipate assets to render herself judgment-proof, it is difficult to see how the potential money judgment will be an adequate remedy for the plaintiff. The author believes the decisions cited above are incorrect to the extent they hold that a money judgment is an adequate remedy regardless of whether the defendant is engaged in conduct designed to render the judgment unenforceable.

harm will be compensable by an award of post-judgment interest,[144] if the time lag between judgment and satisfaction is expected to be short and the plaintiff's need is minimal, then post-judgment interest may well be sufficient and the harm should not be considered irreparable. The court should not enjoin the defendant from engaging in conduct on less than full information if failure to do so would result in only minimal harm to the plaintiff, which could be compensated for after the fact.

If, on the other hand, the time lag is expected to be substantial or the plaintiff's need is great, an award of post-judgment interest will not protect against temporary tertiary harm. Thus, even a wealthy plaintiff will suffer increasingly serious temporary tertiary harm as the time lag lengthens if she could obtain a higher rate of return on the money than the statutory rate of post-judgment interest.[145] More important, if the plaintiff's health or well-being turns on her ability to collect immediately on the judgment—if delay translates into exacerbation of personal injuries, eviction, mortgage foreclosure, or other losses not readily compensable by money[146]—actions that cause even a short delay in collection will result in irreparable tertiary harm. Because courts have deemed such harm irreparable on motions for preliminary injunctions in cases in which plaintiffs have sought permanent injunctions as their final remedy,[147] courts should treat the identical harm as irreparable in actions for money damages when it arises as tertiary harm.

---

144. Post-judgment interest is available in federal court from the date of entry of the judgment. 28 U.S.C. § 1961(a) (Supp. 1991); FED. R. APP. P. 37; SUP. CT. R. 42(.1). *See generally* Susan M. Payor, Comment, *Post-Judgment Interest in Federal Courts,* 37 EMORY L.J. 495 (1988) (considering how federal statutes and rules of procedure should be applied to determine availability and amount of post-judgment interest in a variety of circumstances); Darrell E. Warner, Recent Developments, *Remedies—Federal Courts—Accrual of Postjudgment Interest Under 28 U.S.C. Section 1961,* 56 TENN. L. REV. 483 (1989) (considering how post-judgment interest should be calculated in cases in which the judgment is modified on appeal). Prior to 1982, section 1961 provided for post-judgment interest "at the rate allowed by State law." 28 U.S.C. § 1961 (1982).

"Judgment interest is granted routinely under [state] statutes." DOBBS, *supra* note 7, § 3.5. *See, e.g.,* CAL. CIV. PROC. CODE §§ 685.010(a), 685.020(a) (West Supp. 1991); FLA. STAT. ANN. § 55.03 (West Supp. 1991); ILL. ANN. STAT. ch. 110, paras. 2-1303, 12-109 (Smith-Hurd 1990 & Supp. 1991); N.Y. CIV. PRAC. L. & R. §§ 5003, 5004 (McKinney Supp. 1991); 42 PA. CONS. STAT. ANN. § 8101 (1982); PA. STAT. ANN. tit. 41, § 202 (Supp. 1991).

145. Even if the plaintiff could immediately assign her judgment to a collection agency, she would not receive the full value of the judgment and would suffer some uncompensable tertiary harm. *See supra* notes 24 and 26.

146. The nature of the plaintiff's secondary and tertiary harms are likely to be similar. *See supra* notes 21–22, 26 and accompanying text.

147. *See* Wasserman, *supra* note 10, at 639–42 (citing cases to support the argument that threats to health and inability to meet one's daily needs constitute irreparable harm).

Although the initial characterization of the threatened harm as temporary or permanent may be difficult, and the later effort to gauge the irreparability of temporary tertiary harm may be trying, these decisions should be no more difficult than the decisions courts routinely make in ruling on applications for preliminary injunctions in cases in which the plaintiff seeks permanent injunctive or other equitable relief. Thus, in the case three class of cases described in the Introduction, where a plaintiff brings an equitable action seeking to recover a specific fund of money in the hands of the defendant, courts must assess the likelihood that the defendant will irretrievably dispose of the assets unless restrained. If courts are able to make that assessment in the case three setting, they should be able to make similar assessments in the case four setting.[148] The ultimate conclusion—that the inability to collect money threatens irreparable harm—should not turn on the nature of the final relief sought.

C. Balance of Hardships

Courts recognize that a preliminary injunction that directs the defendant to take action or restrains the defendant from taking action will most likely harm the defendant.[149] Thus, courts must consider whether the risk of irreparable harm to the plaintiff if the preliminary injunction does not issue exceeds the risk of harm to the defendant if it does issue. If this "balance of hardships" tips in the plaintiff's favor and the other requirements for preliminary injunctive relief are met, the court should issue the interim relief notwithstanding the effect it will have on the defendant.

148. Some courts have attempted to distinguish between the tertiary harm a plaintiff will suffer if the defendant dissipates her assets and the secondary harm a plaintiff will suffer if the defendant continues to engage in additional primary conduct, which results in the disposition of assets. *See, e.g.*, Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that "[i]n the instant case the primary illegality involved has ceased and plaintiff seeks only to recover damages for the injury therefrom to itself"). In other words, they have concluded that a preliminary injunction may issue in the case three class of cases, in which the defendant is dissipating assets to which the plaintiff has an equitable claim, but not in the case four class of cases, in which the defendant is dissipating assets that she will need to satisfy the plaintiff's money damages claim. In my view, where the conduct is identical (i.e., the defendant is dissipating assets) and the result will be the same (i.e., the plaintiff will not be able to collect on her judgment), the relief should be the same.

149. *See, e.g.*, Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 356–57 (10th Cir. 1986) (noting that plaintiff "must . . . show that the injury to it if the injunction does not issue outweighs the injury to [defendants] if it does"); Fleet Nat'l Bank v. Rapid Processing Co., 643 F. Supp. 1065, 1067 (D. Mass. 1986) (concluding that "plaintiffs have established that injury to the plaintiffs if the injunction is not granted outweighs any harm which granting injunctive relief would inflict on the defendants").

A defendant who is restrained from transferring or disposing of assets loses the use of property that is concededly hers until judgment is rendered against her. To the extent a corporate defendant needs the assets to conduct or expand its business, the business may suffer during the pendency of the action. If an individual defendant needs the assets to cover daily living expenses or to pay attorneys' fees, the harm will be even greater.[150] But it is not this potentially boundless harm that gets balanced against the irreparable harm to the plaintiff; courts consider only the harm that remains after they act to lessen the impact of the injunction on the defendant.

Courts have two primary tools for reducing the risk of harm to the defendant. They can require plaintiffs seeking preliminary injunctions to post a bond "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."[151] Although courts occasionally waive the bond requirement in actions brought by poor plaintiffs or public interest plaintiffs,[152] they more typically require a bond to ensure that the defendant will be compensated for any loss suffered as result of an erroneously issued preliminary injunction.[153]

Such compensation may come too late, however, if the defendant needs the assets for subsistence or attorneys' fees. In these cases, courts can use a second method to prevent harm to the defendant by limiting the scope of the preliminary injunction that issues in the first place. Thus, rather than barring the defendant from making any transfers whatsoever, the court can preliminarily enjoin the defendant

150. *See, e.g.*, Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991), discussed *supra* note 101; *In re* Feit & Drexler, Inc., 760 F.2d 406, 412 (2d Cir. 1985) (concluding that preliminary injunction, which prohibited defendant from transferring or disposing of any of her property, wherever located, caused "serious and irreparable consequences," which merited immediate review on appeal); West v. Zurhorst, 425 F.2d 919, 920 (2d Cir. 1970) (noting that "[m]aintenance of a lien upon property is not a negligible deprivation"); Commodity Futures Trading Comm'n v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 678 (S.D.N.Y. 1979) (noting that "[f]or a corporate defendant, freezing assets might cause disruption of defendants' business affairs and, accordingly, threatens the very assets to be available for victims of the illegal actions. For an individual defendant, freezing assets might cause serious personal hardship.").

151. FED. R. CIV. P. 65(c). As of 1974, all states except Massachusetts required an injunction bond. Dobbs, *supra* note 30, at 1096–97.

152. *See* Charles L. Blood, *Injunction Bonds: Equal Protection for the Indigent*, 11 S. TEX. L.J. 16, 16–19 (1969); Wasserman, *supra* note 10, at 646 n.75 (citing cases); Reina Calderon, Note, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENVTL. AFF. L. REV. 125, 133–34 (1986).

153. *See, e.g.*, Dobbs, *supra* note 30, at 1093 (noting that "bonds are commonly required by statutes whenever a plaintiff seeks a provisional remedy, whether at law or equity"); Calderon, *supra* note 152, at 132 (noting that "in theory, in federal courts and virtually all state courts applicants for preliminary injunctions who have successfully established all the required elements for equitable relief will nevertheless be denied it if they do not post bonds").

only from making transfers outside the ordinary course of business.[154] Or the court can freeze all assets except those needed for ordinary living expenses or attorneys' fees.[155] Or it can modify or vacate the injunction if the defendant posts a bond to ensure satisfaction of the plaintiff's expected money judgment.[156] Exercising this equitable dis-

154. *See, e.g.,* Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1115 (3d Cir. 1989) (noting that the district court preliminarily enjoined transfers, conveyances and sales of property "except as necessary in the ordinary course of business").

155. *See, e.g.,* Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 565, 566 n.2 (5th Cir. 1987) (concluding that "some kind of an allowance must be made to permit each defendant to pay reasonable attorneys' fees if he is able to show that he cannot pay them from new or exempt assets" and commenting that "allowing a defendant to lose legitimate assets he currently and legitimately possesses [a house] potentially conflicts with the avowed rationale of preliminary injunctions, that is, to preserve the status quo"); Securities & Exch. Comm'n v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975) (preliminarily enjoining defendants from transferring, liquidating or disposing of any personal assets "except for ordinary living expenses").

In the criminal context, federal forfeiture provisions authorize a district court, prior to conviction, to restrain defendants from dissipating assets in their possession allegedly "constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a] violation" of specified criminal provisions. *See* 21 U.S.C.A. §§ 853(a), 853(e) (West Supp. 1991) (authorizing pre-conviction restraining orders to preserve forfeitable property in continuing criminal enterprise (CCE) drug-related prosecutions); 18 U.S.C.A. §§ 1963(a), 1963(d) (West Supp. 1991) (authorizing same in racketeering prosecutions). The Supreme Court has interpreted the CCE forfeiture provisions as authorizing pre-conviction restraining orders even if the defendant needs the assets to pay attorneys' fees, and has upheld the constitutionality of such restraining orders against fifth and sixth amendment challenges. *See* United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). Relying on the "categorical" language of the forfeiture provisions, the *Monsanto* Court rejected the argument that the provisions should be interpreted as authorizing a "district court to employ 'traditional principles of equity' before restraining a defendant's use of forfeitable assets" and to balance the hardships, including the hardship to the defendant if assets needed to retain an attorney were restrained. *Monsanto,* 491 U.S. at 612–13; *accord Caplin & Drysdale,* 491 U.S. at 622–23. *But see id.* at 636–43 (Blackmun, J., dissenting) (arguing that the constitutional issue could have been avoided if the Court had interpreted the forfeiture provisions as excluding assets needed to retain counsel).

This Supreme Court precedent does not undercut the suggestion that district courts issuing preliminary injunctions to freeze assets in civil cases should exclude assets needed by defendants to retain counsel. First, in criminal cases, where the right to counsel is of constitutional dimension, a defendant unable to pay an attorney will be provided a court-appointed attorney. Gideon v. Wainwright, 372 U.S. 335 (1963). In civil cases, on the other hand, a defendant who lacks resources to pay an attorney will go unrepresented (unless she is eligible for Legal Services assistance). Thus, the need to assure the defendant a meaningful opportunity to retain an attorney militates in favor of limiting the scope of preliminary injunctions in the civil context. Second, because the preliminary injunctions in civil cases are the product of equitable balancing and not statutory mandate, the court is not required by statute to freeze all property in the defendant's possession, but may craft an injunction that balances the hardships to both plaintiff and defendant. Third, in criminal cases, the assets subject to forfeiture are the product of alleged criminal wrongdoing; in civil cases, they are often the product of legitimate efforts by the defendant. Thus, the equities in the two situations are quite different.

156. *See, e.g., Dixon,* 835 F.2d at 566 (stating that "[i]f the defendants properly seek modifications, we have suggested the following limitations on the preliminary injunction: . . . the

cretion, courts can accommodate the defendant's basic needs without risking irreparable tertiary harm to the plaintiff. In weighing the balance of hardships, then, courts should balance against the plaintiff's tertiary harm only the residual, temporary harm to the defendant that remains after limiting the scope of the preliminary injunction and requiring the plaintiff to post a bond.

Where the court finds that the plaintiff's tertiary harm will be permanent, the balance of hardships will always tip in her favor. The risk that the plaintiff will obtain a judgment in a specified amount and never be able to collect on it means that she will lose the amount of the judgment plus interest for each year that she is unable to collect. The defendant may be restrained from using the amount of the judgment, but this loss will be both temporary and compensable: the defendant will regain the use of her funds at the conclusion of the action if she prevails on the merits, and will be compensated for her interim loss out of the injunction bond. Assuming that the court does not enjoin the defendant from using funds needed for subsistence, the balance of hardships will always tip in the plaintiff's favor when she faces a risk of permanent tertiary harm.

Where the plaintiff's tertiary harm is expected to be temporary, the balance of hardships will be less susceptible to general rules. Just as the court will have to consider the estimated time lag between judgment and satisfaction and the degree of the plaintiff's need in determining whether the plaintiff's harm will be "irreparable," the court will have to gauge the time lag and the defendant's need in determining the balance of hardships. In cases where the estimated time lag is short and the parties have relatively comparable needs, the court may conclude that the balance of hardships rests in or near equipoise, and should decline to grant the preliminary injunction.[157] If, on the other hand, the time lag is expected to be great and the plaintiff is substantially needier than the defendant, the court should have little difficulty

defendants must have the opportunity to post bond for the entire amounts subject to the freeze"); Canal Auth. v. Callaway, 489 F.2d 567, 578 (5th Cir. 1974) (noting that "the district court has continuing jurisdiction over a preliminary injunction . . . . In the exercise of that jurisdiction, the court is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason"); N.Y. CIV. PRAC. L. & R. § 6314 (McKinney 1980) (stating that "as a condition to granting an order vacating or modifying a preliminary injunction . . . , a court may require the defendant . . . to give an undertaking . . . that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order").

157. In these cases, the court may also conclude that the plaintiff's risk of harm is not irreparable. *See supra* note 144 and accompanying text.

concluding that the balance of hardships tips decidedly in the plaintiff's favor.

Again, these will not be easy determinations. But the calculus is not very different from the one courts routinely use in deciding whether or not to preliminarily enjoin termination of a distributorship,[158] to mandate temporary reinstatement of an employee,[159] or otherwise to grant preliminary injunctive relief in actions in which permanent injunctive relief is sought. That the case four parties are fighting over money does not render the balance of hardships any more difficult to weigh; it may actually make it somewhat easier. Thus, in cases in which the plaintiff can establish a risk of permanent tertiary harm or can show that the expected delay between judgment and satisfaction is great and her financial situation is more precarious than the defendant's, the balance of hardships should tip in her favor and the court should grant a preliminary injunction to freeze the defendant's assets pending trial if the other requirements for such relief are met.

D. The Public Interest

"Sometimes an order granting or denying a preliminary injunction will have consequences beyond the immediate parties. If so, those interests—the 'public interest' if you will—must be reckoned into the weighing process . . . ."[160] If a plaintiff obtains a preliminary injunction to freeze the defendant's assets, the public interest is served in at least six ways. First and most obvious, the preliminary injunction protects the integrity of the judicial process. By reducing the likelihood that the plaintiff's judgment will be rendered meaningless by the defendant's efforts to make herself judgment-proof, the preliminary injunction protects the judicial process from fraud and other deceptive behavior. The absence of such a remedy may contribute to public cynicism about the efficacy of the system and enhance the risk that the system will squander its scarce resources trying cases that will never provide compensation to a meritorious plaintiff.

Second, a preliminary injunction to freeze assets reduces whatever incentive the defendant otherwise would have to delay the litigation. If prejudgment interest is not available or is inadequate and no interim relief issues, a defendant has every incentive to delay the litigation because she retains the full use of her property during the pendency of

158. *See, e.g.*, Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124 (2d Cir. 1984).

159. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988).

160. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 389 (7th Cir. 1984).

the litigation. A preliminary injunction to freeze assets reduces that incentive by limiting some of the uses to which the defendant may put her money. Although it may be less effective in this regard than an award of prejudgment interest or an attachment order, it does give the defendant some incentive to resolve the case expeditiously, thereby increasing judicial economy and efficiency.

Third, to the extent the preliminary injunction issues in lieu of an attachment, it may diminish the "leverage" that the plaintiff otherwise would have over the defendant. Put another way, although the preliminary injunction reduces the defendant's incentive for delay, in many circumstances it does not have as much coercive power as an attachment order. Because a defendant actually loses possession of, and concomitantly many uses of, her property if it is attached,[161] a plaintiff who obtains an attachment order acquires substantially increased bargaining power vis-à-vis the defendant.[162] So empowered, the plaintiff may be able to coerce the defendant into an unfair settlement—a settlement for more than the ordinary present value of the claim.[163]

A preliminary injunction to freeze assets interferes less with the defendant's enjoyment of her property during the pendency of the action.[164] Although such an injunction typically will enjoin the defendant from transferring, hypothecating, or selling her property—and therefore will deprive her of significant property interests—it will not deprive her of the possession and use of her personal property nor affect her title to real estate.[165] Nor will it bar her from incurring ordinary living expenses, paying attorneys' fees, or making transfers in

161. *See supra* notes 97–101 and accompanying text.

162. *See supra* note 102 and accompanying text.

163. *See supra* note 102 and accompanying text; *cf.* Wasserman, *supra* note 10, at 624 n.8 and accompanying text.

164. Where the property in issue is a bank account, an attachment of the account and a preliminary injunction barring the defendant from drawing on the account would be equally intrusive.

165. *See, e.g.*, The Tuyuti, [1984] 2 Lloyd's Rep. 51, 56 (Sheen, J.) (noting that there are "many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshal takes custody of the ship"); Gloster, *supra* note 102, at 1245–46 (noting that California offers an alternative to attachment, the temporary protective order, which "merely prohibits transfer of the asset and involves *far less severe limitations* on the debtor's ability to use the asset") (emphasis added); *see also* United States v. Musson, 802 F.2d 384, 387 (10th Cir. 1986) (concluding that a restraining order issued in a criminal case, which "prohibited transfers or dispositions of the subject property without notice and permission of the court . . . is far less intrusive than a physical seizure of the subject property").

the ordinary course of business.[166] Thus, a preliminary injunction that issues in lieu of an attachment order may minimize the reallocation of bargaining power and reduce the likelihood of a coerced or unfair settlement, thereby furthering the public interest in the just resolution of private disputes.

Fourth, a preliminary injunction to freeze assets reduces the likelihood that other creditors of the defendant will rush to file claims against her or even force her into involuntary bankruptcy. Again, this public benefit inures not so much from the issuance of the preliminary injunction *per se,* but from the forbearance in awarding attachment. If the only avenue the plaintiff has to prevent the defendant from dissipating assets is to obtain an attachment order, the plaintiff may well do so, thereby acquiring a lien on the property so attached.[167] Other creditors of the defendant, who may now start to worry that all of the other creditors will likewise seek to attach property to obtain some kind of priority, will themselves feel constrained to file suit and attach property, or force the defendant into bankruptcy in an effort to defeat the prior claims of the attaching creditors.[168]

The preliminary injunction acts *in personam* and bars the defendant from disposing of assets, but it does not bind the defendant's property in any way. The injunction does not give the plaintiff a security interest in the defendant's assets, and does not affect the priority of the plaintiff's claim against the defendant vis-à-vis the claims of other creditors.[169] To the extent it affects these other creditors at all, it may

166. *See, e.g.,* cases cited *supra* note 155; *see also supra* part III.C. These measures will not eliminate all of the "intrusiveness" of a preliminary injunction. For example, the mere involvement of a court in deciding what expenses constitute "ordinary living expenses" will interfere with the plaintiff's privacy and autonomy. *See, e.g., In re* McDaniel, 126 B.R. 782 (Bankr. D. Minn. 1991) (refusing to confirm debtors' proposed plan of reorganization because the proposed tithe to their church of $540 per month was not a "reasonably necessary" expense; suggesting that a reduced amount would be permitted); *In re* Packham, 126 B.R. 603, 608 (Bankr. D. Utah 1991) (concluding that "the tithe proposed by the debtors to the LDS [Latter Day Saints] Church is not reasonably necessary for the maintenance and support of the debtors or their dependents"). Furthermore, a preliminary injunction barring a defendant from selling a valuable piece of real estate in a falling market may be no less "coercive" than an attachment, but at least the court will have the flexibility to permit the defendant to sell the property if she agrees to pay the proceeds into court or post a bond to ensure satisfaction of the plaintiff's potential judgment. *See supra* note 156 and accompanying text.

167. *See supra* notes 103 and 106 and accompanying text.

168. *See supra* notes 110–11 and accompanying text.

169. *See, e.g.,* Delaware Trust Co. v. Partial, 517 A.2d 259, 261 (Del. Ch. 1986) (noting that "issuance of the writ requested [injunction] would, presumably, not itself create a lien on the property subject to the order, as would a garnishment"); Derby & Co. v. Weldon, [1988] 2 W.L.R. 412, 419 (C.A.) (noting that it is not the purpose of the *Mareva* injunction "to place the plaintiff in the position of a secured creditor"); 3(1) HALSBURY'S LAWS OF ENGLAND § 329 (4th ed. reissue 1989) (noting that "the purpose of the [*Mareva* injunction] is not to improve the

actually help them by preventing the debtor from dissipating assets.[170] Thus, to the extent that a preliminary injunction to restrain the dissipation of assets issues in lieu of an attachment order, it reduces the volume of litigation brought by other creditors and may actually spare the defendant from involuntary bankruptcy.[171]

Fifth, a preliminary injunction to restrain assets is far less likely to affect the rights of innocent third parties who may be in possession of the defendant's property than a garnishment in aid of prejudgment attachment. When courts employ prejudgment garnishment procedures, they often compel such persons to join the lawsuit to protect their property, and conduct separate hearings to determine the merits of the defendant's claims against the garnishees.[172] A preliminary injunction, on the other hand, restrains only defendants, their privies, and those in concert with them to defeat the plaintiff's claim.[173] Since no "innocent" persons are restrained, no additional hearings are needed to ensure protection of their rights. Thus, to the extent a preliminary injunction issues in lieu of prejudgment garnishment, it not

---

position of the plaintiff in an insolvency; a *Mareva* injunction is not a form of pre-trial attachment, but a relief in personam which prohibits certain acts in relation to the assets in question"); *cf.* CAL. CIV. PROC. CODE § 486.110 (West Supp. 1991) (providing that service of temporary protective order creates a lien, but it is not valid as against bona fide purchasers; the lien automatically terminates upon expiration of the order unless perfected by attachment), *discussed in* Gloster, *supra* note 102, at 1246 n.216 and accompanying text. Compare the attachment without seizure remedy proposed in Zaretsky, *supra* note 102, at 844 (noting that a "creditor will obtain a nonpossessory lien on the debtor's property specified in the writ of attachment").

170. *See* Laycock, *supra* note 119, at 716–17 (distinguishing between preliminary orders that require insolvent defendants to perform contracts, which prefer the plaintiff over other creditors of the defendant, and preliminary injunctions that bar "an insolvent [from] inflict[ing] harm for which he can never pay. An insolvent can obey an order not to commit a threatened tort, and such an injunction will not prefer plaintiff over other creditors.").

171. This argument makes assumptions about how other creditors will respond if the first creditor obtains an attachment order as opposed to a preliminary injunction to freeze assets. These assumptions may be wrong. It is possible, for example, that once the first creditor attaches the defendant's property and obtains a lien therein, the other creditors will realize the reduced likelihood that they will ever collect against the defendant and will not bother to file claims against her. Likewise, it is possible that if the first creditor obtains a preliminary injunction freezing the defendant's assets in lieu of the attachment order, the other creditors will then realize that they may be able to collect against the defendant, but only if they beat the first creditor to judgment, so they will have incentives to bring their actions promptly. Although the author believes the assumptions made in the text are more probably correct, she concedes that the creditors' behavior is an empirical question that is not resolved in this Article.

172. *See supra* notes 112–13 and accompanying text.

173. "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, and their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d).

only limits the effect on innocent third parties, but also reduces the complexity of the litigation.[174]

Finally, a preliminary injunction eliminates the need for duplicative actions in multiple states to protect the plaintiff from tertiary harm. Because the geographic scope of an attachment order is limited to the territory of the state,[175] the plaintiff may have to initiate multiple proceedings in the several states in which the defendant has property to attach all of it.[176] Unlike attachment, a preliminary injunction

174. *Cf.* David W. Shenton, *Attachments and Other Interim Remedies in Support of Arbitration: The English Courts,* 1984 INT'L BUS. LAW. 101, 104. Shenton notes that

> disobedience to the [*Mareva*] Order [discussed *infra* part V.B] involves a committal procedure for contempt of Court under which heavy sanctions, including imprisonment, fines and, in the case of corporations, sequestration of assets, can be imposed upon the contemnor for his disobedience. The procedure has the advantage that third parties within the jurisdiction, having been given notice of the terms of the Order can also be punished for contempt if they act in respect of the Defendant's assets in a manner inconsistent with the Injunction. As the third parties having notice of such Orders are almost invariably respectable corporations, such as banks, brokers or commercial undertakings, they find it more convenient to insure scrupulous observation of the Court's Orders regarding customer's assets in their custody, than to risk what may prove to be expensive legal procedures and possibly draconian punishments for ignoring Court Orders made against their customer.

175. *See supra* notes 85–94 and accompanying text.

176. *See, e.g.,* EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir.) (finding attachment remedy inadequate because it could not reach assets located outside state and plaintiff would have to initiate attachment proceedings in several states), *cert. denied,* 488 U.S. 825 (1988); Clark Equip. Co. v. Armstrong Equip. Co., 431 F.2d 54, 57 (5th Cir. 1970) (upholding preliminary injunction to require defendant to assemble and make available to plaintiff collateral, which was located in five states; noting that "no one possessory action would provide an adequate remedy"), *cert. denied,* 402 U.S. 909 (1971); Wilkerson v. Sullivan, 727 F. Supp. 925, 936 (E.D. Pa. 1989) (stating that "a legal remedy is normally considered inadequate if it would result in a multiplicity of lawsuits"); Northeast Women's Ctr., Inc. v. McMonagle, 665 F. Supp. 1147, 1153 (E.D. Pa. 1987) (in granting permanent injunction, stating that "[t]he legal remedy is inadequate if the plaintiff's injury is a continuing one, where the best available remedy at law would relegate the plaintiff to filing a separate claim for damages each time it is injured anew"); Howell Pipeline Co. v. Terra Resources, Inc., 454 So. 2d 1353, 1357 (Ala. 1984) (affirming grant of preliminary injunction to enjoin defendant from failing to honor contract because in absence of injunction, plaintiff would have to sue monthly for damages); State *ex rel.* Missouri Highway & Transp. Comm'n v. Marcum Oil Co., 697 S.W.2d 580, 581 (Mo. Ct. App. 1985) (stating that "where an injury committed by one against another is continuous or is being constantly repeated, so that plaintiff's remedy at law requires the bringing of successive actions, that remedy is inadequate").

operates on the person. Both state[177] and federal[178] courts have held that they have authority to enjoin a person from taking, or to require a person to take, action outside the state or district so long as they have personal jurisdiction over the person.[179] Thus, a court can preliminarily enjoin a defendant from dissipating, transferring or hypothecating assets beyond the territory of the court,[180] and can require the

177. *See, e.g.,* Pines v. Tomson, 206 Cal. Rptr. 866, 885 (Ct. App. 1984) (upholding permanent injunction that required defendants to accept advertising for Christian Yellow Pages from non-Christians, where injunction purported to apply to defendants' publications both inside and outside California; holding that "a court having jurisdiction of the parties may grant and enforce an injunction, although the subject matter affected is beyond its territorial jurisdiction, or require defendant to do or refrain from doing anything beyond its territorial jurisdiction which it could require . . . within the jurisdiction"); District Attorney v. McAuliffe, 493 N.Y.S.2d 406, 412 (Sup. Ct. 1985) (stating that in a forfeiture action, "the Court would have the power on a motion for preliminary injunction to issue a decree that restrains or orders the commission of acts or affects property outside the state, as a provisional remedy"); Mercury Records Prods. v. Economic Consultants, Inc., 283 N.W.2d 613, 622 (Wis. Ct. App. 1979) (upholding temporary injunction that prohibited defendants from advertising sale of pirated tapes, even outside the state; noting that "[w]here a state court has personal jurisdiction over the parties, it may order the parties to do or to refrain from doing a thing although the order may have an extraterritorial effect").

178. *See, e.g.,* United States v. First Nat'l City Bank, 379 U.S. 378, 384 (1965) (holding that "once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States"); Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (holding that "the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction"; holding that district court has jurisdiction to enjoin trademark infringement consummated in a foreign country by a United States citizen); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1529 (D.C. Cir. 1984) (en banc) (holding that "courts in equity do not hesitate to order the defendants, who are present before the court, to do or refrain from doing something directly involving foreign property"; reversing trial court order dismissing plaintiff's complaint, which sought injunctive relief against governmental taking of private property in Honduras), *vacated mem.,* 471 U.S. 1113 (1985), *on remand,* 788 F.2d 762 (D.C. Cir. 1986) (per curiam).

179. *See generally* 11 WRIGHT & MILLER, *supra* note 116, § 2945 (noting that "there is no doubt that if the court has personal jurisdiction over the parties, it has the power to order each of them to act in any fashion or in any place"); Israel S. Gomborov, Note, *Extra-Territorial Jurisdiction in Equity,* 7 TEMP. L.Q. 468, 481 (1933). Gomborov concludes that

> where . . . the *rem* is indirectly affected, and the purpose of the bill in equity is to compel the defendant, over whom the court has jurisdiction, to do or refrain from doing a certain act . . . , and the decree can be enforced by contempt proceedings, a court of equity . . . will have jurisdiction, no matter where the *res* may be situated.

See also Note, *The Power of a Court of Equity to Order a Nonresident Defendant to Do a Positive Act in Another State,* 35 HARV. L. REV. 610 (1922) (arguing that plaintiff, upon showing an "extreme" case, should be able to obtain an injunction requiring performance in another state, unless the decree would interfere with the sovereignty of the other state or would be impossible to enforce).

180. *See, e.g., First Nat'l City Bank,* 379 U.S. at 384 (holding that district court had authority to preliminarily enjoin bank from transferring any property or rights held for the account of defendant in its Montevideo branch); *In re* Feit & Drexler, Inc., 760 F.2d 406, 414 (2d Cir. 1985) (upholding preliminary injunction that required defendant to deliver her property, wherever

defendant to return assets previously transferred outside the state or country.[181] To the extent, then, that a single preliminary injunction issues in lieu of multiple attachment orders, it reduces the need for multiple proceedings in multiple states, thereby reducing judicial costs.

Taken together, these four requirements impose a stringent standard for preliminary injunctive relief. The standard will not be easily met, nor does this Article suggest that it should be. The preliminary injunction will restrain the defendant from dealing in her own property prior to a final judicial determination that she is liable to the plaintiff. Such relief is extraordinary, and should issue only in cases in which the plaintiff's claim on the merits is strong, the risk of dissipation is real, the harm to the plaintiff is likely to be irreparable, and the risk to the defendant is likely to be less severe. In such cases, however, this Article *does* advocate the use of such injunctions because they can be better-tailored than a writ of attachment to reduce the risk of active tertiary harm to the plaintiff, without unnecessarily intruding on the rights of the defendant or the interests of innocent third parties.[182]

---

located, to escrow agent and enjoined her from transferring or disposing of any of her property, wherever located); United States v. Ross, 302 F.2d 831, 834 (2d Cir. 1962) (upholding preliminary injunction directing defendant to turn over stock certificates, located in the Bahamas, to a receiver; stating that "[p]ersonal jurisdiction gave the court power to order [defendant] to transfer property whether that property was within or without the limits of the court's territorial jurisdiction").

181. *See, e.g.*, Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 194, 208 (3d Cir. 1990) (reviewing preliminary injunction, which ordered defendant to "repatriate all funds he had transferred overseas"; vacating injunction as overbroad, but stating that "the district court is free to reimpose some sort of preliminary injunction"); *Feit*, 760 F.2d at 414 (concluding that district court had power to enter a mandatory preliminary injunction requiring the defendant to "deliver her property from outside the court's territorial jurisdiction"); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152 (2d Cir. 1977) (affirming grant of preliminary injunction, which required defendant to bring securities into state and to surrender them to clerk of court, so they could be attached); Fleming v. Gray Mfg. Co., 352 F. Supp. 724 (D. Conn. 1973) (granting a mandatory preliminary injunction to require the defendants to deposit with the court corporate securities located outside the state, so they could be attached). *See generally* 11 WRIGHT & MILLER, *supra* note 116, § 2948 at 465–66 (noting that "there are cases in which it is necessary to require the defendant to disturb the status quo by undoing acts completed before the injunction issues, or by acting affirmatively, in order to preserve the power of the court to render a meaningful decision"). Such an injunction will be most helpful in cases in which the defendant has already moved assets to a foreign country that would not enforce a United States judgment. *See* Bruce, et al., *supra* note 32; Chambers, *supra* note 32. If the assets already have been placed in the possession of third parties, it may be necessary to invoke fraudulent conveyance law to set aside these transfers and to join the transferees as parties to the action, or to commence separate actions against them if they are not subject to the jurisdiction of the court. *See supra* note 33.

182. The availability of pre-conviction forfeiture orders in the criminal context, *see supra* note 155, suggests that the relief proposed here is well within the mainstream of American judicial thought on prejudgment restraints. Although the policies underlying such restraints may be much stronger in the criminal context than in the civil one, *see, e.g.*, Caplin & Drysdale,

IV. REASONS WHY COURTS HAVE REFRAINED FROM ISSUING PRELIMINARY INJUNCTIONS TO SECURE POTENTIAL MONEY JUDGMENTS

Many courts have hesitated or refused to grant preliminary injunctions to freeze a defendant's assets in actions in which the plaintiff sought only money damages, even though she may have met the traditional requirements for preliminary injunctive relief.[183] These courts have offered a variety of reasons to support their ultimate conclusion that a preliminary injunction should not issue to prevent tertiary harm.

Some courts have felt constrained by precedent to deny relief,[184] relying upon one or both of two Supreme Court decisions,[185] which considered the availability of a preliminary injunction to freeze a pool of assets. But, as subpart A will demonstrate, neither opinion directly addressed the question of whether a preliminary injunction may issue to secure assets with which a money judgment for damages could be paid and, therefore, neither opinion should dissuade courts from granting such relief. In fact, a third Supreme Court decision actually supports the issuance of preliminary injunctions to freeze assets.[186]

Other courts that have refused to grant preliminary injunctions to freeze assets have invoked the principle that an equitable remedy—a preliminary injunction—should not issue when an adequate remedy at

---

Chartered v. United States, 491 U.S. 617, 629–30 (1989) (noting the government's interests in "separating a criminal from his ill-gotten gains," and in "lessen[ing] the economic power of organized crime and drug enterprises," among others), the arguments *against* such restraints are also much stronger in the criminal setting, and notwithstanding these arguments, the relief is routinely granted and has been upheld as constitutional. *See supra* note 155. Thus, a criminal defendant may be compelled to forfeit assets prior to conviction notwithstanding the constitutionally required "beyond a reasonable doubt" standard of proof and the presumption of innocence, *see In re* Winship, 397 U.S. 358 (1970), and notwithstanding the enormous stigma associated with pre-conviction forfeiture under either RICO (which brands the defendant a racketeer) or CCE (which brands her a drug dealer).

183. *See, e.g., In re* Fredeman Litig., 843 F.2d 821, 822, 824 (5th Cir. 1988); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 (5th Cir. 1987); Baxter v. United Forest Prods. Co., 406 F.2d 1120, 1127 (8th Cir.), *cert. denied,* 394 U.S. 1018 (1969); L.G. Balfour Co. v. Drake, 703 F. Supp. 530, 532 (S.D. Miss. 1988); Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 82–83 (W.D.N.Y. 1982); Daley v. Ort, 98 F. Supp. 151, 152 (D. Mass. 1951).

184. *See, e.g., Fredeman,* 843 F.2d at 824–27 (relying on *De Beers* for the general rule "that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment"); *L.G. Balfour Co.,* 703 F. Supp. at 521–32.

185. De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940).

186. United States v. First Nat'l City Bank, 379 U.S. 378 (1965).

law exists.[187] Some of these courts have held that the potential money judgment itself will be an adequate remedy at law, even if the plaintiff has offered proof that the defendant is dissipating assets and the judgment will therefore be unenforceable.[188] These cases fail to recognize, however, that the plaintiff in such cases may well face irreparable harm and that the money judgment will therefore not be an adequate remedy.[189]

Still other courts have conceded that the money judgment itself may not be adequate, but nevertheless deny equitable relief because another legal remedy, prejudgment attachment, is considered adequate.[190] This Article has already identified some of the inadequacies of attachment. But even if prejudgment attachment were adequate, courts should have the freedom to issue preliminary injunctive relief unless the reasons for preferring legal remedies over equitable remedies obtain in this context. As will be seen, they do not.

Finally, some courts maintain that prejudgment attachment is the exclusive means for preventing tertiary harm in money damages cases. These courts have refused to permit plaintiffs to evade the statutory requirements of attachment by seeking preliminary injunctive relief; they have denied relief even in cases in which attachment was unavailable, on the theory that the legislature had limited the circumstances in which the defendant could be deprived of property prior to judg-

187. Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1119 (3d Cir. 1989); Barbouti v. Lysandrou, 559 So. 2d 648, 650 (Fla. Dist. Ct. App. 1990); Hiles v. Auto Bahn Fed'n, Inc., 498 So. 2d 997, 998 (Fla. Dist. Ct. App. 1986); St. Lawrence Co. v. Alkow Realty, Inc., 453 So. 2d 514, 514 (Fla. Dist. Ct. App. 1984); Carriage Way Apartments v. Pojman, 527 N.E.2d 89, 97 (Ill. App. Ct. 1988); Michael-Curry Cos. v. Knutson Shareholders Liquidating Trust, 423 N.W.2d 407, 410 (Minn. Ct. App. 1988).

188. *See, e.g.*, Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 86 (W.D.N.Y. 1982) (stating that "[i]t is questionable whether the sort of harm plaintiff points to—frustration of enforcement of a money judgment—can ever constitute irreparable harm for purposes of preliminary injunctive relief"); *Hiles*, 498 So. 2d at 999 (stating that "[t]he possibility that a money judgment, once obtained, will not be collectible is irrelevant under the test of inadequacy of remedy at law"); *Alkow Realty*, 453 So. 2d at 514 (stating that "[t]he test of the inadequacy of a remedy at law is whether a judgment could be obtained, not whether, once obtained it will be collectible").

189. *See supra* note 143 and accompanying text.

190. *See, e.g.*, Taunton Mun. Lighting Plant v. Department of Energy, 472 F. Supp. 1231, 1233 (D. Mass. 1979) (stating that plaintiff's "proper course to preserve the fund is to seek attachment . . . . Thus it appears if any remedy is warranted, it would be one governed . . . by Rule 64."); Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 33 (Minn. Ct. App. 1987) (stating that plaintiff "has the burden of showing the attachment statute would not have afforded it adequate relief, and it has not met that burden"); Fair Sky Inc. v. International Cable Ride Corp., 257 N.Y.S.2d 351, 353 (App. Div. 1965) (noting that "the defendant . . . is a foreign corporation and a transfer of the cable car business may leave it without assets in the State, but the plaintiff has already had the benefit of an attachment order . . . . An 'attachment is the more appropriate remedy to prevent a removal or disposition of property.' ").

ment and that the courts should not undermine that legislative policy.[191] Respect for legislative policy, however, does not mandate a blanket refusal to issue preliminary injunctions to freeze assets.

A. Supreme Court Precedent

1. Deckert v. Independence Shares Corporation

Within two years of the adoption of the *Federal Rules of Civil Procedure*, the Supreme Court decided *Deckert v. Independence Shares Corporation.*[192] In that case, plaintiffs purchased securities known as "savings plan contract certificates" from Independence Shares Corporation, a trust and investment company.[193] The certificates required the holders to make monthly installment payments for ten years to The Pennsylvania Company for Insurances on Lives and Granting Annuities, a banking corporation that served as the trustee for the installment investment plan. After deducting trustee fees and other charges, The Pennsylvania Company used the net installment payments to purchase Independence Trust Shares from Independence for the account of each certificate holder. The shares were interests in an installment investment trust for which The Pennsylvania Company was the trustee and Independence was the issuer, sponsor and depositor. A second set of trustee fees, commissions and other charges were deducted upon purchase of the shares.[194] The prospectus used in con-

191. *See, e.g.,* Dorfmann v. Boozer, 414 F.2d 1168, 1172 (D.C. Cir. 1969) (reversing grant of preliminary injunction, which required a credit union to pay into court funds on deposit in defendants' name, which funds would then be released by the court to the plaintiff; noting that plaintiffs "now attempt . . . not only to get around the attachment statute, but actually to obtain relief (the use of the funds) which they could not get under that statute"); Baxter v. United Forest Prods. Co., 406 F.2d 1120, 1127 (8th Cir. 1969) (stating that "provisional remedies of attachment before judgment were not recognized at common law. They are statutory remedies in derogation of the common law and strict compliance with the statutory requirements is therefore necessary."); Delaware Trust Co. v. Partial, 517 A.2d 259, 262 (Del. Ch. 1986) (noting that the plaintiff sought a preliminary injunction to restrain a bank from permitting the defendant to withdraw amounts held on deposit because under Delaware law, garnishment was not available against banks; holding that the "policy of the legislature with respect to the seizure or garnishment of funds held by Delaware banks . . . may [not] be ignored by the simple expedient of denominating the writ sought as one of injunction rather than one of garnishment"); *Alkow Realty,* 453 So. 2d at 515 (holding in an action at law that "either prejudgment attachment or garnishment, *with attendant safeguards,* may be available . . . under these circumstances; injunctive relief is not") (emphasis added).

192. 311 U.S. 282 (1940).

193. Plaintiffs actually purchased the certificates from Capital Savings Plan, Inc., then the parent corporation of Independence. Deckert v. Independence Shares Corp., 27 F. Supp. 763, 764 (E.D. Pa.), *rev'd,* 108 F.2d 51 (3d Cir. 1939). In 1938, prior to commencement of the action, Capital was merged into Independence. *Id.* Capital and Independence both will be referred to as Independence.

194. 27 F. Supp. at 764–65.

nection with the sale of the savings plan contract certificates misstated these charges and made other material misrepresentations.[195]

Plaintiffs brought a class action against Independence, its officers and directors, and The Pennsylvania Company in the United States District Court for the Eastern District of Pennsylvania, alleging that they bought the certificates from Independence in reliance on misrepresentations and fraudulent misstatements.[196] Plaintiffs sought relief under section 12(2) of the Securities Act of 1933, which permits an aggrieved purchaser "to recover the consideration paid for [the] security with interest thereon, less the amount of any income received thereon, upon the tender of such security."[197] Alleging that "Independence [was] insolvent and threatened with many law suits, that its business [was] virtually at a standstill because of unfavorable publicity, that preferences to creditors [were] probable, and that its assets [were] in danger of dissipation and depletion,"[198] plaintiffs also sought the appointment of a receiver for Independence with authority to take possession of the trust assets held by The Pennsylvania Company.[199] Federal jurisdiction was invoked under section 22(a) of the Securities Act[200] and the court's "general equitable and receivership powers."[201]

After rejecting defendants' motion to dismiss for lack of subject matter jurisdiction, the district court proceeded to consider Independence's motion to dismiss for lack of equity jurisdiction because plaintiffs "were unsecured simple contract creditors who had not reduced their claims to judgment and failed to realize upon execution process."[202] Although conceding that "as a general rule unsecured simple contract creditors who have not obtained judgments upon their claims have not the status to appeal to equity for relief,"[203] the district court concluded that the plaintiffs were the beneficiaries of a trust—cestuis

195. *Id.* at 774–75.

196. In addition to the parties discussed in the text, plaintiffs sued two affiliated companies, but the claims against them were dismissed prior to review by the Supreme Court. *Deckert,* 311 U.S. at 285.

The Securities and Exchange Commission previously had commenced an action against Capital and Independence, alleging that the defendants had engaged in acts and practices that constituted violations of § 17(a) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77q (1988)). The SEC action was resolved by consent decree, which restrained the defendants from engaging in the practices complained of by the SEC. 27 F. Supp. at 767.

197. Section 12(2) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77l (1988)).

198. 311 U.S. at 285.

199. *Id.*

200. Section 22(a) of the Securities Act of 1933 (currently codified at 15 U.S.C. § 77t (1988)).

201. 27 F. Supp. at 764.

202. *Id.* at 768.

203. *Id.* at 769–70.

que trustent—and therefore properly had sought relief in equity.[204] The district court then noted that even though The Pennsylvania Company was not charged with misconduct, neglect or mismanagement, it was not itself an equity receiver responsible to the court, and therefore, such a receiver might have to be appointed to preserve and distribute the trust assets in The Pennsylvania Company's hands.[205] Finally, the district court appointed a special master to take testimony to determine whether or not Independence was solvent.[206] Approximately two weeks after issuing its opinion, the district court enjoined The Pennsylvania Company from paying to Independence a sum of money owed to Independence or otherwise disposing of the sum during the pendency of the suit.[207]

Both Independence and The Pennsylvania Company appealed to the United States Court of Appeals for the Third Circuit.[208] Characterizing the relief sought under section 12(2) of the Securities Act as "a money judgment or . . . a money decree payable to the individual who has been defrauded"[209]—that is, as legal rather than equitable relief—the Third Circuit held that the injunction against The Pennsylvania Company could "not be maintained."[210] In fact, because no cause of action had been stated against The Pennsylvania Company, the Third Circuit held that it was not a proper party to the suit.[211] It also concluded that the district court erred in appointing a receiver for Independence on the ground that it was insolvent or its assets were being dissipated.[212]

The Supreme Court unanimously reversed.[213] While recognizing that "any suit to establish the civil liability imposed by the [Securities] Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the secur-

204. *Id.* at 770.

205. *Id.* at 771.

206. *Id.* at 776.

207. Independence Shares Corp. v. Deckert, 108 F.2d 51, 53 (3d Cir. 1939), *rev'd*, 311 U.S. 282 (1940). In its opinion, the Supreme Court noted that plaintiffs sought "an injunction restraining Pennsylvania from transferring or disposing of any of the assets of the corporations or of the trust." 311 U.S. at 285.

208. "The Circuit Court of Appeals did not expressly consider whether the appeals were premature." *Deckert*, 311 U.S. at 286.

209. 108 F.2d at 54.

210. *Id.*

211. *Id.*

212. *Id.* The court left open the possibility that plaintiffs "upon a proper showing might . . . obtain injunctive relief against Independence . . . in aid of the remedy supplied to them by Section 12(2) of the Act . . . ." *Id.* at 55.

213. Justice Douglas did not participate in the consideration or decision of the case.

ity"[214]—just money—the Court noted that the Act did not "purport to state the form of action or procedure the claimant is to employ."[215] In fact, the Court concluded that the judicial power "*to enforce* any liability or duty created" by the Act[216] "implie[d] the power to make effective the right of recovery afforded by the Act,"[217] which itself implied "the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."[218] In concluding that the complaint stated a cause of action for equitable relief, the Court relied upon plaintiffs' allegations of Independence's insolvency, possible preferences to creditors, and other threats to defendants' assets, as well as the proposition that "a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate . . . ."[219]

Once the Court concluded that plaintiffs stated a claim entitling them to "some equitable relief,"[220] it followed inexorably that the district court properly "consider[ed] whether injunctive relief should be given in aid of the recovery sought by the bill."[221] Because of the risks of insolvency and depletion or dissipation of assets, "the legal remedy against Independence, without recourse to the fund in the hands of Pennsylvania, would be inadequate."[222] Therefore, the preliminary injunction restraining the transfer of specified assets from The Pennsylvania Company to Independence was "a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill."[223]

Reduced to its essence, *Deckert* stands for the proposition that a preliminary equitable remedy will issue to protect a final equitable remedy of restitution or constructive trust. Thus, it speaks to the availability of a preliminary injunction only in cases in which plaintiffs have an equitable claim to assets in the hands of defendants; it simply

214. Independence Shares Corp. v. Deckert, 311 U.S. 282, 288 (1940).

215. *Id.*

216. *Id.* (quoting 15 U.S.C. § 77v (1936)) (emphasis in original).

217. *Id.*

218. *Id.*

219. *Id.* at 288–89.

220. *Id.* at 289.

221. *Id.* at 289; *accord* Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 561 (5th Cir. 1987) (holding that "an asset freeze by preliminary injunction is an appropriate method to assure the meaningful, final equitable relief sought"); Federal Trade Comm'n v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982) (holding that preliminary injunction to freeze assets would issue to protect final equitable remedy of rescission).

222. 311 U.S. at 290.

223. *Id.*

does not speak to the case of a plaintiff seeking money damages only as her final remedy.[224] Courts finding that *Deckert* either precludes preliminary injunctive relief in such cases or authorizes it read more into the opinion than it contains.

2. De Beers Consolidated Mines, Ltd. v. United States

Only five years after it decided *Deckert,* the Supreme Court again grappled with the question of the availability of a preliminary injunction to freeze assets. In *De Beers Consolidated Mines, Ltd. v. United States,*[225] the United States commenced an action against several foreign corporations and individuals, alleging that they had "engaged in a conspiracy to restrain and monopolize the commerce of the United States with foreign nations in gem and industrial diamonds" in violation of the Sherman Act and the Wilson Tariff Act.[226] The ultimate relief sought was a permanent injunction preventing and restraining future violations of federal law. Upon commencement of the action, the government sought a preliminary injunction to restrain the corporate defendants from "withdrawing from the country any property located in the United States, and from selling, transferring or disposing of any property in the United States 'until such time as [the trial court] shall have determined the issues of this case and defendant corporations shall have complied with its orders.' "[227] The government was concerned that the defendants, whose principal places of business were abroad, would flout the court's final order and would remove their assets from the United States so as to make a proceeding for civil contempt fines futile or impracticable; the government thus alleged irreparable injury.[228] A temporary restraining order without notice was issued and served on several banks that held some of the defendants' assets, and a preliminary injunction was "continued in force" after a hearing on affidavits and oral argument.[229] The defendants applied directly to the Supreme Court for review under section 262 of the Judiciary Code.[230]

224. At most, the Court may have implied that if the complaint had not stated a claim for final equitable relief, a preliminary injunction could not have issued. This implication is rejected in United States v. First Nat'l City Bank, 379 U.S. 378 (1965) (discussed *infra* in part IV.A.3).

225. 325 U.S. 212 (1945).

226. *Id.* at 215.

227. *Id.* (quoting the government's motion).

228. *Id.*

229. *Id.* at 216.

230. Section 262 authorized the Supreme Court and the district courts to issue writs of scire facias, and authorized the Supreme Court, the courts of appeals, and the district courts to issue "all writs not specifically provided for by statute, which may be necessary for the exercise of their

In holding that it had jurisdiction under section 262 to review the issuance of the preliminary injunction,[231] the Supreme Court made some preliminary comments about the nature of the temporary and final relief sought by the United States: "[T]he order in question was not made to grant interlocutory relief such as could be afforded by any final injunction, but [was] one respecting a matter lying wholly outside the issues in the case . . . ."[232] Because the nature of the preliminary equitable relief granted was different than the final equitable relief sought, an appeal from a final injunction prohibiting anticompetitive activity would not provide an occasion for review of the propriety of the preliminary injunction freezing defendants' domestic assets. Thus, review under section 262 was the only avenue for determining whether the district court "ha[d] . . . power to do what it purport[ed] to do."[233]

In arguing to the Supreme Court that the district court had authority to issue the preliminary injunction, the United States relied on neither Rule 64[234] nor Rule 70[235] of the Federal Rules of Civil Procedure; instead, it invoked section 4 of the Sherman Act[236] and section

---

respective jurisdictions, and agreeable to the usages and principles of the law." Act of March 3, 1911, ch. 231, § 262; 36 Stat. 1162 (1911) (codified at 28 U.S.C. § 377 (1940)) (currently codified at 28 U.S.C. § 1651 (1966)). Rule 81(b) of the Federal Rules of Civil Procedure abolished the writ of scire facias so the recodification of § 262 omits the sentence authorizing such writs. *See* 28 U.S.C. § 1651 (1988).

231. Only five justices believed that review by the Supreme Court was appropriate in the circumstances of the case. The majority opinion stated:

> If the preliminary injunction here granted, unless set aside, will stand throughout the course of the trial and for an indefinite period after its termination, and if the order was beyond the powers conferred upon the court, it is plain . . . that the petitions present an appropriate case for the exercise of our jurisdiction under § 262.

325 U.S. at 217. In a strongly-worded dissent, Justice Douglas concluded that the Court did not have jurisdiction to entertain the appeal from this interlocutory order, and that to do so would "open the flood gates . . . ." *Id.* at 225 (Douglas, J., dissenting).

232. *Id.* at 217.

233. *Id.*

234. The Supreme Court noted that no applicable federal statute authorized attachment, and that under the law of the state in which the district court sat, New York, an attachment could issue only "in an action seeking a money judgment" and not "in an equity suit such as the instant one." *Id.* at 218. For a discussion of Rule 64, *see infra* part IV.B.2.e.

235. The Court stated:

> Although the Government based its motion upon the theory that the entry of the requested injunction would amount to a sequestration of the defendants' assets, and so argued in the court below, it has abandoned that position, because Rule 70 . . ., which permits the issue of a writ of attachment or sequestration against the property of a disobedient party to compel satisfaction of a judgment, is operative only after a judgment is entered.

325 U.S. at 218.

236. 15 U.S.C. § 4 (1940) (granting the district courts "jurisdiction to prevent and restrain violations" of the title; authorizing the United States Attorneys to "institute proceedings in equity to prevent and restrain such violations"; authorizing the courts, prior to final decree, to "make such temporary restraining order or prohibition as shall be deemed just in the premises").

262 of the Judicial Code.[237] Because the Court found that neither of those sections granted any "new or different power than those traditionally exercised by courts of equity,"[238] the Court was remitted to an examination of traditional equity practice.

In concluding that traditional equity practice would not countenance the preliminary injunction entered by the district court, the Supreme Court noted that the courts lacked power under the relevant federal laws to enter a money judgment; the only remedy authorized was an injunction against "future continuance of actions or conduct intended to monopolize or restrain commerce."[239] Because the court had power to enter a permanent injunction, it also had power to enter a preliminary injunction "*of the same character*" as that which might have been granted finally.[240] Thus, a preliminary injunction restraining violations of the Acts during the pendency of the action would have been authorized. But the preliminary injunction at issue did no such thing. "[I]t deal[t] with a matter lying wholly outside the issues in the suit. It deal[t] with property which in no circumstances [could] be dealt with in any final injunction that [might] be entered."[241] If an injunction could issue under these circumstances, then:

> every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree.[242]

And in case these prospects were not frightening enough, the Court continued down the slippery slope: "[I]t is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment

237. Act of March 3, 1911, ch. 231, § 262; 36 Stat. 1162 (1911) (codified at 28 U.S.C. § 377 (1940)) (currently codified at 28 U.S.C. § 1651 (1966)). *See supra* note 230 and accompanying text.

238. 325 U.S. at 219. In discussing § 4 of the Sherman Act, the Court noted that the jurisdiction it granted "to prevent and restrain violations" of the Act had "to be exercised according to the general principles which govern the granting of equitable relief." *Id.* at 218–19. Likewise, § 262 of the Judicial Code required an "inquiry as to what is the usage, and what are the principles of equity applicable in such a case." *Id.* at 219.

239. *Id.* at 219–20.

240. *Id.* at 220 (emphasis added).

241. *Id.*

242. *Id.* at 222.

in such a law action."[243] No citation was necessary for the ultimate conclusion that "no relief of this character has been thought justified in the long history of equity jurisprudence."[244]

Although some courts have read *De Beers* as barring the use of preliminary injunctions to freeze assets in all money damages cases,[245] the Third Circuit's more limited reading of *De Beers*'s holding is fairer: it "simply held that a defendant's money may not be encumbered by a preliminary injunction when the final merits judgment sought by plaintiffs cannot involve a transfer of money from defendants to plaintiffs. In short, *De Beers* is simply inapplicable to cases in which a litigant seeks money damages."[246] Although *De Beers*'s dicta also may be read as counseling against all preliminary injunctions to freeze assets, again a more careful parsing suggests otherwise:

> [T]he government's evidence [of irreparable injury] consisted only of one conclusory affidavit submitted by the government accusing De Beers of secreting assets—in other words, "a mere statement of belief that the defendant can easily make away with or transport his money or goods."
>
> Against this background, the passage from *De Beers* . . . can be understood more sensibly. *De Beers* was concerned that not just "any action for personal judgment" should result, "on a mere statement" by a plaintiff, in burdensome encumbrances imposed on the assets of a defendant as yet found liable to no one. A case in which recovery is especially likely is not just "any action," however, and a case in which asset secretion has been proven involves more than just "a mere statement" of irreparable injury.[247]

---

243. *Id.* at 222–23. According to United States *ex rel.* Taxpayers Against Fraud v. Link Flight Simulation Corp., 722 F. Supp. 1248 (D. Md. 1989):

> This was simply dicta, superfluous to the Court's holding . . . . Secondly, this passage, particularly the fourth sentence, read in the context of the Court's decision as a whole, refers to situations such as the one there presented where the principal relief sought is a permanent injunction restraining conduct and the motion for preliminary injunction seeks to restrain property to secure compliance with that principal relief. Finally, the last two sentences set forth a generalized "parade of horribles" which does not account for cases founded on fraud where there is a realistic threat of insolvency, as in *Deckert* . . . .

Id. at 1254.

244. 325 U.S. at 223.

245. *See, e.g., In re* Fredeman Litig., 843 F.2d 821, 824 (5th Cir. 1988) (citing *De Beers* for the "general federal rule of equity" that "a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment"); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 (5th Cir. 1987) (citing *De Beers* for the "general rule" that "such an injunction is not permissible to secure post-judgment legal relief in the form of damages").

246. Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 197 (3d Cir. 1990).

247. *Id.* (citation omitted).

Thus, neither the holding nor the dicta of *De Beers,* properly read, precludes the availability of preliminary injunctive relief to freeze assets in cases in which the plaintiff seeks money damages and in which she can demonstrate a genuine risk of irreparable injury.

3. United States v. First National City Bank

A third case, decided by the Supreme Court in 1965, actually casts more light on the availability of preliminary injunctive relief in money damages cases than either *Deckert* or *De Beers,* but oddly is cited less frequently. In *United States v. First National City Bank,*[248] the Court reviewed a preliminary injunction granted by the district court in an action by the United States against Omar, S.A., a Uruguayan corporation, for taxes due.[249] The government had sought a preliminary injunction against several banks and brokerage firms to restrain them from "selling, transferring, pledging, encumbering, disposing of or distributing any property or rights to property of defendant taxpayer Omar, S.A."[250] The government claimed that Omar's "principal assets" were in the hands of the banks and brokerage firms, and that "disposition of the . . . assets might make its lawful rights therein unenforceable and that it would be irreparably injured by removal of any such assets outside the power of the court."[251] By affidavit, the government demonstrated that Omar had, in fact, been liquidating its accounts in the United States and transferring the proceeds abroad.[252]

Concluding that it had "power, under Rule 65 of the Federal Rules of Civil Procedure, to grant a preliminary injunction . . . to prevent irreparable injury pending the determination of an action,"[253] and finding that the government "will be needlessly injured if recovery is prevented by further removal of defendant's assets from the jurisdiction of the court,"[254] the district court then considered the bank's argument that the court lacked power to affect property held outside the country. Noting that an "injunction does not operate *in rem,*"[255] the district court concluded that it could compel parties over whom it had personal jurisdiction to perform "acts with respect to property

248. 379 U.S. 378 (1965).

249. *Id.* at 379–80.

250. United States v. Omar, S.A., 210 F. Supp. 773, 774 (S.D.N.Y. 1962), *rev'd sub nom.* United States v. First Nat'l City Bank, 321 F.2d 14 (2d Cir. 1963), *cdhered to en banc,* 325 F.2d 1020 (2d Cir. 1964) (per curiam), *rev'd,* 379 U.S. 378 (1965).

251. *Id.*

252. *Id.*

253. *Id.* at 774–75.

254. *Id.* at 775.

255. *Id.*

located within or without its jurisdiction."[256] On the basis of the foregoing, the district court granted the preliminary injunction enjoining the banks and brokerage firms from transferring or distributing any of Omar's property.[257]

The First National City Bank of New York appealed and the Second Circuit reversed.[258] The "crucial factor"[259] was jurisdiction over Omar, the taxpayer: because the district court lacked in personam jurisdiction over Omar, it had to acquire quasi-in-rem jurisdiction by attaching its property, or the bank's debt to it. But under New York law, "accounts in a foreign branch bank are not subject to attachment or execution by the process of a New York court served in New York on a main office, branch or agency of the bank."[260] Thus, because the court lacked even quasi-in-rem jurisdiction over Omar, the "injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States."[261] The Second Circuit sitting en banc agreed with the panel.[262]

This time the government appealed, and the Supreme Court reversed. Noting the recent passage of a New York long-arm statute, which afforded personal jurisdiction over non-domiciliaries who transacted business in the state, the Court concluded that Omar could be served thereunder and that, accordingly, the temporary injunction would be judged "as of now and in light of the present remedy" that the long-arm statute provided.[263]

Whether or not the Montevideo branch of the bank was a "separate entity" for purposes of attachment under New York law was no longer germane because it was "not a separate entity in the sense that it [was] insulated from [the main branch's] managerial prerogatives."[264] An in personam order against the main branch in New York could reach the branch bank's affairs. Thus, the Court concluded:

> once personal jurisdiction of a party [the bank] is obtained, the District Court has authority to order it to 'freeze' property under its control, whether the property be within or without the United States . . . . The

256. *Id.*

257. *Id.* at 776.

258. United States v. First Nat'l City Bank, 321 F.2d 14 (2d Cir. 1963), *adhered to en banc,* 325 F.2d 1020 (2d Cir. 1964) (per curiam), *rev'd,* 379 U.S. 378 (1965).

259. *Id.* at 23.

260. *Id.* at 19.

261. *Id.* at 24.

262. 325 F.2d 1020 (2d Cir. 1964) (en banc) (per curiam).

263. United States v. First Nat'l City Bank, 379 U.S. 378, 382–83 (1965).

264. *Id.* at 384.

> temporary injunction issued by the District Court seems to us to be eminently appropriate to prevent further dissipation of assets.[265]

In the last paragraph of the opinion, almost as an afterthought, the Court distinguished *De Beers* and analogized *Deckert:*

> Unlike *De Beers* . . ., there is here property which would be 'the subject of the provisions of any final decree in the cause' [*quoting De Beers*]. We conclude that this temporary injunction is 'a reasonable measure to preserve the status quo' [*quoting Deckert*] pending service of process on Omar and an adjudication of the merits.[266]

Thus, the Court specifically upheld a preliminary injunction to freeze assets to secure a future money judgment.[267]

Read together, these cases confirm the availability of a preliminary injunction to freeze assets that may be the subject of an equitable decree at the conclusion of the litigation (*Deckert*) and strongly suggest the availability of such an injunction to freeze assets that may be levied upon to satisfy a future money judgment (*First National*).[268] Not even *De Beers* undermines the argument in favor of such relief. But if the precedent supports the issuance of the preliminary injunctions advocated here, why have the courts been so leery about granting them?

B. The "No Adequate Remedy at Law" Requirement

Courts often begin discussions regarding the availability of a preliminary injunction by noting that equitable relief is unavailable if an adequate remedy at law exists.[269] As this section of the Article will demonstrate, not only do the historical and revisionist rationales for the "no adequate remedy at law" requirement fail to justify a blanket preference for prejudgment attachment over preliminary injunction,

---

265. *Id.* at 384–85.

266. *Id.* at 385.

267. Although *First Nat'l City Bank* provides strong support for the availability of preliminary injunctions to freeze assets, it is distinguishable from the ordinary case in two relevant respects: first, the party seeking the injunction was the government, and the Court noted that "courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved," *id.* at 383 (quoting Virginia Ry. Co. v. Federation, 300 U.S. 515, 552 (1937)); second, a statute specifically authorized the district court to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws." *Id.* at 380 (quoting 26 U.S.C. § 7402(a)).

268. *Cf. supra* note 267.

269. *See, e.g.,* EBSCO Indus., Inc. v. Lilly, 840 F.2d 333 (6th Cir.), *cert. denied,* 488 U.S. 825 (1988); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 386 (7th Cir. 1984); Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19, 22 (1st Cir. 1984); Barbcuti v. Lysandrou, 559 So. 2d 648, 650 (Fla. Dist. Ct. App. 1990).

but the continued adherence to the rule without good cause has detrimental effects on judicial economy and efficiency.

1. Historical Rationale

The "no adequate remedy at law" requirement was adopted by the Chancellor not because he believed that the damages remedy at law was inherently superior to equitable relief, but because he wanted to reduce the tension that plagued the relationship between the Chancery and the common law courts during the seventeenth century.[270] By voluntarily refraining from assuming jurisdiction over cases that could be handled adequately by the law courts, the Chancellor acted to neutralize the friction between the two systems. With the merger of law and equity into a unitary system,[271] this historical reason for preferring legal remedies to equitable ones disappeared. Thus, unless other reasons justify judicial restraint in granting equitable relief, courts should not hesitate to grant preliminary injunctions to freeze assets even if prejudgment attachment is considered adequate.

2. Revisionist Rationales

Even with the merger of law and equity, courts continue to prefer legal remedies over equitable ones, and offer modern reasons to support the "no adequate remedy at law" requirement. None of these revisionist rationales justifies the judiciary's general preference for prejudgment attachment over preliminary injunctions to freeze assets.

a. Due Process Concerns

Courts refrain from granting preliminary injunctive relief out of fear that they may cause the defendant harm by enjoining her conduct without the benefit of a fully developed record.[272] This fear is legitimate. But, if anything, it counsels in favor of preliminary injunctions to freeze assets over prejudgment attachment orders. Over the course of the last twenty years, the Supreme Court has struck down as violative of due process several state statutes that authorized prejudgment attachment, garnishment, or replevin.[273] These statutes were held

270. 3 BLACKSTONE, *supra* note 49, at *442; F. W. MAITLAND, EQUITY: A COURSE OF LECTURES 6–7 (2d ed. 1936); E. Allan Farnsworth, *Legal Remedies for Breach of Contract,* 70 COLUM. L. REV. 1145, 1154 (1970).

271. *See* FED. R. CIV. P. 1 (stating that "these rules govern the procedure in . . . all suits of a civil nature whether cognizable as cases at law or in equity").

272. *See supra* notes 130–32 and accompanying text; Wasserman, *supra* note 10, at 660–63.

273. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (holding Georgia's prejudgment garnishment statute unconstitutional); Fuentes v. Shevin, 407 U.S. 67

unconstitutional because they permitted the seizure of the defendant's property without prior notice to the defendant,[274] without any judicial involvement,[275] without any evidentiary showing on the merits of the plaintiff's claim,[276] and without a sufficient showing of exigent circumstances.[277]

These problems are largely avoided in the preliminary injunction context. A judge, not a clerk, hears the request for a preliminary injunction or a temporary restraining order.[278] To obtain a preliminary injunction, the plaintiff must establish, by affidavit or oral testimony, the likelihood of the success of her claim on the merits; merely conclusory statements will not do.[279] Moreover, the plaintiff must

(1972) (holding Florida's and Pennsylvania's prejudgment replevin statutes unconstitutional); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (holding Wisconsin's prejudgment garnishment statute unconstitutional). Most recently, the Supreme Court held unconstitutional, as applied, the Connecticut statute that authorized prejudgment attachment of real property. *See* Connecticut v. Doehr, 111 S. Ct. 2105, 2113 (1991). *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (upholding constitutionality of Louisiana's prejudgment sequestration statute).

274. *See Doehr,* 111 S. Ct. at 2109 (prejudgment attachment authorized "without affording prior notice or the opportunity for a prior hearing"); *North Georgia Finishing,* 419 U.S. at 606 (account impounded "without notice or opportunity for an early hearing"); *Fuentes,* 407 U.S. at 75 (defendant "is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ"); *Sniadach,* 395 U.S. at 338 ("notice and an opportunity to be heard are not given before the *in rem* seizure of the wages").

275. *See North Georgia Finishing,* 419 U.S. at 606 (writ of garnishment "issued by a court clerk . . . without participation by a judicial officer"); *Fuentes,* 407 U.S. at 74 (noting that "court clerk" is authorized "to issue the writ summarily"); *Sniadach,* 395 U.S. at 338–39 (noting that "the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen").

276. *See Doehr,* 111 S. Ct. at 2114 ("statute demands inquiry into the sufficiency of the complaint, or, still less, the plaintiff's good-faith belief that the complaint is sufficient"); *North Georgia Finishing,* 419 U.S. at 607 (writ of garnishment issues "on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts . . . . The affidavit . . . need contain only conclusory allegations."); *Fuentes,* 407 U.S. at 74 (noting that applicant need only recite "in conclusory fashion that he is 'lawfully entitled to the possession' of the property").

277. *See Doehr,* 111 S. Ct. at 2115 (stating that "there was no showing that [defendant] was about to transfer or encumber his real estate"); *North Georgia Finishing,* 419 U.S. at 612 (noting that garnishment statute required only an "unrevealing assertion of apprehension of loss") (Powell, J., concurring in judgment); *Fuentes,* 407 U.S. at 93 (noting that replevin statutes did not require "a showing of immediate danger that a debtor will destroy or conceal disputed goods"); *Sniadach,* 395 U.S. at 339 (stating that "no situation requiring special protection to a state or creditor interest is presented by the facts").

278. FED. R. CIV. P. 65(b).

279. *See, e.g.,* Hoxworth v. Blinder, Robinson, & Co., 903 F.2d 186, 191 (3d Cir. 1990) (noting that district court "conducted a four-day evidentiary hearing on the preliminary injunction motion" and based its conclusion regarding likelihood of success on merits on the evidence adduced at the hearing); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987) (noting that district court had based its findings in support of preliminary injunction "on extensive evidence in the form of affidavits, several thousand pages of documents, business records of earnings, sworn statements, admissions of defendants and their answers to the complaint, and defendants' apparent efforts to block discovery"); *In re* DeLorean Motor Co., 755

demonstrate that she will suffer irreparable harm in the absence of preliminary relief; the mere desire to obtain security for her judgment is insufficient.[280] Once she has met these requirements for preliminary injunctive relief, she must post a bond.[281]

The most serious process problem, of course, is that a temporary restraining order may issue without any prior notice to the defendant.[282] Two responses to this problem can be made, one flip, one not. The flip answer is that a temporary restraining order is no more violative of the defendant's due process rights than an ex parte attachment order, both of which temporarily deprive the defendant of the use of her property without prior notice. Thus, the due process concerns, although legitimate, do not justify a blanket preference for attachment over injunctive relief because they underlie both prejudgment remedies.

The more compelling answer is that courts will grant temporary restraining orders without notice only if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition."[283] Moreover, the temporary restraining order will expire by its own terms within a specified period of time not to exceed ten

F.2d 1223, 1230 (6th Cir. 1985) (in concluding that likelihood of success on the merits was established, appellate court cited testimony establishing that there was a "reasonable possibility" that property in issue was part of the estate); Hiles v. Auto Bahn Federation, Inc., 498 So. 2d 997, 998 (Fla. Dist. Ct. App. 1986) (stating that moving party must "allege[] and prove[] facts entitling it to relief"); *cf. Doehr,* 111 S. Ct. at 2114 (disparaging the utility of the "skeletal affidavit" that would satisfy Connecticut's prejudgment attachment statute).

280. *See, e.g.,* Sampson v. Murray, 415 U.S. 61, 88 (1974) (questioning district court finding of irreparable harm where "the record . . . indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted . . . did not touch in any way upon considerations relevant to irreparable injury"); *Hoxworth,* 903 F.2d 186, 205 (stating that " 'establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a "clear showing of immediate irreparable injury" ' "; reviewing evidence to support district court's finding of irreparable harm) (citations omitted); *In re* Marriage of Schmidt, 455 N.E.2d 123, 126 (Ill. App. Ct. 1983) (concluding that "the allegations that respondent could hide his interests and that petitioner believe[d] that he would dissipate his assets [were] mere conclusions"; suggesting that a verified petition made only upon information and belief was insufficient to support a preliminary injunction); Bisca v. Bisca, 437 N.Y.S.2d 258, 262 (Sup. Ct. 1981) (declining to grant preliminary injunction when "there seems here to be no substantial evidence that defendant . . . is about to make transfers which would impair plaintiff's ability to obtain proper relief").

281. *See supra* notes 151–52 and accompanying text.

282. *See, e.g.,* FED. R. CIV. P. 65(b) (authorizing temporary restraining order "without written or oral notice to the adverse party or that party's attorney" in limited circumstances).

283. *Id.*

days,[284] and the defendant may appear and move to dissolve the restraining order expeditiously.[285] Although the Supreme Court has recently reaffirmed that even a temporary deprivation of property is within the purview of the due process clause,[286] it likewise noted that "a properly supported claim [of fraudulent transfer or dissipation of assets] would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected."[287] Thus, a properly supported application for a temporary restraining order, replete with evidence of irreparable tertiary harm, should pass due process muster, and certainly should create no greater problems in this regard than prejudgment attachment. Due process concerns, then, do not justify the continued preference of prejudgment attachment over preliminary injunctions to freeze assets.

b. Right to Jury Trial

Another modern rationale for preferring legal remedies over equitable ones is that a jury will decide claims seeking the former, while a judge will hear those seeking the latter.[288] Judicial respect for the right to a jury trial—a right of constitutional dimension[289]—counsels in favor of legal remedies over equitable ones.

Again, this revisionist rationale for the "no adequate remedy at law" requirement fails to obtain in the context of preliminary injunctions to freeze assets. A judge (or clerk) rather than a jury will hear the request for a prejudgment attachment[290] as well as the preliminary injunction, so respect for the right to a jury trial can play no role in

284. *Id.*

285. *Id.*

286. Connecticut v. Doehr, 111 S. Ct. 2105, 2115 (1991) (stating that " 'the Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' ") (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).

287. *Id.* (citing Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974); *Fuentes*, 407 U.S. at 90–92; Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969)); *see also* United States v. Musson, 802 F.2d 384, 386–87 (10th Cir. 1986) (upholding against due process challenge a restraining order in aid of forfeiture under criminal law issued without a hearing after indictment); United States v. Keller, 730 F. Supp. 151, 162–63 (N.D. Ill. 1990) (same).

288. Wasserman, *supra* note 10, at 658.

289. The Seventh Amendment preserves the right to a jury trial "[i]n Suits at common law." U.S. CONST. amend. VII.

290. *See, e.g.*, CAL. CIV. PROC. CODE § 484.090 (a) (West Supp. 1991) ("the court . . . shall issue a right to attach order"); CONN. GEN. STAT. ANN. § 52-278e (West 1991) ("the court or a judge . . . may allow the prejudgment remedy to be issued by an attorney without hearing"); FLA. STAT. ANN. § 76.03 (West 1987) ("attachments shall be issued by a judge of the court"); ILL. STAT. ANN. ch. 100, ¶ 4-104 (Smith-Hurd 1983) ("the court . . . shall enter an order for attachment").

deciding between prejudgment attachment and preliminary injunction. Moreover, the ultimate merits of the plaintiff's claim against the defendant will be resolved by a jury even if a preliminary injunction issues,[291] and the findings made at the preliminary injunction stage will not bind this jury.[292] Thus, as the Supreme Court has stated, the right to a jury trial "does not . . . interfere with the District Court's power to grant temporary relief pending a final adjudication on the merits,"[293] and therefore should not influence the choice between a prejudgment attachment and preliminary injunction.

c. Intrusiveness of Injunctions

Courts typically view equitable remedies as more intrusive than legal remedies both because the former may command the defendant to engage in affirmative conduct,[294] and because they are enforceable by contempt proceedings, which threaten imprisonment.[295] These rationales for preferring legal remedies fail in the context of preliminary relief to prevent tertiary harm because preliminary injunctions to freeze assets are not very intrusive, and because the legal remedy, attachment, is far more intrusive.[296]

The preliminary injunction to freeze assets will typically be a prohibitory injunction rather than a mandatory one; it will bar the

---

291. Wasserman, *supra* note 10, at 659 (citing Friends For All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 831–32 (D.C. Cir. 1984)).

292. *Id.* at 659 n.137 (citing University of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1139 (7th Cir. 1984); 11 WRIGHT & MILLER, *supra* note 116, § 2943).

293. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 n.20 (1962) (dicta).

294. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 905 (1st Cir. 1988) (noting, in dicta, "the law's typical reluctance to force private citizens to act"), *cert. denied,* 488 U.S. 1043 (1989); Lumley v. Wagner, 42 Eng. Rep. 687, 693 (1852) (stating that "beyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract," which bound defendant to sing at plaintiff's theatre for three months).

295. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 600 n.5 (1984) (Blackmun, J., dissenting) (noting that "[a]n enjoined party is required to obey an injunction issued by a federal court . . . even if the injunction turns out . . . to have been erroneous, and failure to obey such an injunction is punishable by contempt"); Califano v. Yamasaki, 442 U.S. 682, 705 (1979) (stating that the Secretary of Health, Education and Welfare's duty to comply with injunctions is enforceable by contempt); Laycock, *supra* note 119, at 698–99 (noting that courts "will not enforce money judgments with the contempt power" because of "our aversion to imprisonment for debt; the adequacy of the legal remedy is irrelevant"); Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction,* 33 U. FLA. L. REV. 346, 357 (1981) (noting that "resort to coercive imprisonment may amount to incarceration for a civil debt"); *cf. In re* Feit & Drexler, Inc., 760 F.2d 406, 414 (2d Cir. 1985) (noting that defendant had been cited for civil contempt and imprisoned to coerce compliance with a preliminary injunction that required her to deliver all of her deliverable property to her attorney as escrow agent).

296. *See supra* part II.C.3.

defendant from dissipating her assets. To the extent it requires the defendant to undertake any affirmative action at all—it may order the defendant to return to the state property already removed—the preliminary injunction to freeze assets will not require the defendant to engage in any conduct that could be perceived as offensive or repugnant. Thus, while the preliminary injunction will act in personam, it will not place "substantively unacceptable limitations on [the defendant's] personal freedom."[297]

Although a defendant who violates a preliminary injunction may be held in contempt and subject to imprisonment, the sanction will not be available merely for failing to satisfy the final money judgment; it will not be akin to imprisonment for debt. Rather, the defendant will be sanctioned for violating a court order that barred her from dissipating assets the court had already determined were not needed for subsistence.[298] Weighing the intrusiveness of imprisonment in these circumstances, which would be felt only by defendants who intentionally flouted preliminary injunctions to freeze assets, against the inevitable intrusiveness of attachment,[299] which would be felt by all defendants deprived of the possession and use of their property, it is difficult to see why the legal remedy should be automatically preferred.

d. Administrability

Especially when considering the availability of structural injunctions, courts hesitate to grant equitable relief because they fear that they will be overwhelmed by administrative tasks and oversight responsibilities.[300] These concerns have no place in the choice between preliminary injunctions to freeze assets and attachment orders, however. In both situations, the court will have to consider first whether preliminary relief should issue at all, and, if so, what property of the defendant's will be attached or frozen.[301] In the attachment setting, the judicial machinery will then have to be deployed to seize the goods and safely keep them.[302] In the prelimi-

297. Anthony T. Kronman, *Specific Performance,* 45 U. CHI. L. REV. 351, 372 (1978).

298. *See supra* note 155 and accompanying text.

299. *See supra* part II.C.3.

300. Wasserman, *supra* note 10, at 656 (citing cases and 11 WRIGHT & MILLER, *supra* note 116, § 2944 (noting "the belief that awards of equitable remedies potentially are more burdensome on the courts than damage remedies because of difficulties in drafting, administering and enforcing them")).

301. The availability of preliminary injunctive relief to freeze assets should not increase the demand for interim relief, as the showing required to obtain an injunction will be more rigorous than that presently required to obtain an attachment order. *See supra* parts II.A and III.

302. *See supra* notes 97–98 and accompanying text.

nary injunction context, on the other hand, no judicial effort will be required to implement the injunction.

Of course, judicial resources may be needed to enforce the injunction, but they should not be great. The plaintiff will have every incentive to police the defendant's behavior and to report noncompliance to the court. The plaintiff may actually reduce the likelihood of violation by notifying banks and securities firms with which the defendant has accounts that an injunction has been entered against the defendant.[303] Although the *Federal Rules of Civil Procedure* do not appear to authorize the plaintiff to discover "facts about a defendant's financial status . . . prior to judgment with execution unsatisfied,"[304] arguably such matters are "relevant to the subject matter involved in the pending action"[305] once the court has issued a preliminary injunction against dissipation of assets. Even if such discovery is not technically authorized by the rules, the court should have authority under the All Writs Act to order discovery (to be taken by the plaintiff) reasonably tailored to ensure compliance with the preliminary injunction.[306] If

303. This procedure has enhanced compliance with *Mareva* injunctions issued in England. *See supra* note 174.

304. FED. R. CIV. P. 26 advisory committee notes to 1970 amendments. *Compare* Ranney-Brown Distribs., Inc. v. E.T. Barwick Indus., Inc., 75 F.R.D. 3, 5 (S.D. Ohio 1977) (stating that "[o]rdinarily, Rule 26 will not permit the discovery of facts concerning a defendant's financial status, or ability to satisfy a judgment, since such matters are not relevant, and cannot lead to the discovery of admissible evidence") *and* Gangemi v. Moor, 268 F. Supp. 19, 21–22 (D. Del. 1967) (denying discovery of defendant's assets prior to judgment) *with* Miller v. Doctor's Gen. Hospital, 76 F.R.D. 136, 140 (W.D. Okla. 1977) (stating that "where punitive damages are claimed, it has been generally held that the Defendant's financial condition is relevant to the subject matter of the action and is thus a proper subject of pretrial discovery") *and* Holliman v. Redman Development Corp., 61 F.R.D. 488, 490–91 (D.S.C. 1973) (holding that a defendant's pecuniary condition is relevant on the issue of punitive damages). *Cf.* FED. R. CIV. P. 69(a) (stating that "in aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held").

305. FED. R. CIV. P. 26(b).

306. *See* 28 U.S.C. § 1651(a) (1988) (providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); Kemp v. Peterson, 940 F.2d 110, 113 (4th Cir. 1991) (affirming district court order that required defendants to submit biweekly or monthly reports itemizing their business and personal expenses so the magistrate could monitor their compliance with a preliminary injunction freezing their assets; stating that "a court is authorized to issue all orders necessary to enforce orders it has previously issued in the exercise of its jurisdiction"); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 557 (5th Cir. 1987) (upholding preliminary injuction that required "the defendants . . . to maintain itemized monthly accountings of their expenditures"); New York v. Shore Realty Corp., 763 F.2d 49, 53 (2d Cir. 1985) (upholding district court order granting discovery in aid of a permanent injunction, regardless of whether such discovery was authorized by FED. R. CIV. P. 69; relying on § 1651 for the proposition that "the District Court had ample authority to issue all orders necessary for the enforcement of its [injunction]"); *see also infra* notes 393–96 and accompanying text (discussing the availability of discovery in

discovery is permitted, the plaintiff will be well-situated to police compliance with the injunction.

In the event the plaintiff alleges that the defendant has violated the preliminary injunction, the court will have to hold a contempt hearing and may have to impose sanctions. But these burdens, which will be borne only in instances of noncompliance, probably do not outweigh the burdens routinely borne in attachment proceedings, which require the seizure and maintenance of the defendant's property in all cases. Thus, administrability concerns do not justify a blanket preference of prejudgment attachment over preliminary injunctions to freeze assets.

e. Jurisdiction and Federalism

The "no adequate remedy at law" requirement "is often invoked to serve its original purpose of allocating jurisdiction among decisionmakers."[307] Within the state system, where the choice is between attachment under state statute and a preliminary injunction governed by state equitable principles, jurisdictional concerns should not matter so long as the courts are careful not to use equity to evade legislatively crafted limitations on the attachment remedy.[308]

In the federal system, on the other hand, the choice is between attachment under state law pursuant to Rule 64[309] and preliminary injunctive relief governed by federal equitable principles pursuant to Rule 65.[310] Here, jurisdictional/federalism issues can crop up, but are masked by the "no adequate remedy at law" requirement.

England in aid of the *Mareva* injunction); United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988) (upholding district court order in criminal RICO action, which directed a partnership formed by defendants to allow a government-appointed monitor to review at least twice monthly the partnership's books and records to ensure compliance with a pre-conviction restraining order).

307. Laycock, *supra* note 119, at 732.

308. *See supra* part II.C.1 and *infra* part IV.C.

309. Rule 64 (which has not been amended since it was originally adopted in 1938, 11 WRIGHT & MILLER, *supra* note 116, § 2931; 7 JAMES WM. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 64.01[1] (1991)) provides that

> at the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought.

FED. R. CIV. P. 64.

310. Prior to the adoption of the Federal Rules of Civil Procedure, equity jurisdiction in the federal courts was drawn from English equity procedure and was governed by the federal courts' own Equity Rules. *See* 2 MOORE & LUCAS, *supra* note 309, ¶ 2.03; 11 WRIGHT & MILLER, *supra* note 116, § 2941; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 931 (1987). The Supreme Court promulgated the first set of federal equity rules in 1822, and a second set in 1843.

The issue should not be whether legal or equitable remedies are preferable, but rather, whether state or federal law should govern the availability of preliminary relief in federal court. Professors Wright and Miller conclude that:

> [A federal] plaintiff should be able to obtain a temporary restraining order or a preliminary injunction to preserve the status quo even though he is suing to enforce a state right and those devices are not provided for by the forum's law or are available only upon a different showing than is required under Rule 65.[311]

Professors Moore and Lucas, on the other hand, suggest that under *Erie:*

> [T]he parties [in a diversity case] are entitled to the same substantial treatment they would get in the same court. If, for example, the Delaware state court will not give the coercive relief of an injunction but will award damages then the plaintiff in the federal court across the street is entitled only to damages, and the defendant should not be subjected to an injunction.[312]

Resolution of this question requires consideration of the "relations between state and federal courts," not of "relations between law and

---

2 MOORE & LUCAS, *supra* note 309, ¶ 2.03 (citing 7 Wheat. v (1822) and 17 Pet. lxi (1842)). The citation to 17 Pet. is incorrect, as the second set of equity rules were published at 42 U.S. (1 How.) lxi (1843).

Largely taken from Equity Rule 73 and sections of the Clayton Act, 38 Stat. 738, 28 U.S.C. §§ 381-383 (1940), *superseded by* FED. R. CIV. P. 65, *repealed by* Judicial Code Revision Act of 1948, Rule 65 restates the former federal practice in injunction actions. 7 MOORE & LUCAS, *supra* note 309, ¶ 64.03; 11 WRIGHT & MILLER, *supra* note 116, § 2941.

311. 11 WRIGHT & MILLER, *supra* note 116, § 2943 at 390–91 (relying on Hanna v. Plumer, 380 U.S. 460 (1965), and the proposition that "the application of the federal rule to requests for preliminary injunctions or temporary restraining orders would not impair state interests in any substantial way").

312. 2 MOORE & LUCAS, *supra* note 309, ¶ 2.09; *accord* 7 MOORE & LUCAS, *supra* note 309, ¶ 64.04[3], at 64–21, ¶ 65.18[1], at 65–170.

In all events, a preliminary injunction to freeze assets in a diversity action is not a "remed[y] providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," and therefore is not within the purview of Rule 64. 7 MOORE & LUCAS, supra note 309, ¶ 64.04[3], at 64–19 to 64–21 (concluding that "the equitable injunctive remedy is not a 'corresponding' or 'equivalent' remedy within the intendment of Rule 64"; noting that the "statutory predecessor of Rule 64 dealt only with provisional remedies available in actions at law"); *id.* ¶ 65.02[2] (stating that "Rule 64 does not deal with the equitable remedy of injunction. Therefore, state law is not applicable to the equitable injunctive remedy by virtue of Rule 64."). *But see In re* Feit & Drexler, Inc., 760 F.2d 406, 415 n.2 (2d Cir. 1985) (raising the possibility that a preliminary injunction to freeze assets could be construed as a "remed[y] providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," in which case the federal court arguably should apply the state law standard for determining whether or not such an injunction is available in the circumstances of the case).

equity."[313] The "no adequate remedy at law" requirement has no place in this inquiry, and only confuses the proper question regarding the equitable powers of federal courts in diversity cases.[314]

3. *Judicial Economy and Efficiency*

Given the number of published opinions that consider the issue, it appears that courts take the "no adequate remedy at law" requirement seriously and therefore spend enormous amounts of time considering whether they even have authority in money damages actions to issue preliminary injunctions to freeze assets.[315] In many of these cases, the plaintiff can make a strong showing that some interim relief is needed to prevent active tertiary harm. In cases where an attachment order is the most likely alternative, a defendant's opposition to preliminary injunctive relief is understandable only to delay the grant of relief, to force the plaintiff to expend additional resources to obtain necessary relief, or to obfuscate the issue sufficiently to avoid the grant of relief altogether. In cases where the plaintiff can make a strong showing on all four requirements for preliminary injunctive relief, it is difficult to understand "why we have a rule that encourages the parties to litigate"[316] the question of authority to issue equitable relief.

Judicial resources are expended not only on the primary question of whether courts have authority to issue preliminary injunctions in money damages cases, but also by appellate courts on the secondary question of appealability. Again, based on the number of published opinions that address the issue, appellate courts apparently spend substantial amounts of time first characterizing the relief in issue as an attachment or a preliminary injunction,[317] and then, depending upon

313. Laycock, *supra* note 119, at 736.

314. A sixth revisionist rationale for the "no adequate remedy at law requirement" will be addressed separately in part IV.C. because it has been specifically relied upon by courts that have denied preliminary injunctions to freeze assets.

315. *See, e.g., supra* notes 187, 188, and 190 (citing cases).

316. Laycock, *supra* note 119, at 723.

317. *See, e.g.,* General Motors Corp. v. Gibson Chem. & Oil Corp., 786 F.2d 105, 108 (2d Cir. 1986) (declining to decide whether an order confirming an ex parte order authorizing the seizure of goods, which allegedly infringed plaintiff's trademark, was "equivalent" to a preliminary injunction or an order of attachment because there was no showing that the order might have a "serious, perhaps irreparable, consequence" and could be "effectually challenged" only by immediate appeal; holding that seizure order was not reviewable under collateral order doctrine); Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 45–47 (1st Cir. 1986) (characterizing an order, which enjoined defendant from disposing of or encumbering $4 million of its assets and directing it to set aside that amount in an interest-bearing account, as a preliminary injunction appealable under § 1292(a)(1) because it created a "significant constraint," it had been treated by district court and parties as an injunction, and it ordered defendant to refrain from certain conduct and to affirmatively take certain conduct); *In re* Feit & Drexler, Inc., 760 F.2d 406, 412

the classification, deciding whether or not an interlocutory appeal may be taken from the grant, denial, or vacatur of the order.[318] It is unfor-

(2d Cir. 1985) (characterizing an order, which continued prior orders that "prohibited a party from transferring or disposing of any of her property, wherever located, and which ordered her to deliver all of her deliverable property, wherever located, to her attorney in New York as escrow agent," as an appealable preliminary injunction); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152, 154 (2d Cir. 1977) (holding that district court order, which required defendant to bring stock certificates into the state from their locations in other states and countries so that they could be attached, was an injunction and therefore appealable), *cert. denied,* 434 U.S. 1046 (1978); Rosenfeldt v. Comprehensive Accounting Serv. Corp., 514 F.2d 607, 610–11 (7th Cir. 1975) (holding that portions of district court order, which restrained counterclaim-defendants from soliciting and collecting fees from specified clients and required them to deliver accounts to counterclaim-plaintiff, were the "functional equivalents" of a writ of attachment or replevin, and therefore were not appealable; but portion that restrained counterclaim-defendants from instituting an action in bankruptcy court was an appealable preliminary injunction); United States v. Estate of Pearce, 498 F.2d 847, 850 (3d Cir. 1974) (Gibbons, J., dissenting) (concluding that denial of motion to quash prejudgment sequestration was appealable under § 1292(a)(1) because "it is functionally identical with an injunction against transfer or the appointment of a pendente lite receiver").

318. Although both state and federal appellate courts have routinely permitted parties to appeal from the grants, denials or vacaturs of preliminary injunctions that enjoin parties from dissipating assets, *see, e.g.,* Illinois *ex rel.* Hartigan v. Peters, 861 F.2d 164 (7th Cir. 1988); *Feit,* 760 F.2d at 411–12; Ettridge v. TSI Group, Inc., 548 A.2d 813, 817 (Md. Ct. Spec. App. 1988); Federal Nat'l Mortgage Ass'n v. O'Donnell, 446 So. 2d 395, 399 (La. Ct. App. 1984), some federal courts have first grappled with the question whether the movant must establish that deferring appellate review would cause irreparable injury. *See, e.g.,* Holmes v. Fisher, 854 F.2d 229, 231 (7th Cir. 1988); *Gibson,* 786 F.2d at 108.

Federal courts have generally held that district court orders denying a prejudgment attachment (or vacating an attachment) are appealable as final "collateral orders" within the meaning of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), *see, e.g.,* Interpool Ltd. v. Char Yigh Marine (Panama) S.A., 890 F.2d 1453 (9th Cir. 1989); American Oil Co. v. McMullin, 433 F.2d 1091, 1096 (10th Cir. 1970); Chilean Line, Inc. v. United States, 344 F.2d 757, 759 (2d Cir. 1965); *see also* 11 WRIGHT & MILLER, *supra* note 116, § 2936, but that district court orders granting an attachment (or refusing to vacate one) are not appealable. *See, e.g.,* Perpetual Am. Bank v. Terrestrial Sys., Inc., 811 F.2d 504, 505–06 (9th Cir. 1987) (per curiam); Inter-Regional Fin. Group, Inc. v. Hashemi, 562 F.2d 152, 154 (2d Cir. 1977), *cert. denied,* 434 U.S. 1046 (1978); W.T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976); *see also* 11 WRIGHT & MILLER, *supra* note 116, § 2936.

State court rulings on the appealability of attachment orders are even more difficult to categorize. *See* M.L. Schellenger, Annotation, *Appealability, Prior to Final Judgment, of Order Discharging or Vacating Attachment or Refusing to Do So,* 19 A.L.R.2D 640 (1951 & Later Case Service 1982 & Supp. 1991) (reviewing and attempting to categorize state court decisions regarding appealability of orders regarding prejudgment attachment). Some states permit an immediate appeal from the grant, denial, confirmation or vacatur of an attachment order, either by characterizing such judicial action as "final," *see, e.g.,* CONN. GEN. STAT. ANN. § 52-278l (West Supp. 1991), or by authorizing an appeal irrespective of finality. *See, e.g.,* N.M. STAT. ANN. § 42-9-34 (Michie 1978); N.Y. CIV. PRAC. L. & R. § 5701(a)(2)(i) (McKinney 1978); OHIO REV. CODE ANN. § 2715.46 (Anderson Supp. 1990); PA. R. APP. P. 311(a)(2). Other states, in deciding questions of appealability, distinguish between orders granting or confirming or refusing to vacate attachments, on the one hand, and orders denying or vacating attachments, on the other. *See, e.g.,* CAL. CIV. PROC. CODE § 904.1(e) (West Supp. 1991); IOWA CODE ANN. § 639.65 (West 1950); International Typographical Union Negotiated Pension Plan v. Ad Compositors, Inc., 191 Cal. Rptr. 227, 228 n.1 (Cal Ct. App. 1983); Hamilton v. Hanks, 309 So.

tunate that the confusion regarding the availability of preliminary injunctions to freeze assets has forced both trial and appellate courts to "squander[ ] on jurisdictional matters time needed to decide the case on the merits."[319] When a plaintiff seeking interim relief from active tertiary harm can satisfy all of the requirements for preliminary injunctive relief and the reasons for preferring legal remedies over equitable ones fail to obtain, this expenditure of scarce judicial resources on "jurisdictional matters" is difficult to justify.

C. *Exclusivity and Evasion*

"Litigants sometimes appeal to a court's general equity powers to evade more particular rules of law."[320] In fact, several courts have denied preliminary injunctions to freeze assets because they concluded that the plaintiff was seeking injunctive relief in an effort to circumvent particular statutory requirements contained in the prejudgment attachment statute, or because the plaintiff was attempting to evade the statute altogether by seeking relief that was not authorized thereby. Concluding that the attachment statute offers exclusive relief from tertiary harm, some courts have declined to grant preliminary injunctions to freeze assets.[321]

In some states, concern that the legislature intended attachment to be an exclusive remedy will be easily allayed by reference to other statutes enacted by the same legislature, which permit courts to grant preliminary injunctions to prevent the dissipation of assets.[322] Where

2d 229 (Fla. Dist. Ct. App. 1975); Stahlman Lumber Co. v. Ferrill, 320 So. 2d 331, 333 (La. Ct. App. 1975); Casco N. Bank, N.A. v. Moore, 583 A.2d 697, 698–99 (Me. 1990); McQuade v. E.D. Sys. Corp., 570 S.W.2d 33, 34–35 (Tex. Civ. App. 1978); Bowden v. W.H. Hunt, 571 S.W.2d 550, 550–51 (Tex. Civ. App. 1978).

319. Holmes v. Fisher, 854 F.2d 229, 231 (7th Cir. 1988) (refusing to read into § 1292(a)(1) a requirement that appellant show that denial of immediate review would cause irreparable injury when the order under review unambiguously denied an injunction). If trial courts were free to issue preliminary injunctions to freeze assets without regard to the adequacy of the legal remedy, they might be more willing to characterize the relief they grant as a preliminary injunction. If they were, appellate courts would waste less time on the preliminary question of appealability since the availability of an interlocutory appeal from the grant or denial of a preliminary injunction is relatively well-established. *See supra* note 318.

320. Laycock, *supra* note 119, at 752. Laycock argues, and this author agrees that "the real question in these cases is whether the more particular law controls," not "whether the less particular theory is legal or equitable." *Id.* at 752, 754.

321. *See, e.g., supra* note 191 (citing cases).

322. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-1801 (1982) (authorizing injunction "when, pending litigation, it appears that a party . . . threatens or is about to do some act . . . in violation of the rights of the applicant, which would tend to render the judgment ineffectual"); CAL. CIV. PROC. CODE §§ 486.030, 486.050, 486.070 (1979) (permitting court to grant a temporary protective order in lieu of writ of attachment if it "would be in the interest of justice and equity to the parties"; such order may prohibit transfer by defendant only of her property in the state

express statutory authority exists for the grant of a preliminary injunction to prevent active tertiary harm, courts err in concluding that attachment is the exclusive prejudgment remedy.

Nevertheless, concerns about evasion of legislatively enacted policy may justify the denial of preliminary injunctive relief in particular cases. If, for example, a plaintiff seeks a preliminary injunction to freeze assets rather than attachment in an effort to enjoin the defendant's use of her wages (which would be exempt from attachment), a court could legitimately decline to "undermine[ ] a policy that the court or legislature is committed to preserving,"[323] and refuse to grant the preliminary injunction.[324] In enacting the wage exemption, the legislature intended to shield some of the defendant's assets from prejudgment orders, and courts should honor that legislative policy.

Likewise, if a plaintiff seeks a preliminary injunction under a rule that permits the court to waive the bond requirement, and if the attachment statute requires a bond in an amount equal to twice the value of the property attached, a court might legitimately refrain from granting the injunction (or at least from waiving the bond requirement). In enacting the double bond requirement for attachment, the legislature intended to protect defendants from any harm they might suffer as a result of an erroneous attachment and perhaps to deter plaintiffs from seeking prejudgment attachment. To permit the plaintiff to obtain protection from tertiary harm without complying with any bond requirement would undermine this legislative policy.

If, on the other hand, a plaintiff seeks to freeze property that the defendant has already taken overseas with the intent to defraud creditors, prejudgment attachment will be ineffective because it cannot reach property outside the state. In providing that the sheriff can

---

subject to levy on writ of attachment); IDAHO R. CIV. P. 65(e)(4) (preliminary injunction may be granted "[w]hen it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of his property with intent to defraud the plaintiff"); MINN. STAT. ANN. §§ 570.026, 571.932 (West 1988 & Supp. 1991) (if court finds that plaintiff has made requisite showing for attachment or garnishment but declines to issue order because harm to defendant might outweigh harm to plaintiff without attachment, or for other reason, court may restrain defendant from selling, disposing, or otherwise encumbering the property); N.D. CENT. CODE § 32-06-02 (1976) (authorizing temporary injunction "[w]hen, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors").

323. Laycock, *supra* note 119, at 754.

324. *See, e.g.*, Allstate Sales & Leasing Co. v. Geis, 412 N.W.2d 30, 33 (Minn. App. 1987) ("By obtaining injunctive relief rather than proceeding under the [attachment] statute, Allstate was able, in effect, to attach appellants' assets without making the showing required by the statute or affording appellants the statute's protections. Such injunctive relief frustrates the intent of the legislature.").

attach only property within the county or state, the legislature most probably was cognizant of the limited authority of the sheriff and the enforcement difficulties that would result if the statute purported to authorize extraterritorial attachment. It is less likely that the legislature intended to shield property fraudulently taken overseas from any prejudgment remedy. In such a case, then, the plaintiff's invocation of equity would "fill[ ] a gap or correct[ ] an injustice that the court is empowered to correct . . . . This is indeed a traditional function of substantive equity."[325] Thus, even though attachment could not reach the assets removed from the state, a mandatory preliminary injunction to require the defendant to bring the assets back would not undercut any state policy or circumvent any procedural protection. It would, however, provide the plaintiff with protection against active tertiary harm that would not be available using the prejudgment attachment remedy. On these facts, the preliminary injunction probably should issue.

Concerns about evasion or circumvention of legislative policy will not justify an automatic preference in all cases for the legal remedy, prejudgment attachment. Courts will have to "focus directly on the . . . substantive policies"[326] embodied in the attachment statutes, and ask whether issuance of a preliminary injunction in lieu of an attachment order would undercut those policies. Only in cases where the risk of evasion is real should courts refuse to grant preliminary injunctions out of respect for the attachment statutes.

V. USE OF PRELIMINARY INJUNCTIONS TO SECURE MONEY JUDGMENTS IN OTHER CONTEXTS

The use of preliminary injunctions to avoid tertiary harm is not unprecedented. In cases in which the plaintiff's underlying claim is an equitable one—where she asserts a preexisting interest in the property subject to dispute, for example—American courts have routinely issued preliminary injunctions to freeze the assets to secure a future equitable decree.[327] Likewise, courts in matrimonial litigation have issued preliminary injunctions to prevent a spouse from dissipating assets during the pendency of a divorce proceeding. Finally, even in actions at law for money damages only, courts in England are authorized to issue preliminary injunctions called *Mareva* injunctions, which

325. Laycock, *supra* note 119, at 754.

326. *Id.*

327. *See supra* note 8.

bar the dissipation of assets pending trial. These three classes of cases demonstrate the efficacy of preliminary injunctions to freeze assets.

A. The American Experience With Preliminary Injunctions to Freeze Assets

1. Preliminary Injunctions in Equitable Actions Seeking the Return of Money

Courts have often issued preliminary injunctions to freeze assets in actions in which the plaintiff stated a claim for final equitable relief and alleged irreparable tertiary harm.[328] In declining to issue a preliminary injunction to freeze assets in a case in which the plaintiff sought a remedy at law, money damages, the Fifth Circuit Court of Appeals distinguished the equity cases:

> The cases cited by the plaintiffs and the district court upholding preliminary injunctions freezing assets fall into categories none of which is applicable here. First, as the Court stated in *De Beers,* an injunction may issue to protect assets that are the subject of the dispute or to enjoin conduct that might be enjoined under a final order.[329]
>
> * * * *
>
> In a number of other cases, most of which the district court cited, this court and others have upheld preliminary injunctions to preserve the particular assets in dispute in actions that were essentially in rem.[330]

328. *See supra* note 8.

329. *In re* Fredeman Litig., 843 F.2d 821, 827 (5th Cir. 1988) (citing Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980) (affirming grant of preliminary injunction to enjoin movement of goods even if plaintiff's ultimate remedy were limited to damages for breach of contract because unless goods could be levied upon, money judgment would be unenforceable; but holding that plaintiff had remedies other than damages available, including replevin); USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97–98 (6th Cir. 1982) (upholding preliminary injunction that froze defendant's assets because it secured plaintiffs' claim for restitution and a constructive trust, not treble damages under RICO; citing *Deckert* for the proposition that "the power of the district court to preserve a fund or property which may be the subject of a final decree is well established")); *see also, e.g.,* Republic of Philippines v. Marcos, 862 F.2d 1355, 1361, 1364 (9th Cir. 1988) (en banc), *cert. denied,* 490 U.S. 1035 (1989); Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987); Republic of Philippines v. Marcos, 806 F.2d 344, 355–56 (2d Cir. 1986); *In re* De Lorean Motor Co., 755 F.2d 1223, 1227 (6th Cir. 1985); Federal Trade Comm'n v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982); Taxpayers Against Fraud v. Link Flight Simulation Corp., 722 F. Supp. 1248, 1255 (D. Md. 1989); Korn v. Ambassador Homes, Inc., 546 So. 2d 756, 757 (Fla. Dist. Ct. App. 1989) (per curiam); Levitt v. Maryland Deposit Ins. Fund Corp., 505 A.2d 140, 147 (Md. App. 1986).

330. *Fredeman,* 843 F.2d at 827 (citing Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (an admiralty action, modifying and affirming preliminary injunction that enjoined individuals from interfering with plaintiff's search and salvage operations of 1622 Spanish sailing vessel); Meis v. Sanitas Serv. Corp., 511 F.2d 655, 658 (5th Cir. 1975) (an action to rescind a corporate merger agreement allegedly induced by

Although issuance of a preliminary injunction in these cases secures the final equitable relief sought—restitution, rescission or constructive trust—often the plaintiffs in these equitable actions seek nothing more than the return of a fund of money. Although a plaintiff's claim to money that was originally hers is theoretically different from a claim to money as damages only, the harm the plaintiff suffers in the two actions as a practical matter is identical if the defendant dissipates the fund: she suffers irreparable tertiary harm because she can never collect on her judgment or enforce her decree. Thus, the interim equitable measures used to prevent tertiary harm to the plaintiff seeking final equitable relief should serve as models for the preliminary injunctions to freeze assets in money damages cases advocated here.

2. *Preliminary Injunctions in Divorce Actions*

Courts in matrimonial actions have commonly issued preliminary injunctions to freeze assets, and thus prevent spouses from transferring or encumbering their property during the pendency of the divorce litigation.[331] Although many states authorize such preliminary relief by

misrepresentations, affirming grant of preliminary injunction that enjoined defendant purchaser from "removing any of the assets, books and records from the corporation which belonged to it immediately prior to the merger . . . [and] in any way handling corporate assets except as may be reasonably necessary in the ordinary course of business and in accordance with good corporate business practices"); Foltz v. U.S. News & World Rep., 760 F.2d 1300, 1309 (D.C. Cir. 1985) (directing the district court to reconsider request for preliminary injunction to restrain profit-sharing plan from distributing all its assets pending litigation of claim against plan; stating that "an equitable remedy designed to freeze the status quo, as opposed to creating a pool of resources from which members of the plaintiff class could draw prior to a determination of liability and the extent . . . of damages, would be entirely in keeping with the principles that undergird equity jurisprudence"), *on remand,* 613 F. Supp. 634 (D.D.C. 1985) (granting preliminary injunction against distribution of plan assets in an amount equal to the amount plaintiffs realistically could recover from the plan plus 6% prejudgment interest); Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986) (reversing denial of preliminary injunction to enjoin sale by member cooperative of its assets in action for permanent injunction barring sale)); *see also* People v. Superior Court, 264 Cal. Rptr. 28, 29 (Cal. Ct. App. 1989) (directing trial court to reconsider request for preliminary injunction to enjoin defense attorneys from disposing of monies paid to them by clients with "drug money"; noting that "the forfeiture action is not a suit for money damages, but an action for the return of property which, in this case, happens to be money").

331. 2 HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 15.6 (2d ed. 1987); JOANNE ROSS WILDER et al., PENNSYLVANIA FAMILY LAW PRACTICE AND PROCEDURE HANDBOOK § 12-2 (2d ed. 1989) (noting that "the court may issue injunctions and may attach property to prevent the disposition, alienation or encumbrance of property in order to defeat equitable distribution, alimony pendente lite, alimony, child and spousal support or similar award"). Courts in matrimonial actions also have authority to make awards of temporary alimony, 2 CLARK, *supra,* § 17.2, which, like preliminary injunctions that enjoin conduct, "prevent additional primary conduct that threatens secondary harm (i.e., cutting off support of the dependent spouse)." Wasserman, *supra* note 10, at 668.

statute,[332] courts have granted it without statutory authority, invoking "the inherent power of equity courts to give whatever incidental relief may be necessary to make their decrees effective."[333]

To obtain such preliminary relief, the dependent spouse must demonstrate that the supporting spouse intends to transfer the property and that the transfer would prejudice the dependent spouse's claim to the property either because the dependent spouse "had an interest in the property as such, or because it would disable the [supporting spouse] from making payments for alimony or support."[334] Thus, even where the dependent spouse does not claim a property interest in the assets, he or she may obtain a preliminary injunction to enjoin the supporting spouse from dissipating assets if they would be needed to satisfy the pending claim for alimony or support.[335] To the extent, then, that claims for alimony and money damages are analo-

332. 2 CLARK, *supra* note 331, § 15.6, at 92 n.2; *see, e.g.*, CAL. CIV. CODE § 4359 (West Supp. 1991) (authorizing issuance of ex parte orders to restrain transfer, encumbrance, hypothecation, concealment or disposition of property except in usual course of business or for necessities of life, and to require party to account for all extraordinary expenditures); ILL. ANN. STAT. ch. 40, ¶ 501(2) (Smith-Hurd Supp. 1991) (authorizing issuance of temporary restraining order or preliminary injunction only if motion is "accompanied by affidavit showing a factual basis" for the relief sought); N.Y. DOM. REL. LAW § 234 (McKinney 1986) (interpreted as permitting court to restrain a party from hiding or disposing of assets during pendency of matrimonial litigation; party seeking relief need not seek preliminary injunction per se, but must demonstrate that party to be restrained has done, or is threatening to do, an act that would prejudice movant's equitable distribution claim); UNIFORM MARRIAGE AND DIVORCE ACT § 304, 9A U.L.A. 201 (1987) (authorizing issuance of temporary injunction to restrain transfer, encumbrance, concealment or disposition of property except in usual course of business or for necessities of life and to require notification of any proposed extraordinary expenditures).

333. 2 CLARK, *supra* note 331, § 15.6 at 92–93 (citing National Automobile & Casualty Ins. Co. v. Queck, 405 P.2d 905 (Ariz. Ct. App. 1965); McRae v. McRae, 52 So. 2d 908 (Fla. 1951); Klajbor v. Klajbor, 75 N.E.2d 353 (Ill. 1947)); *see also* Pennington v. Fourth Nat'l Bank, 243 U.S. 269 (1917) (upholding preliminary injunction enjoining bank from paying out balance in account to husband pending determination of wife's suit for alimony; quasi-in-rem jurisdiction obtained by attaching defendant's property via preliminary injunction against bank).

334. 2 CLARK, *supra* note 331, § 15.6, at 94 (footnotes omitted); *see also* WILDER et al., *supra* note 331, § 12-3, at 117 (stating that "the standard for the grant or denial of requests for equitable relief under the [Pennsylvania] Divorce Code follows the law respecting equitable relief generally").

335. *See, e.g.*, Sandstrom v. Sandstrom, 565 So. 2d 914, 914 (Fla. Dist. Ct. App. 1990) (per curiam) (stating that wife may "seek to enjoin the husband's removal, concealment or fraudulent conveyance of his assets which may be part of her alimony award in the plan of equitable distribution"); Lupo v. Lupo, 366 So. 2d 932, 934 (La. Ct. App. 1978) (affirming grant of preliminary injunction that barred husband from alienating property even though there was "a dispute as to the separate or community nature of a portion of these funds"); Hempel v. Hempel, 30 N.W.2d 594, 599 (Minn. 1948) (stating that "in a divorce case, the court may issue a temporary injunction restraining the husband from disposing of his property and income during the pendency of the case, where it appears that contemplated transfers thereof would defeat the wife's claims to alimony"); Petrus v. Petrus, 199 N.E.2d 579, 581 (Ohio 1964) (stating that court has "full power and authority in domestic relations cases to preserve the status quo . . . until such

gous,[336] the preliminary injunctions to freeze assets that issue in divorce cases provide additional support for preliminary injunctions to freeze assets in money damages cases.

B. The English Experience with Mareva *Injunctions*[337]

Like American courts, English courts hesitated to grant any form of preliminary equitable relief in actions in which the plaintiff sought a money judgment as her final remedy.[338] In fact, no legal restraint whatsoever existed to inhibit concealment or dissipation of assets or

time as the court can dispose of the alimony or support problems *or* a division of property") (emphasis added).

In states that "permit the courts in divorce cases to divide all the property owned by either spouse, regardless of when or how acquired," 2 CLARK, *supra* note 331, § 16.1, this issue will not arise. *See also* UNIFORM MARITAL PROP. ACT § 4(b), 9A U.L.A. 108 (1987) (stating that "all property of spouses is presumed to be marital property").

336. The claims are analogous in that each seeks a transfer of money from one party to another without the transferee alleging any pre-existing interest in the money sought to be transferred. To the extent that "alimony can also serve as compensation to the [spouse] for faithful service during marriage," 2 CLARK, *supra* note 331, § 17.5, at 255, a claim for alimony is analogous to a claim seeking money damages for breach of contract.

337. For a thorough discussion of *Mareva* injunctions, see MARION HETHERINGTON, MAREVA INJUNCTIONS (1983); RICHARD N. OUGH, THE *MAREVA* INJUNCTION AND THE ANTON PILLER ORDER: PRACTICE AND PRECEDENTS (1987). For a discussion of *Mareva* injunctions in the arbitration context, see Shenton, *supra* note 174; David L. Zicherman, Note, *The Use of Pre-Judgment Attachments and Temporary Injunctions in International Commercial Arbitration Proceedings: A Comparative Analysis of the British and American Approaches*, 50 U. PITT. L. REV. 667 (1989).

Mareva injunctions have been granted in most common law jurisdictions that follow English law, including Australia, Canada, New Zealand, Malaysia, Hong Kong and Singapore. OUGH, *supra*, §§ 8.0-8.6, at 93–94.

338. HETHERINGTON, *supra* note 337, at 3 ("before 1975 the courts would not grant an injunction to restrain a defendant from disposing of his assets pendente lite merely because the plaintiff feared that by the time he obtained judgment the defendant would have no assets against which execution could be levied"); Nippon Yusen Kaisha v. Karageorgis, [1975] 3 All Eng. Rep. 282, 283 (C.A.) (noting that "[i]t has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them"); *see, e.g.*, Mills v. Northern Ry. of Buenos Ayres, 5 L.R.-Ch. 621, 628 (Ch. App. 1870) (Eng.) (noting that "[i]t is wholly unprecedented for a mere creditor to say, '. . . I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment' "); Newton v. Newton, 11 P.D. 11, 13 (1885) (Eng.) (in matrimonial action, denying wife's application for a preliminary injunction to enjoin husband from removing his property from the country; holding that "it is not competent for a Court, merely quia timet, to restrain a respondent from dealing with his property"); Lister & Co. v. Stubbs, 45 Ch. D. 1, 13 (C.A. 1890) (Eng.) (declining to grant interlocutory injunction to restrain defendant from dealing with the real estate purchased with monies allegedly received as kickbacks for placing orders on behalf of plaintiffs' business; injunction declined because the monies sought by plaintiffs as their final remedy never belonged to them; Cotton, L.J., stating that "I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree").

other methods of "judgment evasion"[339] between 1881, when foreign attachment fell into disuse,[340] and 1975, when the Court of Appeal decided *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*[341] and revolutionized English practice.[342]

In *Mareva,* plaintiff shipowners let their vessel, *Mareva*, to foreign defendants on a time charter[343] for $3850 per day payable half-

339. HETHERINGTON, *supra* note 337, at v; *accord* Shenton, *supra* note 174, at 104.

340. Prior to 1867, attachment was available even in cases in which the plaintiff's claim against the defendant did not arise in London and the garnishee was only transiently present there. In such cases, the plaintiff and the garnishee could collude to deprive the defendant of his property without notice. PULLING, *supra* note 60, at 192; Levy, *supra* note 53, at 420. To reduce this risk of fraud, the House of Lords limited the availability of foreign attachment to cases in which the defendant accrued the debt in London, the garnishee resided in London, and the defendant received prior notice and an opportunity to contest the debt. MILLAR, *supra* note 48, at 484; Levy, *supra* note 53, at 422 (citing The Mayor and Aldermen of the City of London v. Cox, L.R. 2 E.&I. App. 239 (H.L. 1867)). Shortly thereafter, in an 1881 decision, the House of Lords held that garnishment did not lie against a corporation. Because only a payment under compulsion discharged the garnishee vis-a-vis the defendant and because a corporation's "body" could not be arrested pursuant to a *capias ad satisfaciendum,* any payment a corporate garnishee made would have been deemed voluntary. Thus, foreign attachment could not lie against corporate garnishees because they could not be protected against multiple claims. MILLAR, *supra* note 48, at 485 (citing The Mayor and Aldermen of the City of London v. The Shareholders of the London Joint Stock Bank, 6 App. Cas. 393 (H.L. 1881)); Levy, *supra* note 53, at 414 (citing same). Given these restrictions on the use of foreign attachment, the procedure fell into disuse in or about 1881. 25 HALSBURY'S LAWS OF ENGLAND 572 n.(r) (3d ed. 1958); MILLAR, *supra* note 48, at 485; Levy, *supra* note 53, at 424.

341. [1980] 1 All E.R. 213 (C.A. 1975). The *Mareva* case actually was the second case in which the Court of Appeal granted a preliminary injunction to freeze assets to which plaintiff had no pre-existing claim. The first case was Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, 1094 (C.A.) (continuing a preliminary injunction, which had been granted ex parte two days earlier, to enjoin defendants "from disposing or removing any of their assets which are in this jurisdiction outside it"). In concluding that such an injunction was appropriate on the facts of the case, the *Nippon* Court found that plaintiff had established "a strong prima facie case" and that "[i]f an injunction is not granted, these moneys [defendants' accounts with a London bank] may be removed out of the jurisdiction and [plaintiffs] will have the greatest difficulty in recovering anything." *Id.* at 1095. Like the *Mareva* Court, see *infra* text accompanying note 346, the *Nippon* Court invoked authority under section 45 of the Supreme Court of Judicature (Consolidation) Act.

342. One exception to this blanket statement exists. Just as American courts issue preliminary injunctions to freeze assets more freely in matrimonial litigation than in other kinds of cases, *supra* part V.A.2, the English courts were authorized to "grant injunctions to stop transactions intended to prevent or reduce financial relief in matrimonial proceedings" before *Mareva* was decided. Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 431 (C.A.) (citing Matrimonial Causes Act 1973, § 37(2), 27 HALSBURY'S STATUTES 751 (4th ed. 1987)) (Neill, L.J.).

343. A time charter is

> a specific and express contract by which the owner lets a vessel or some particular part thereof to another person for a specified time or use; the owner continues to operate the vessel, contracting to render services by his master and crew to carry goods loaded on the vessel, and the master and crew remain servants of the owner.

BLACK'S LAW DICTIONARY 1483 (6th ed. 1991).

monthly in advance. Defendants paid the first two installments, but failed to make the third when due. While the vessel was still on its voyage to India, plaintiffs commenced suit to collect the unpaid hire ($30,800) and damages for repudiation, an action the court characterized as one at law for debt.[344] Concerned, however, that "there [was] a grave danger that [defendants'] moneys in the bank in London [would] disappear," plaintiffs sought a preliminary injunction "to restrain the disposal of those moneys."[345]

Relying on section 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which provided that "an injunction may be granted . . . by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient,"[346] the Court of Appeal concluded that it had unlimited power to grant injunctive relief " 'where it would be right or just to do so,' "[347] so long as the plaintiff had some underlying legal or equitable right. It held: "If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him from disposing of those assets."[348]

The Court of Appeal deemed the instant case a proper one for the assertion of the power, even on an ex parte application, because defendants could, at any time, withdraw their funds from the London bank and remove them outside of the country, thereby undercutting plaintiffs' ability to collect the money owed them.[349] Thus, the court granted "an injunction to restrain the charterers [and their agents and servants][350] from disposing of these moneys now in the bank in London until the trial or judgment in this action."[351] Parliament rec-

344. *Mareva,* [1980] 1 All E.R. at 214–15 (Denning, M.R.).

345. *Id.* at 214.

346. 15 & 16 Geo. 5, ch. 49, § 45(1). This provision was reenacted with modifications as section 37(1) of the Supreme Court Act 1981, 11 HALSBURY'S STATUTES 792 (4th ed. 1985). *Compare* 28 U.S.C. § 1651(a) (authorizing the Supreme Court and "all courts established by Congress . . . [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to usages and principles of law").

347. *Mareva,* [1980] 1 All E.R. at 214 (Denning, M.R.) (quoting Beddow v. Beddow, 9 Ch. D. 89, 93 (1878)).

348. *Id.* at 215.

349. *Id.*

350. *Id.* In colloquay with counsel for plaintiffs, Lord Denning, Master of the Roll, agreed to extend the injunction to bar "defendants, their agents or servants or otherwise from disposing of the assets or moving them out of the jurisdiction." [1980] 1 All E.R. 213 (C.A. 1975), [1975] 2 Lloyd's Rep. 509, 512 (C.A.) (Colloquay found only in Lloyd's Reports).

351. *Mareva,* [1980] 1 All E.R. at 215. Writing separately, Lord Justice Roskill agreed that the preliminary injunction should issue in the particular circumstances of the case, but did not endorse a general departure from past practice, which "consistently refused" such relief. *Id.*

ognized and approved of the *Mareva* injunction in 1981 with the enactment of the Supreme Court Act.[352]

Referred to as everything from the "greatest piece of judicial law reform" of Lord Denning's time[353] to "the nuclear weapon[ ] of the law,"[354] the *Mareva* injunction's effect on English practice has been remarkable. Since 1975, the English courts have awarded *Mareva* injunctions to freeze assets in an ever-increasing set of circumstances both within and beyond the commercial setting[355] to an ever-expanding number of plaintiffs.[356] As the demand for *Mareva* injunctions has grown, the Court of Appeal has defined more precisely the circumstances in which such injunctions may issue. For present purposes, seven refinements in the law governing *Mareva* injunctions are worthy of discussion.

First, although English courts initially granted *Mareva* injunctions only against foreign defendants on the theory that only they were likely to transfer their assets outside the country,[357] by 1980 the courts

352. The Supreme Court Act 1981 § 37(3), 11 HALSBURY'S STATUTES 792 (4th ed. 1985), authorizes the High Court to:

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

Parliament extended the power to issue such injunctions to the county court in the County Courts Act 1984 § 38, 11 HALSBURY'S STATUTES 441 (4th ed. 1985).

Order 29, Part I of the Rules of the Supreme Court authorizes the issuance of interlocutory injunctions and orders for the interim preservation of property. Rules of the Supreme Court 1965 (O.29, r.1), in 1 THE SUPREME COURT PRACTICE 497–524 (1991).

353. ALFRED T. DENNING, THE DUE PROCESS OF LAW 134 (1980), *quoted in* Marion Hetherington, *History and Development of the Mareva Jurisdiction in the United Kingdom and Australasia, in* HETHERINGTON, *supra* note 337, at 2.

354. OUGH, *supra* note 337, at vii.

355. By 1982, the *Mareva* injunction was being "employed generally against foreign and domestic defendants alike and in respect of matrimonial, personal injuries and *Fatal Injuries Act* cases as well as in commercial matters like the shipping cases where it originated." Hetherington, *supra* note 353, at 2; *accord* Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 584.

356. Shenton, *supra* note 174, at 104 (noting that "there are now [i.e., 1984] a steady flow of such applications to our Courts which have been estimated to exceed one thousand per month"); Hetherington, *supra* note 353, at 2 (noting that "by early 1979 the *Mareva* injunction had become a commonplace . . . remedy, with applications being made in the Commercial Court at the rate of about 20 per month"); Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft m.b.H. & Co KG (*The Niedersachsen*), [1984] 1 All E.R. 398, 401 (Q.B.D. 1983) (recognizing "a rapid and sustained increase in the number of applications for *Mareva* relief"), *appeal dismissed,* [1984] 1 All E.R. 413 (C.A. 1983). Professor Juenger has commented that forum-shoppers find the *Mareva* injunction an "especially attractive" feature of English law. Freidrich K. Juenger, *Forum Shopping, Domestic and International,* 63 TUL. L. REV. 553, 565 (1989).

357. Devlin, *supra* note 1, at 1589 n.65; Hetherington, *supra* note 353, at 5 n.40. *See* Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 659 (C.A. 1977) (distinguishing cases "where a defendant is out of the jurisdiction

had extended the reach of the remedy to domestic defendants as well.[358] Parliament confirmed the broader reach in the Supreme Court Act 1981, which granted the High Court the power to issue *Mareva* injunctions "in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."[359] Like a preliminary injunction available in the United States, then, the *Mareva* injunction may issue against both residents and nonresidents who are subject to the court's jurisdiction.

Second, the Court of Appeal has clarified the strength of the claim that the plaintiff must establish to obtain a *Mareva* injunction. Originally the courts reserved the *Mareva* injunction for cases "founded on a debt which was undisputed or indisputable,"[360] in which summary judgment under Rules of the Supreme Court Order 14[361] would have been appropriate.[362] As early as 1977, however, the Court of Appeal

---

but has assets in this country"; but dismissing appeal from discharge of preliminary injunction on facts of case) (Denning, M.R.). The *Rasu Maratima* court noted that:

> so far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

See also Gebr Van Weelde Scheepvaart Kantoor B.V. v. Homeric Marine Services Ltd., [1979] 2 Lloyd's Rep. 117, 120 (C.A. 1978) (holding that a *Mareva* injunction could not issue against a resident defendant) (Lloyd, J.).

358. Hetherington, *supra* note 353, at 2 n.13; *see, e.g.*, Chartered Bank v. Daklouche [1980] 1 W.L.R. 107, 113 (C.A. 1979) (affirming grant of a *Mareva* injunction against a defendant who was personally served in England and had a home there, but who was a Lebanese citizen and "said that she intended to live here permanently") (Denning, M.R.); Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1265 (Ch. D.) (holding that "it is no bar to the grant of a *Mareva* injunction that the defendant is not a foreigner, or is not foreign-based, in any sense of those terms") (Megarry, V.-C.); Rahman (Prince Abdul) Bin Turki Al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, 1273 (C.A.) (holding that "a *Mareva* injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger . . . that the plaintiff, if he gets judgment, will not be able to get it satisfied") (Denning, M.R.).

359. Supreme Court Act 1981, § 37(3), 11 HALSBURY'S STATUTES 792 (4th ed. 1985).

360. Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft m.b.H. & Co. K.G. (*The Niedersachsen*), [1984] 1 All E.R. 398, 401 (Q.B.D. 1983), *appeal dismissed*, [1984] 1 All E.R. 413 (C.A. 1983).

361. Order 14 of the Rules of the Supreme Court authorizes summary judgment if the defendant "has no defence to a claim . . . or to a particular part of such a claim, or has no defence to such claim or part except as to the amount of any damages claimed." Rules of the Supreme Court 1965 (O.14, r.1), in 1 THE SUPREME COURT PRACTICE 140 (1991). *See generally id.* at 140–71.

362. Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 661 (C.A. 1977) (noting that the earlier cases in which *Mareva* injunctions had been granted "were ones in which summary judgment would have been given under Order 14"); Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 649 (noting that early *Mareva* cases involved a creditor with "a claim against a foreign debtor which was not disputed or was not capable of serious dispute") (Mustill, J.), *appeal dismissed*, [1979] 1 Q.B. 655 (C.A.).

held that a *Mareva* injunction could issue to secure the assets of defendants in an action in which summary judgment was not appropriate so long as "the plaintiff can show that he has a 'good arguable case.' "[363] Lord Denning, Master of the Roll, seemed willing to ease even this requirement in a 1979 case,[364] but the Court of Appeal later reiterated that it must "appear[ ] likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum."[365] Although this statement of the standard might appear to bar *Mareva* injunctions in contract claims for unliquidated damages and tort actions, it has not been so employed. In such cases, the Court of Appeal has resorted to the "good arguable case" standard.[366] Thus, the requisite showing on the merits to obtain a *Mareva* injunction is comparable to our "likelihood of success on the merits" criterion.[367]

Third, the plaintiff must demonstrate that she will suffer harm if the *Mareva* injunction is not granted. Originally, the courts reasoned that the sole purpose of the *Mareva* injunction was to insure that assets

363. *Rasu Maratima,* [1978] 1 Q.B. at 661 (Denning, M.R.). In adopting the "good arguable case" test, Lord Denning borrowed the test used in determining whether or not a defendant beyond the court's jurisdiction can be served extraterritorially. *Id.* (citing Vitkovice Horni a Hutni Tezirstvo v. Korner, [1951] App. Cas. 869 (appeal taken from Eng. C.A.)). Lord Denning justified the borrowing because, like extraterritorial service, the *Mareva* injunction "is appropriate when defendants are out of the jurisdiction." *Id.* He also noted that the "good arguable case" test was "also in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*" *Id.* (citing American Cyanamid Co. v. Ethicon Ltd., [1975] App. Cas. 396 (appeal taken from Eng. C.A.) (holding that in considering whether an interlocutory injunction should issue, court must conclude that the plaintiff's "claim is not frivolous or vexatious; in other words, that there is a serious question to be tried") (Lord Diplock)).

364. *Third Chandris,* [1979] 1 Q.B. at 668 (suggesting that the plaintiff need only "give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant") (Denning, M.R.).

365. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 585 (C.A. 1981) (Kerr, L.J.); *see also The Niedersachsen,* [1984] 1 All Eng. Rep. at 401 (reaffirming that "a 'good arguable case' is no doubt the minimum which the plaintiff must show in order to cross what the judge rightly described as the 'threshold' for the exercise of the jurisdiction") (Kerr, L.J.); Hetherington, *supra* note 353, at 5 n.39.

366. F.D. Rose, *The* Mareva *Injunction—Attachment in Personam—Part I,* 1981 LLOYD'S MAR. & COM. L.Q. 1, 8 (noting that "the injunction is . . . available in support of unliquidated claims"); *see, e.g.,* Allen v. Jambo Holdings Ltd., [1980] 1 W.L.R. 1252, 1255 (C.A. 1977) (in wrongful death action in which issues of comparative negligence existed but in which plaintiffs made a "good, arguable case," reinstating *Mareva* injunction to enjoin defendants from removing an aircraft from England) (Denning, M.R.); Dellborg v. Corix Properties (C.A. 1980) (LEXIS, Enggen library, Cases file) (granting *Mareva* injunction in actions for nuisance) (Lawton, L.J.); Praznovsky v. Sablyack, [1977] V.R. 111 (Australia) (permitting *Mareva* injunction in action seeking damages for tort of conspiracy).

367. *See supra* part III.A.

were not removed from England,[368] so "[i]f the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk . . . that the defendant may dissipate his assets."[369] The Court of Appeal later rejected this reasoning, however, and has since stated that "the *Mareva* injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction."[370] Thus, just as the American plaintiff must demonstrate a risk of irreparable harm, the English plaintiff seeking a *Mareva* injunction must establish that "there are . . . reasons to believe that the defendant . . . may well take steps designed to ensure that [his assets] are no longer available or traceable when judgment is given against him."[371]

368. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1264 (Ch. D.) (stating that "the heart and core of the *Mareva* injunction is the risk of the defendant *removing* his assets from the jurisdiction and so stultifying any judgment given by the courts in the action") (Megarry, V.-C.) (emphasis added); *Third Chandris,* [1979] 1 Q.B. at 669 (stating that "[t]he plaintiff should give some grounds for believing that there is a risk of the assets being *removed* before the judgment or award is satisfied") (Denning, M.R.) (emphasis added); A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 941 (C.A.) (noting that "the foundation of the jurisdiction is the need to prevent judgments of the court from being rendered ineffective by the removal of the defendant's assets from the jurisdiction") (Ackner, L.J.).

369. *Barclay-Johnson,* [1980] 1 W.L.R. at 1264.

370. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 571 (C.A. 1981); *see also id.* at 584 (concurring that it is "logical to extend the scope of this jurisdiction whenever there is a risk of a judgment which plaintiff seems likely to obtain being defeated in this way") (Kerr, L.J.); Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft m.b.H. & Co. K.G. (*The Niedersachsen*), [1984] 1 All E.R. 398, 419 (Q.B.D. 1983) (stating that "*Mareva* injunctions can, and nowadays frequently are, also granted where there is a danger of dissipation of assets within this country") (Kerr, L.J.) *appeal dismissed,* [1984] 1 All E.R. 413 (C.A. 1983); Rules of the Supreme Court 1965 (O.29, r.1), note 29/1/20, in 1 THE SUPREME COURT PRACTICE 506 (1991). In concluding that the *Mareva* injunction should be available to restrain domestic dissipation of assets, Lord Denning stated that the language in the Supreme Court Act 1981, which authorized the High Court to grant interlocutory injunctions "restraining a party . . . from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction," should be given "a wide meaning. They are not to be construed as ejusdem generis with 'removing from the jurisdiction.' " *Z Ltd.,* [1982] 1 Q.B. at 571 (quoting Supreme Court Act 1981, 15 & 16 Geo. 5, ch. 49, § 37(3)); *see also* Rahman (Prince Abdul) Bin Turki Al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, 1273 (C.A.) (holding that "a *Mareva* injunction can be granted . . . if the circumstances are such that there is a danger of [the defendant's] absconding, or a danger of the assets being removed out of the jurisdiction or *disposed of within the jurisdiction,* or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied") (Denning, M.R.) (emphasis added); Kirby v. Banks (C.A. 1980) (Transcript No. 624 of 1980 unreported opinion), *cited in Z Ltd.,* [1982] 1 Q.B. at 571 (granting a *Mareva* injunction even though the "defendant was within the jurisdiction" and the danger was only that "he would dispose of £60,000—within the jurisdiction—in such a way as to be beyond the reach of the plaintiffs").

371. *Z Ltd.,* [1982] 1 Q.B. at 585; *see also The Niedersachsen,* [1984] 1 All E.R. at 419 (stating that "the test is whether . . . the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiff would remain unsatisfied").

The plaintiff can make a prima facie showing of this risk "by showing that the asset is present and that it is movable, and by drawing some inference from the fact that the defendant is abroad (or, if within the jurisdiction, will not divulge his whereabouts)."[372] One commentator has suggested that "inferential evidence of the defendant's 'good character' or 'bad character' may play a material part in the determination of whether to grant the injunction."[373] And a judge has suggested that inferences regarding risk of default may be drawn from facts "about the defendant's business . . ., including . . . its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen."[374]

Fourth, the Court of Appeal has acknowledged the need "to provide certain safeguards for a defendant or other person who might suffer hardship if subjected to an order in the unadorned form which was in use at the outset."[375] Thus, it has limited the amount to be restrained by the injunction,[376] allowed the defendant to draw on separate accounts for reasonable living expenses and attorneys' fees,[377] consid-

372. F.D. Rose, *The* Mareva *Injunction—Attachment in Personam—Part II,* 1981 LLOYD'S MAR. & COM. L.Q. 177, 179 (footnotes omitted).

373. OUGH, *supra* note 337, at 72 (footnotes omitted). In *Third Chandris*, the Court of Appeals stated:

> The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any *reputable* foreign company to be plagued with a *Mareva* injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comment. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it—where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments . . . . In such cases, the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or award is obtained, it may go unsatisfied.

Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 669 (C.A.) (Denning, M.R.) (emphasis added); *see also* Chambers, *supra* note 32, at 13 (discussing offshore trusts created under the laws of the Isle of Man, an island in the Irish Sea, which does not enforce judgments of foreign countries); Bruce, et al., *supra* note 32, at 1 (same).

374. *Third Chandris,* 1 Q.B. at 672 (Lawton, L.J.).

375. *The Niedersachsen,* [1984] 1 All E.R. at 401.

376. Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 576 (C.A.) (noting that "[n]owadays it has become usual to insert the maximum amount to be restrained. The maximum amount is the sum claimed by the plaintiff from the defendant.") (Denning, M.R.); *id.* at 589 (preferring "maximum sum" orders, which "only freeze the defendant's assets up to the level of the plaintiff's prima facie justifiable claim," to blanket injunctions) (Kerr, L.J.); Rules of the Supreme Court 1965, O.72, A.27, in 1 THE SUPREME COURT PRACTICE 1195–96 (1991); OUGH, *supra* note 337, at 15.

377. *See, e.g.,* Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 419 (C.A.) (noting that "it is not [the *Mareva* injunction's] purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim") (Donaldson of Lymington, M.R.); S.C.F. Finance Co. v. Masri, [1985] 1 W.L.R. 876, 880 (C.A.) (stating that "[i]t is now

ered the defendant's needs in operating a business,[378] required the plaintiff to give an undertaking to protect the defendant from damages and third parties from any expenses reasonably incurred in complying with the *Mareva* injunction,[379] and confirmed that the injunction is not designed to improve the plaintiff's position in the event of the defendant's insolvency or otherwise to give the plaintiff a lien.[380] These protections, like those urged in the "Balance of Hardships" section of this

---

well settled that an injunction will be varied where necessary so as to enable a defendant to pay his ordinary trading debts as they fall due, or to meet his ordinary living expenses") (Lloyd, L.J.); PCW (Underwriting Agencies) Ltd. v. Dixon, [1983] 2 All E.R. 697 (C.A.) (varying trial court's order to permit defendant to draw on specified accounts for living expenses and solictors' costs); *Z Ltd.*, [1982] 1 Q.B. at 576 (stating that "if in any case it is thought desirable to allow the defendant to have the use of sums for 'normal living expenses,' or such like, the injunction should specify the sums as figures") (Denning, M.R.); Rules of the Supreme Court 1965, O.29, r.1, note 29/1/22, in 1 THE SUPREME COURT PRACTICE 507–10 (1991); OUGH, *supra* note 337, at 15–17.

378. *See, e.g.*, Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] 1 Q.B. 644, 662 (C.A.) (stating that "[c]are should be taken before an injunction is granted over assets which will bring the defendant's trade or business to a standstill or will inflict on him great loss") (Denning, M.R.); The Rena K, [1979] 1 Q.B. 377, 410 (noting that the "one apparently strong point against granting an injunction" was that the defendant's principal asset, a ship, "was a trading asset, and that, if the shipowners were compelled by an injunction to keep her here, they would lose the benefit of trading her") (Brandon, J.); Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1266 (Ch. D.) (stating that if the *Mareva* injunction "is likely to affect the defendant seriously, I think that he is entitled to have this put into the scales against the grant of the injunction . . . . [I]f he is trading here and the injunction would 'freeze' his bank account, the injury may be grave. I think that he should be able to rely on the *Lister* principle except so far as it cannot be fairly reconciled with the needs of the *Mareva* doctrine") (Megarry, V.-C.); Dellborg v. Corix Properties (C.A. 1980) (LEXIS, Enggen library, Cases file) (noting the "particular[] importan[ce] that [defendant] should not be inhibited from making profits" by selling the properties it was incorporated to develop) (Lawton, L.J.); *see also* OUGH, *supra* note 337, at 16–17; Rose, *supra* note 366, at 14 (noting that "it is always possible to make the order in such a form as to permit *bona fide* dealings in the course of business . . ., to draft an order in terms that application can be made to the court to sanction particular dealings, or for the court to vary the order").

379. *See, e.g.*, Searose Ltd. v. Seatrain UK Ltd., [1981] 1 W.L.R. 894, 896 (Q.B.D.) (requiring plaintiff to give an undertaking to the effect "that a bank to whom notice of an injunction is given can, before taking steps to ascertain whether the defendants have an account at any particular branch, obtain an undertaking from the plaintiffs' solicitors to pay their reasonable costs incurred in so doing") (Robert Goff, J.); *Z Ltd.*, [1982] 1 Q.B. at 577 (noting that "[t]he plaintiff . . . should normally give an undertaking in damages to the defendant, and also an undertaking to a bank"; giving judge discretion to require a bond or other security for the undertaking) (Denning, M.R.); Rules of the Supreme Court 1965, O.29, r.1, note 29/1/22, in 1 THE SUPREME COURT PRACTICE 507–10 (1991); OUGH, *supra* note 337, at 14–15.

380. *See, e.g.*, A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 942 (C.A.) (noting that "the purpose of the *Mareva* jurisdiction was not to improve the position of claimants in an insolvency, but simply to prevent the injustice of a defendant removing his assets from the jurisdiction") (Ackner, L.J.); Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A., [1981] 1 Q.B. 65, 72 (Robert Goff, J.); Cretanor Maritime Co. v. Irish Marine Management Ltd., [1978] 1 W.L.R. 966, 974 (C.A.) (distinguishing the *Mareva* injunction from prejudgment attachment, which "means a seizure of assets . . . normally with a view to their being . . . held as . . . security") (Buckley, L.J.).

Article,[381] are designed to reduce the risk of harm to the defendant and other innocent parties without exposing the plaintiff to active tertiary harm.[382]

Fifth, consistent with the early view that the *Mareva* injunction was designed only to ensure that assets within England were not removed therefrom,[383] English courts initially refrained from restraining assets outside the territory of England.[384] With the increasing recognition that the injunction is intended, more broadly, to bar a defendant from frustrating subsequent orders of the court or the plaintiff's potential judgment,[385] the Court of Appeal has acknowledged that restraining the defendant from disposing of foreign assets may be necessary.[386] Thus, just as a preliminary injunction issued by an American court can restrain a defendant from disposing of assets outside the state,[387]

---

381. *See supra* part III.C.

382. In reviewing ex parte grants of *Mareva* injunctions, the English courts actually may pay greater deference to the defendant's potential harm than American courts typically do in "balancing the hardships." In *The Niedersachsen*, for example, the Court of Appeal stated in passing that:

> if, or to the extent that, the grant of a *Mareva* injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well-founded but which still remains to be established at the trial.

[1984] 1 All E.R. 398, 422 (Q.B.D. 1983) (Kerr, L.J.), *appeal dismissed*, [1984] 1 All E.R. 413 (C.A. 1983). This statement seems to suggest that any substantial showing of harm by the defendant, whether or not outweighed by potential harm to the plaintiff, would bar the issuance or affirmance of a *Mareva* injunction.

383. *See supra* note 368.

384. Shenton, *supra* note 174, at 104. Shenton notes that:

> so far, the Courts have only been willing to grant *Mareva* injunctions in respect of assets actually within the jurisdiction of the Court, irrespective of whether the Defendant is within or without the jurisdiction. Logically, the Court should be able to restrain a respondent within the jurisdiction from disposing of assets outside the jurisdiction.

See, e.g., Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 668 (C.A.) (requiring that "[t]he plaintiff should give some grounds for believing that the defendant has assets here") (Denning, M.R.).

385. *See supra* note 370 and accompanying text.

386. Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 422 (C.A. 1988) (stating that "no court should permit a defendant to take action designed to frustrate subsequent orders of the court. If for the achievement of this purpose it is necessary to make orders concerning foreign assets, such orders should be made, subject, of course, to ordinary principles of international law.") (Donaldson of Lymington, M.R.); *id.* at 435 (stating "unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court") (Neill, L.J.); Babanaft Int'l Co. S.A. v. Bassatne, [1989] 2 W.L.R. 232, 242 (C.A.) (stating that "in appropriate cases, though these may well be rare, there is nothing to preclude our Courts from granting *Mareva* type injunctions against defendants which extend to their assets outside the jurisdiction.") (Kerr, L.J.).

387. *See supra* notes 180–81 and accompanying text.

so can a *Mareva* injunction bar an English defendant from disposing of assets outside the country.[388]

Sixth, the English courts have always recognized that to be effective, the *Mareva* injunction must issue ex parte,[389] and that to be fair to the defendant, the court must hold a prompt inter partes hearing upon the defendant's request.[390] The Supreme Court Rules codify this practice, specifically authorizing ex parte applications for Mareva injunctions.[391] One commentator has noted that:

> heavy pressure is . . . put on the applicant's advisers at the ex parte stage to put such information before the Court as is likely to produce an Order in the form in which it would be likely to be after the inter partes hearing, alternatively to use all efforts to agree on a form of Order with

388. In part, this conclusion obtains because the *Mareva* injunction operates in personam against the defendant rather than in rem against the assets themselves. *See, e.g.*, The Tuyuti, [1984] 2 All E.R. 546, [1984] 2 Lloyd's L.R. 51, 56 (C.A.) (noting that "there are . . . many fundamental differences between an injunction, which is an order directed to the owners and master of the ship not to take a ship out of the jurisdiction and an arrest by which the Admiralty Marshall takes custody of the ship") (Sheen, J.), opinion found only in Lloyd's Reports; Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd., [1984] 1 W.L.R. 1097, 1100 (Q.B.D.) (noting that "the *Mareva* injunction acts in personam on the defendant and does not give the plaintiff any rights over the goods of the defendant nor involve any attachment of them") (Farquharson, J.); Derby & Co. v. Weldon, [1989] 2 W.L.R. 412, 425, [1989] 1 All Eng. Rep. 1002, 1011 (C.A. 1988) (stating that "[a] *Mareva* injunction operates solely in personam") (Donaldson of Lymington, M.R.). *But see* Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 573 (C.A.) (stating that a *Mareva* injunction "is a method of attaching the asset itself. It operates in rem . . . just as the process of foreign attachment used to do in the City of London, and still does in the United States of America") (Denning, M.R.).

If all of the defendant's assets are located outside the country, the plaintiff will have to bring a second action in the country in which the property is located to enforce the English judgment, assuming that country honors foreign judgments. *Cf.* Bruce et al., *supra* note 32; Chambers, *supra* note 32.

389. *See, e.g.*, Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 669 (C.A.) (setting forth guidelines for ex parte *Mareva* proceedings, and noting that "speed is of the essence. Ex parte is of the essence") (Denning, M.R.); *Z Ltd.*, [1982] 1 Q.B. at 577 (C.A.) (noting that "[w]hen granting a *Mareva* injunction ex parte, the court may sometimes think it right only to grant it for a few days") (Denning, M.R.); Rules of the Supreme Court 1965, O.29, r.1, note 29/1/21, in 1 THE SUPREME COURT PRACTICE 506–07 (1991) (acknowledging that "to be efficacious, [the *Mareva* injunction] must be swift and secret, in the sense that the injunction must always be granted *ex parte*, without notice to the defendant").

390. Dormeuil Freres S.A. v. Nicolian Int'l (Textiles) Ltd., [1988] 1 W.L.R. 1362, 1370 (Ch. D.) (stating that "[w]hen the motion comes before the court inter partes, the court can then on the evidence before it from both sides decide what is the correct form of the *Mareva* relief to grant until trial"); *Z Ltd.*, [1982] 1 Q.B. at 577 (noting that after an ex parte *Mareva* injunction issues, "the defendant and the bank or other innocent third party . . . should be given the earliest possible opportunity to be heard") (Denning, M.R.).

391. Rules of the Supreme Court 1965 (O.29, r.1), in 1 THE SUPREME COURT PRACTICE *supra* note 370, at 497.

the Respondent's solicitors which can be signed by the Judge without a second hearing.[392]

Finally, the English courts have recognized the difficulty plaintiffs may have in knowing "how much, if anything, is in any of [the defendant's bank accounts]; nor does each of the defendant's bankers know what is in the other accounts. Without information about the state of each account it is difficult, if not impossible, to operate the *Mareva* jurisdiction properly."[393] In light of these difficulties, the courts have concluded they have power to order discovery "in order to ensure that the *Mareva* jurisdiction is properly exercised and thereby to secure its objective . . ., the prevention of abuse."[394] They have ordered discovery not only against the defendant,[395] but also against third party bankers with knowledge of the whereabouts of the defendant's assets.[396]

The British experience with *Mareva* injunctions confirms both the utility of such preliminary injunctions to freeze assets and the risks they pose to defendants and third parties if issued without restraint or precaution. The *Mareva* experience highlights methods for reducing these risks: courts can limit the scope of preliminary injunctions to permit defendants to pay attorneys' fees, incur ordinary living expenses, and make transfers in the ordinary course of business; courts

392. Shenton, *supra* note 174, at 104.

393. A. v. C., [1981] Q.B. 956, 959–60 (1980) (Robert Goff, J.).

394. *Id.* at 960; *accord* Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274 (C.A.) (permitting discovery against defendant bank in which individual defendants had deposited moneys they had obtained by forgery from plaintiff bank) (Denning, M.R.); A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 943–44 (C.A.) (concluding that court has "power to make an order for discovery in 'aid' of a *Mareva* injunction"; to "police" the *Mareva* injunction, "plaintiffs could have applied for an order for the cross-examination of the defendant on his affidavit, or the court itself could have made such an order") (Ackner, L.J.); *id.* at 949 (stating that "it may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective") (Griffiths, L.J.); Z Ltd. v. A-Z and AA-LL, [1982] 1 Q.B. 558, 577–78 (C.A. 1981) (noting that "it is very desirable that the defendant should be required in a proper case to make discovery. . . . There is ample power in the court to order discovery.") (Denning, M.R.). *See generally* Eric Gertner, *Prejudgment Remedies: A Need for Rationalization,* 19 OSGOODE HALL L.J. 503, 533–35 (1981) (discussing the availability of discovery to ensure the effectiveness of a *Mareva* injunction); OUGH, *supra* note 337, at 43–44.

395. *See, e.g., A. v. C.,* [1981] Q.B. at 959–60 (Robert Goff, J.).

396. *See, e.g.,* Bankers Trust Co. v. Shapira, [1980] 1 W.L.R. 1274, 1282 (C.A.) (ordering discovery against a bank named as a nominal defendant, which faced no personal liability; adding that discovery against a bank should "only be done when there is a good ground for thinking the money in the bank is the plaintiff's money—as, for instance when, the customer has got the money by fraud—or other wrongdoing, and paid it into his account at the bank") (Denning, M.R.). *But see* A.J. Bekhor & Co. v. Bilton, [1981] 1 Q.B. 923, 937–38 (C.A.) (declining to limit authority to order discovery in aid of *Mareva* jurisdiction to actions "in which the plaintiff seeks to trace property which in equity belongs to him") (Ackner, L.J.).

can require the plaintiff to post a bond out of which the defendant's losses will be paid if the injunction issued erroneously and a third party's expenses in complying with the injunction will be reimbursed; and courts can require the plaintiff to make a strong showing on the merits of her claim and the risk of harm she will suffer if the defendant is not restrained.

CONCLUSION

There is little doubt that some defendants, once sued (or even before), will attempt to transfer, hide or dissipate their assets in an effort to frustrate the potential judgment to be rendered against them. There is little doubt that such conduct causes harm to the plaintiff—active tertiary harm—because she will not be able to collect promptly on her judgment, if ever. And there is little doubt that courts can prevent this active tertiary harm. There is doubt, however, as to the means courts may employ to prevent this harm.

If the plaintiff's suit is for money damages, some courts have concluded that the money judgment itself is an adequate remedy, thereby obviating the need for any preliminary injunctive relief, or that attachment is the only permissible prejudgment remedy for preventing active tertiary harm. The money judgment and the attachment remedy are not adequate, however, in that they fail to reach all of the defendant's assets, and intrude unnecessarily on the defendant's freedom and the rights and interests of third parties. Furthermore, as long as the plaintiff can demonstrate irreparable harm, the judicial preference for legal remedies over equitable ones serves no useful purpose in this context. Therefore, courts should use preliminary injunctions to freeze assets in cases where the risk of irreparable tertiary harm to the plaintiff exceeds the risk of harm to the defendant and the plaintiff establishes a likelihood of success on the merits.

Wellens, K., *Remedies Against International Organisations,* Cambridge University Press, 2002

Counterclaims

The UN may have counterclaims against the claimant party arising from the same situation; if they have arisen from a different situation they are labelled 'set-offs'.[30] Particularly in the context of a lump-sum agreement between the UN and a government acting on behalf of its nationals the latter claims can be deducted, thus contributing to the lump-sum settlement constituting a finite limit to the financial responsibility of the organisation.[31]

The mechanism was used in the aftermath of ONUC in separate lump-sum agreements, with the governments of Belgium, Greece, Italy, Luxembourg and Switzerland providing for financial compensation of physical, material and moral damage based on estimates made unilaterally by the UN Legal Office. The amounts varied between the various member states but they largely did not correspond to an adequate level of financial compensation, the diplomatic efforts of the states concerned only having convinced the organisation to increase its initial offer slightly. In some cases victims have themselves been considered to have contributed to the occurrence of the acts which had caused the damage that gave rise to the claims.

In the Belgian case the UN accepted 581 out of 1,400 claims as being entitled to compensation. A lump-sum agreement amounting to $1.5 million was agreed as a final settlement of that matter. At the same time, a number of financial questions still outstanding between the UN and Belgium were settled. Payment was effected by offsetting the amount of $1.5 million against unpaid ONUC assessments amounting to approximately $3.2 million.[32] The compensation was apportioned among the private claimants based upon appreciations made by the UN.

The mechanism of lump-sum agreements has now been formally incorporated into the claim-settlement mechanism provided for in peacekeeping operations.

Peacekeeping operations

Given their complexity, both in terms of surrounding circumstances and the variety of actors involved, peacekeeping operations are likely to continue to give rise to a large number of claims. In order to reduce this number, general limitations and exclusions have been adopted in

[30] A/51/389 of 20 September 1996, para. 41. [31] *Ibid.*, para. 35. [32] *Ibid.*, note 8.

General Assembly Resolution 52/247 of 26 June 1998.[33] In addition to the procedural limitations and the exclusion imposed,[34] the UN's tortious liability has also been limited in the following way: compensation is limited to $50,000, the actual amount to be determined by reference to local compensation standards. No financial limitations are applicable to claims arising from gross negligence or wilful misconduct; the UN would assume liability to compensate a third party, retaining the right to seek recovery from the individual or the troop-contributing state concerned.[35]

Non-economic losses such as pain and suffering, moral anguish, indirect damages or those impossible to verify are excluded, as are punitive damages. Specified formulae will govern the calculation of damages to premises whereas reasonable costs of repair or replacement operate as limitations for the compensation of damages to property. In contrast to, for instance, ECHR's case law, the Resolution does not recognise 'that circumstances within a country may make it difficult if not impossible to adduce the evidence necessary to prove specific values for pecuniary harm'.[36]

As an observation of a more general nature, one could question whether the restriction imposed by the public policy of the organisation on the remedies available is not going beyond the minimum which, according to E. Rabel as cited by Christine Gray,[37] should ensure that as

[33] What triggered the call to limit UN liability was an undocumented joint claim submitted by Bosnia and Herzegovina against the UN in the amount of $70 million, of which $64 million was for damages caused in the normal use of roads, bridges and parking places by UN vehicles. In receiving notice of the claim, the Advisory Committee on Administrative and Budgetary Questions noted 'This sort of information is, in the view of the Committee, compelling evidence of the need for the United Nations to develop, as quickly as possible, effective measures which could limit its liability': as cited by D. Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage', *AJIL* 94 (2000), 406–12, at 410, note 24.

[34] See above, p. 102

[35] A/51/903 of 21 May 1997, para. 14. According to the UN Secretary-General 'the statutory basis for imposing financial liability for gross negligence is staff rule 112.3', a view that is supported by both the UN General Assembly and the UNAT. In the follow-up report on management irregularities causing financial losses to the organisation, the Secretary-General outlined the procedures he is developing for determining gross negligence and for the effective implementation of staff rule 112.3 for financial recovery. In doing so, the due process rights of staff members will be respected: A/54/793 of 13 March 2000, paras. 8, 10 and 11. Cases may be referred to the Joint Disciplinary Committee and/or the Local Property Survey Board, the decisions of which may be appealed to the Joint Appeals Board: *ibid.*, paras. 14 and 15.

[36] As referred to by D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), p. 235.

[37] C. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987), p. 10.

Zappalà, S., "The Rights of Victims v. The Rights of the Accused", *J. Int Crim J* (2010)

The Rights of Victims *v.* the Rights of the Accused

Salvatore Zappalà*

Abstract

For too long victims have been neglected in international criminal law; with the adoption of the International Criminal Court (ICC) Statute they have, however, been granted a set of procedural rights that entitles them to some form of participation in international criminal proceedings. Arguably there is nothing prejudicial per se to the rights of the accused in allowing victims to participate in international criminal proceedings. Unfortunately, however, the ambiguities of the ICC Statute, the lack of clarity as to the procedural model, and the absence of clear cut provisions in the ICC Rules of Procedure and Evidence (RPE) have created a legal framework which is flawed with regard to the principle of legal certainty and, at least in this respect, clearly amounts to a violation of the rights of the accused. Against this background, the judges are solely responsible for finding the appropriate way to enable some measure of victim participation consistent with the rights of the accused. According to the Statute, any balancing between these two competing interests must be premised on the primacy of the rights of the accused. The practice of ICC Chambers, however, suggests that the judges are hesitant explicitly to recognize the primacy of such rights. This reluctance may lead in some instances (e.g. the broad definition of victims; permission for the presentation of evidence by victims; the acceptance of the double status as victim and as witness; and so on) to weaken the protection of the rights of the accused due to a mistaken interpretation of the right of victims to obtain justice.

1. Introduction

A. The Role of Victims in the Procedural System of the International Criminal Court

It is well known that until the adoption of the International Criminal Court (ICC) Statute in 1998 there was no room for victims in international criminal

* Professor of International Law, University of Catania; member of the Board of Editors and Managing Editor of this *Journal*. [salvo_zappala@yahoo.it]

Journal of International Criminal Justice 8 (2010), 137–164 doi:10.1093/jicj/mqq001

procedure other than as witnesses.[1] In the United Nations' ad hoc Tribunals system, the exclusion of victims was justified with arguments relating to the mandate of the Tribunals, their nature, and the structure of their procedural system (accusatorial common law procedural systems do not usually allow for victims' participation).[2] The argument was also made that it would have been impossible to allow victims of international crimes to participate in the proceedings before international courts given their potentially large numbers and the negative impact this would have on the proceedings.

The reasons for not allowing victim participation in international criminal trials, however, never seemed to include specific concern for the rights of the accused.[3] Moreover, it must be noted that several national procedural systems do allow for victim participation. At least broadly speaking, these systems do not appear to be less respectful of the rights of defendants than those which do not provide for such participation, although some concerns about the consistency of victim participation with the rights of the accused have been expressed.[4]

With the adoption of the ICC Statute the decision was taken to bring victims into the international criminal justice system not merely as witnesses for the Prosecution but with an autonomous standing. Nonetheless, the proper understanding of the position and role of victims in international criminal proceedings suffers from inextricable uncertainty relating to the procedural model chosen for international criminal courts and tribunals, and the ambiguities of some crucial provisions of their constitutive instruments.

In this article I will mainly refer to the ICC system, however, some references, at least in passing, will also be made to the Extraordinary Chambers in the Courts of Cambodia (the 'ECCC') and to the Special Tribunal for Lebanon

1 On this issue see C. Jorda and J. de Hemptinne, 'The Status and the Role of the Victim', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The International Criminal Court Statute: A Commentary*, vol. I (Oxford: OUP, 2002) 1387–1419, in which several problems concerning victim participation in the proceedings before the Court had been already previsaged.

2 For a concise overview on the evolution of victim participation in international criminal proceedings from the ad hoc Tribunals to the ICC Statute, see J. de Hemptinne, 'Victims' Participation in International Criminal Proceedings', in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice* (Oxford: OUP, 2009) 562–564; see also S. Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: OUP, 2003) 219–232.

3 See *contra*, though with caution, Ch. Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings', 29 *Michigan Journal of International Law* (2008) 777–826, at note 69, who mentions that '... perhaps driven by concerns of victor's justice, the drafters decided not to permit victim participation, which they thought might jeopardize the rights of the accused', and also de Hemptinne *supra* note 2, at 562. Nonetheless, there does not seem to be any evidence that such a thought has guided the drafters of the Statutes of the ad hoc Tribunals.

4 Most of these systems are in civil law countries and provide for criminal proceedings regulated in a largely inquisitorial manner. However, even in such systems, with a tradition in providing for the *'constitution de partie civile'*, several arguments based on the protection of the rights of the accused have been raised against such participation, see e.g. M.L. Rassat, *Procédure Pénale* (Paris: PUF, 1990) 215–224.

(the 'STL'), both of which provide for some measure of victim participation, although in different forms, and based on slightly clearer procedural rules.[5]

Under the procedural system adopted for the ICC, on the other hand, it remains unclear whether victims should be considered as participants in a judge-driven fact finding (inquisitorial-type) process or as participants in a party-driven fact finding (accusatorial-type) process. In the former, judges have the task of searching for the truth with the involvement of several other actors, including the victims. In the latter, victims cannot usually have the same role as the other parties since this would alter the truth seeking process of the system (essentially, the system for presentation of evidence at trial), which is essentially based on the confrontation of two parties.[6]

This situation of uncertainty as to the procedural model has led ICC Chambers to adopt several contradictory decisions, which, although not entirely satisfactory, represent a laudable attempt to clarify various sensitive issues that were left unsolved by the treaty drafters. Naturally, this general uncertainty also assumes relevance when it comes to tackling the issue of the relationship between the rights of the accused and the rights of victims.

The title of this article is based on the assumption that victim participation in criminal proceedings *necessarily* implies some sort of conflict with the rights of defendants. This article, however, seeks to contradict this view and demonstrate that there is nothing prejudicial per se to the rights of the accused in allowing victim participation in international criminal proceedings, provided that some fundamental principles of due process and fair trial are respected and granted primacy over any other potentially conflicting interest.

B. How to Ensure Respect for the Rights of the Accused and How to Construe their Relationship with the Participation of Victims in the Proceedings in a Nutshell

In order to ensure that the participation of victims does not turn out to be detrimental to the rights of the accused, it is essential that the modes and the

5 In this respect see J. de Hemptinne in this issue and D. Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation', 4 *Journal of International Criminal Justice (JICJ)* (2006) 307–313. Certainly, the ECCC procedural model is clearer for it is largely based on the inquisitorial system adopted in Cambodia. The victims in this context may be (and have been) very closely involved in the preparation of the dossier of the investigating judge. Moreover in the ECCC system victims participating in the proceedings are clearly considered as parties, cf. Rule 23 (6)(a) ECCC Internal Rules and Co-prosecutors' Submission on Civil Party Participation in Provisional Detention Appeals (Case n. 002/19-09-2007-ECCC/OCIJ (PTC1), 22 February 2008; on the decision relating to this matter see J. Iontcheva Turner, 'International Decisions: Decision on Civil Party Participation in Provisional Detention Appeals: Extraordinary Chambers in the Courts of Cambodia', 103 *American Journal of International Law* (2009) 116–122.

6 On the procedural models adopted for international criminal tribunals and courts, see in general A. Orie, 'Accusatorial v. Inquisitorial Approach in International Criminal Proceedings', in Cassese et al. (eds), *Commentary, supra* note 1, 1439–1495 and K. Ambos, 'The Structure of International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' 3 *International Criminal Law Review* (2003) 1–37.

boundaries of *victim participation* in international criminal trials are properly identified *in the light of the rights of defendants.*

Any conflict between the rights of victims and the rights of defendants has to be the object of a *delicate balancing* that must be carried out in the knowledge that the overarching purpose of criminal procedure is to reach a finding of guilt or innocence whilst protecting at the highest level the rights of those subjected to the proceedings (i.e. the suspect and the accused). Modern criminal procedure is based on the assumption that it is 'better that ten guilty persons escape than that one innocent suffer'.[7]

The balancing of victim participation against the rights of the accused should be inspired by some *procedural principles of an imperative nature*, which represent *the backbone of international criminal procedure*: the presumption of innocence, the right to a fair hearing in full equality, the right to an expeditious trial, the right to confront and present evidence, and so on.[8]

The primacy of the rights of the accused, which is enshrined in all international human rights instruments and is to a large extent customary international law, must be implemented at three levels. Firstly, it must be recognized within the relevant *normative* instruments regulating the activities of each given court; secondly, it must be ensured by the *judges* in the proceedings on a case by case basis; thirdly, there should be some mechanism of *redress* in case of violations.

Regarding the normative aspect, whilst in general both the ICC Statute and the Rules of Procedure and Evidence (RPE) contain satisfactory provisions protecting the rights of the suspect (although they do not use this term; Articles 55 and 58 ICC Statute) and of the accused (Articles 66 and 67 ICC Statute), in so far as the provisions regarding victim participation are concerned, the ICC system lacks an appropriate level of clarity.

Moreover, as far as redress is concerned, the situation is even worse since no international criminal court or tribunal provides for appropriate remedial procedures in case of violations.[9] In particular, all systems fall short of appropriate redress mechanisms in case of human rights violations by the Prosecutor or Chambers. By looking at the practice of the relevant courts, commentators will at most be able to argue that there has been a violation in this or that specific case. However, such observations will not produce any concrete effects. The best solution would be to have some sort of monitoring mechanism for human rights violations within the international criminal justice system

7 W. Blackstone, *Commentaries of the Laws of England in Four Books, B. IV: Of Public Wrongs* (London: Cadell and Davies, 1769), at 358; on the maxim see A. Volokh, '*n* Guilty Men', 146 *University of Pennsylvania Law Review* (1997) 173, available online at http://www.law.ucla.edu/volokh/guilty.htm (visited 18 December 2009).

8 Here I am not necessarily arguing that these rights have a *jus cogens* status under international law (although the argument could be made that most of these rules are of a peremptory nature). I simply consider that they are imperative in the sense that no modern system of criminal procedure can be envisaged that does not recognize these principles.

9 Even if the ICC Statute appropriately provides for a right of compensation for those unjustly convicted (see Art. 85 ICCSt.).

providing for appropriate remedies in case of violations. This solution, however, seems at least at this stage of development to be largely utopian.[10]

Therefore, it seems better to concentrate on how to protect the rights of the accused against those of victims through interpretation, and in particular, through *judicial* interpretation.

2. The Vagueness of the Applicable Law in the ICC System and the Role of the Judges

Probably, the most appropriate way to balance the rights of the accused against the rights of victims would have been to adopt specific provisions setting out in detail the limits to victim participation in proceedings in light of the rights of the accused.[11] There is no need to recall the drafting history of the Rome Statute, and in particular the debates concerning the provisions on victim participation.[12] Broadly speaking, these provisions have rightly been seen as a step forward in international criminal justice;[13] however, there is no doubt that they left many aspects unclear.[14] The ICC RPE did nothing to add any clarity to the situation. The existence of so many grey areas is largely due to the so-called 'constructive ambiguity' of diplomatic negotiations.[15] Thus, it has been left to the judges to find proper ways to enable victim participation in the proceedings.[16]

10 Naturally, this is a much broader problem which does not merely concern victim participation, but refers to all potential violations of fundamental rights by international criminal courts. It is unlikely that a solution will be envisaged in the near future. Suggesting the establishment of monitoring mechanisms does not take into any account the fundamentals of the international criminal justice system and would prove scant knowledge of the reality of international relations. At this stage one may hope that a system of procedural sanctions together with strict supervision by Chambers could ensure more respect for the primary rules which grant appropriate protection to the rights of the accused. On this issue see more generally Zappalà, *supra* note 2, at 256–8.

11 The system outlined in the Statute appears to hinge on the presentation of evidence before the Trial Chamber in a manner which is largely adversarial, and does not seem to provide for an investigative file to be handed over to the judges. See M. Damaška, 'Problematic Features of International Criminal Procedure' in Cassese et al. (eds), *supra* note 1, 175–186.

12 G. Bitti and H. Friman, 'Participation of Victims in the Proceedings', in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, NY: Transnational Publisher, 2001) 456–474.

13 For a thorough presentation, see D. Donat-Cattin, 'Protection of the Victims and Witnesses and Their Participation in the Proceedings – Article 68' and 'Reparations to Victims – Article 75' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999) respectively at 869–888 and 965–978.

14 See Zappalà, *supra* note 2, at 228.

15 See in this respect C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise', 1 *JICJ* (2003) 603–617, at 604–606.

16 It has been effectively pointed out that 'Article 68 (3) of the Rome Statute is frustratingly vague' (Trumbull, *supra* note 3, at 793). The ambiguity or vagueness of some notions creates a strong need for judicial activism in international criminal justice; on this issue see S. Zappalà,

There are some key provisions of the ICC Statute which outline the *roles* that victims may play in the proceedings. Victims are entitled to some measure of involvement both in order to present their views in various forms (Articles 15, 19, and 68(3)) and in order to obtain compensation (Article 75). In both areas, however, the provisions of the Statute are affected by the same fundamental lack of clarity. As far as the presentation of views is concerned, the Statute adopts language that is open to diverging interpretations and in reality leaves it to the judges to determine the actual modes of participation. As regards reparation, the Statute is particularly vague in that it leaves it to the Chambers of the Court to determine the principles for awarding reparation to victims — this seems to provide for a policy choice and the subsequent creation of principles that is not typically the task for a judicial institution.

All the provisions dealing with the right of victims to submit their concerns to the Chambers imply the general accountability of ICC organs, and in particular of the ICC Prosecutor, towards victim communities.[17] Such accountability, however, is not facilitated by appropriate specific mechanisms that would allow victims to trigger control over the exercise of the relevant duties of prosecuting and judicial authorities.[18] In other words, victims are given the right to present their views, but there is no clear rule requiring the authorities (neither the Prosecutor nor Chambers) to give appropriate responses to these views, to clarify the reasons for not taking them fully or even partially into account, and it is not even clear what the consequences would be for not taking the victims' views into account. The inclusion of such provisions would have enhanced transparency in the administration of justice.

For several reasons greater precision was unattainable and hence, as regards the modes and limits of victim participation, there was no solution other than to leave it to judicial interpretation. Nonetheless, it is often difficult to strike the proper balance between conflicting interests on a case-by-case basis. The case-by-case approach creates problems of consistency in the treatment of different defendants, which in turn threatens the principle of equality before the law.

Judges, however, can find some guidance in a few fundamental principles that have been laid down in the Statute. Appropriately, the judges are 'instructed' to give primacy to the rights of the accused. This should not only inspire their individual decisions but also their overall judicial management of the hearings in their courtroom. The key provision on victim participation, Article 68(3) ICC Statute, specifically indicates that victims may present their

---

'Judicial Activism v. Judicial Restraint in International Criminal Law', in Cassese et al. (eds), *Companion*, *supra* note 2, 216–223, at 220–221.

17 See Arts 15, 19, 53 and 68 ICCSt. These provisions however do not specify the format in which these views are to be presented to the Chambers, nor does the RPE shed any light on this point.

18 In this respect, however, it is somewhat unfortunate that the Statute does not clarify the scope of the obligations of the Prosecutor and the Chambers, and the mechanisms for redress in case of violations.

views and concerns 'in a manner not prejudicial to or inconsistent with the rights of the accused'. In this provision there is no requirement that participation must create an actual prejudice, it is sufficient that there is an abstract conflict, a *fumus* that a conflict may arise. In other words, a risk that the rights of the accused may be violated should be sufficient to preclude victims' involvement.

On the other hand, there is no similar requirement under Article 75 ICC Statute. Here victims are considered for the purpose of obtaining reparation from a convicted person. There is no need to preserve the rights of the accused since the establishment of guilt or innocence has already occurred. In this respect, as will be argued below, victims may be more active in this phase of the proceedings.

The general situation of uncertainty regarding the overall procedural framework coupled with the lack of clarity as to the specific degree of victims' involvement in the proceedings, has been prejudicial to the first defendants appearing before the ICC. It has entailed delays and complex procedural debates in these initial cases.[19] Arguably these delays already amounted to a *violation of the right to an expeditious trial* of the defendants concerned and, although mainly *attributable to the drafters* of the Statute and the RPE, they may have damaged the image of the Court.

3. The Rights of Victims in the Light of Fundamental Due Process Principles

A. The Primacy of the Rights of the Accused in International Criminal Procedure

As seen above, judicial interpretation is indispensable for fleshing out the details and the limits of victim participation in international criminal proceedings. In construing the provisions of the ICC Statute and of the RPE the judges should insist on the notion that the due process principles and fair trial rights must have primacy over any other competing interest. These rights and principles have been created for the benefit of the defendants.[20] They represent the fundamental bedrock of modern criminal procedural law, so that it can be even argued that there is no longer any distinction between adversarial

19 Delays, however, should not to be attributed solely to victim participation.

20 See in this respect M. Chiavario, 'Private Parties: The Rights of the Defendant and the Victim', in M. Delmas-Marty and J. Spencer (eds), *European Criminal Procedures* (Cambridge: CUP, 2002) 541–593, where the author appropriately clarifies that under the ECHR there are rights to judicial proceedings and rights in the course of the proceedings, which are intended for the sole benefit of the accused (at 542).

and non-adversarial trials, and that the only genuine criterion for assessing the quality of criminal justice is the reliance on the 'fair trial model'.[21]

Naturally, this does not mean that victims have no rights under international law. On the contrary, they enjoy a number of rights which are protected under international human rights and humanitarian law, and which are of the utmost importance and should be fully implemented, but not necessarily within the context of international criminal proceedings.[22] One should not confuse the panoply of rights granted to victims under various branches of international law with their procedural rights in the international criminal justice system. Indeed, these rights are much more limited and, above all, they must be counter-balanced against the primacy of the rights of the accused, which means that their exercise in this specific forum (i.e. the criminal trial) is constrained by other prevailing rights.

In the ad hoc Tribunal system the relationship between the rights of victims and the rights of the accused is clarified by Articles 20 ICTY Statute and 19 ICTR Statute, which specify that 'the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with *full respect* for the rights of the accused and *due regard* for the protection of victims and witnesses'.[23] In that system, however, the rights of victims are limited to protection and the restitution of property, where applicable.

Surprisingly, at the ICC, where victims enjoy more extensive rights, Article 64 ICC Statute on the protection of victims, adopts the same language as that used in the ad hoc Tribunals' Statutes. Moreover, as mentioned above, Article 68(3) ICC Statute, specifically dealing with victim participation, indicates that victims may present their views and concerns 'in a manner not prejudicial to or inconsistent with the rights of the accused'.

This clearly entails that in international criminal procedure there is widespread recognition of the primacy of the rights of the accused over any other

21 See J. Pradel, 'Inquisitoire-Accusatoire: Une Redoutable Complexité', in *International Review of Penal Law* (1997) 213–229; this trend towards convergence is, at least in Europe, a clear consequence of the ECHR and of the case law of the ECtHR, in this respect see e.g. J. Spencer, 'Introduction', in Delmas-Marty and Spencer (eds), *supra* note 20, 1–75, at 37–50. See also G. Mettraux, 'Of The Need For Procedural Fairness and Certainty', available online at http://www.internationallawbureau.com/blog/?p=998 (visited 27 January 2010).

22 The primacy of the rights of the accused over the rights of victims in international criminal procedural law, however, does not mean that victims' rights should not be fully implemented in different arenas. Victims have several rights which cannot be satisfied in the criminal process. These rights must indeed be granted appropriate protection at various levels. As an example, two aspects should be taken into account. First, states are under the ongoing obligation to provide victims with all necessary facilities for rehabilitation and other forms of reparation and social support. This is extremely important, since the ICC will only be able to try very few cases and on very few charges and can only intervene in a very limited area for a limited period of time. Second, the creation of a Trust Fund for victims as an autonomous institution indicates an understanding that the needs of victims must be satisfied beyond the narrow scope of criminal proceedings.

23 Emphasis added. Protective measures for victims are generally allowed provided that they respect the fair trial rights of the accused see e.g. Rules 69(C) and 75 ICTY/ICTR RPE.

conflicting interest. Whilst victims' interests and concerns must be given due consideration in the proceedings as one of the elements that the judges are obliged to take into account at different stages of the proceedings for various purposes, including to adopt appropriate protective measures, under no circumstances may these concerns justify a curtailment of the rights of the accused.

It is worth clarifying that the rights of the accused are not 'just' human rights guarantees; they are part and parcel of the epistemological mechanism for fact finding in criminal proceedings.[24] Respecting the rules to establish the truth requires full consistency with rights of the accused; these must be seen as an essential component of accurate and truthful fact finding on which punishment is premised. If only one of these rights is violated, in only one aspect, in only one instance, the whole process loses credibility and is likely to fail in its objective of properly establishing the truth and of imposing just punishment. There is no truth outside the process; there is no truth that can be reached without full respect of the rights of the accused. It is precisely in this sense that Justice Robert Jackson, in Nuremberg, warned the entire international community that 'to pass a poisonous chalice to the lips of the defendants is to pass it to our own'.

There are several areas in which tensions and conflicts arise: May victims be allowed to participate from the early stages of the proceedings, even prior to the identification of the potential defendant? Would their participation unduly prolong the proceedings? Is victim participation fully consistent with the presumption of innocence? Does it diminish the perception of independence and impartiality of the tribunal? Does it affect the right to equality of arms? Is the right to confront the accuser respected? May victims be allowed to participate anonymously?

B. The Participation of Victim and the Right to an Expeditious Trial

One of the most widespread criticisms of victim participation in international criminal proceedings is that it may entail huge delays and thus conflict with the defendant's right to an expeditious trial.[25]

Apart from the practical consideration that very long proceedings have taken place before international criminal tribunals even in the absence of any right of victims to participate, it should also be said that this risk to the right of the accused should be addressed through organizational measures and the

24 Criminal procedure is based on the idea that if the charges are proven a punishment can be imposed on the defendant. To determine whether the charges are proven means to discover and establish the 'truth' (i.e. judicial truth). It is certainly not the truth with capital T, but it is still the only justification that today society can use to impose a penalty on an individual. The establishment of the truth can only be carried out through a process of information gathering and of verification of the facts which must be done with accuracy and respect for certain rules.

25 See e.g. the Foreword to the Symposium, and the article by L. Zegveld, 'Victims' Reparation Claims and International Criminal Courts: Incompatible Values?' in this issue of the *Journal*.

proper balancing of conflicting interests on a case-by-case basis. In some cases, for example, if victims prolong proceedings by presenting several motions and engaging in systematic challenges to prosecutorial strategy, the system will have to accept that defendants will be released pending trial to compensate for this prolongation of the proceedings due to the active involvement of victims.[26] This is just one example; it is vital to ensure that the right balance is always struck, keeping in mind the primacy of the rights of the accused and the presumption of innocence.

The ICC Chambers have not always been coherent in reaffirming the importance of such a principle and of the rights of the accused as the central pillar of international criminal proceedings. For example, it is respectfully submitted that Judge (now President) Song was not entirely correct when in a separate opinion he stated that the delays in the proceedings were not in violation of the rights of the accused because they were the mere consequence of the participation of victims which is authorized by the Statute.[27] The Statute does indeed authorize victim participation, but it does so only to the extent that it is not inconsistent with the rights of the accused. Victim participation that unreasonably prolongs the proceedings, and violates the rights of the accused, finds no justification in the fact that participation is provided for in the Statute. One may argue that the reasonableness of the length of proceedings is also assessed in the light of victim participation. However, nowhere in the Statute is victim participation authorized to the detriment of the rights of the accused. On the contrary, the Statute prescribes that participation must occur in a manner 'not prejudicial to or inconsistent with the rights of the accused'. The fact that participation is allowed cannot cure this inconsistency with the rights of the accused. Criminal proceedings must not be unreasonably long, otherwise the rights of the accused are violated, even if this prolongation is due to victim participation. The right of the accused to an expeditious trial is not per se curtailed by victim participation, however, the bench should take all necessary steps to avoid unnecessary procedural debates involving victim representatives and take into account the increased risk of procedural delays.

C. The Presumption of Innocence

Although the participation of victims is not per se in conflict with the presumption of innocence, there is at least one aspect of victim participation which creates a potential prejudice: the mere fact of victim participation entails an underlying presumption that the events (the crimes) are considered to have occurred in given circumstances and that certain people were the

26 It is important to recall that all defendants have a right to be tried within reasonable time; however, defendants who are in custody have the more stringent right to be tried without undue delays.

27 Decision of the Appeals Chamber on the Joint Application of Victims, Separate Opinion of Judge Song, *Lubanga Dyilo* (ICC-01/04-01/06), Appeals Chamber, 2 February 2007, § 27.

victims.[28] Normally the factual basis of the crime is one of the elements that the Prosecutor must prove beyond reasonable doubt, and it is part of the fact-finding process of a criminal trial. When victims are admitted to the proceedings on the basis of a preliminary finding that a crime was committed against them, there seems to be a presumption as to the unfolding of events. This implies the establishment (at least prima facie) of the fact that a crime occurred and that the persons claiming the status of victims were somehow affected by this crime. There is a risk that the trial will be only limited to the legal characterization of the events and the identity of their author. As is well known, modern criminal trials are based on the presumption of innocence and the defendant — no matter how serious the allegation against him or her — is presumed to be innocent and must be treated accordingly, including by requiring proof beyond reasonable doubt of the relevant facts establishing the offence. Moreover, the ICC Statute explicitly clarifies that the burden of proof rests on the Prosecution (Article 66(2)) and no reversal of the burden is allowed (Article 67(1)(i)). The fact that victims are allowed to take part in the proceedings cannot alter such rules, which are essential to a fair trial. The judges will thus have to be extremely careful to include in their judgment specific reasoning showing that they did not take the factual basis of the crimes for granted.

D. The Right to an Independent and Impartial Tribunal

The participation of victims has also a potential impact on the right to an independent and impartial tribunal, or at least the perception thereof. Courts must not only be independent and impartial but should of course also be seen as being so.

There is little doubt that the ICC is a potentially powerful instrument against impunity; and the fight against impunity, as has been recalled, is part of its broader mission. This may generate a strong tendency to view the whole court system as a mechanism to ensure punishment, convictions, and prospectively the occurrence of no more crimes rather than — more modestly — an institution that dispenses fair trials on international crimes charges. One should never forget that a just sentence can only be the result of a fair trial. There is no certainty that respecting all fair trial rights leads to a just sentence, but it is certain that violating them means an unjust one. Moreover, the potential scenario of victims proposing the production of certain evidence would

28 Even if one agrees with the view that there might be victims without the identity of the culprit being established (see in this respect Donat Cattin, *supra* note 13), it is clear that the establishment of the facts of the crime is one of the aspects of the criminal trial and normally the burden to prove them rests on the Prosecution. By allowing victims to participate in the proceedings, judges may seem to have predetermined that there are certain persons who are victims of certain crimes, and that there is a strong presumption that the crimes took place in a given location at a certain moment in time. This may — though indirectly — lessen the burden for the Prosecution to prove its case, which is an essential component of trial proceedings before the ICC on the basis of Art. 66 ICCSt.

place the judges in an unenviable position. How would the judges be seen if they disregarded a request from the victims to gather a certain piece of evidence or to call a particular witness? They would inevitably be subjected to a degree of 'pressure' which would be hard to resist, especially when dissenting or separate opinions are possible.

Furthermore, the power of judges to secure evidence even at the request of victims is clearly justified by the procedural system of the ICC as well as the STL. However, it confers on judges a role which will have to be performed with great care including the adoption of several safeguards to ensure that the judges, who will have to decide on the guilt or innocence of the accused, are not unduly transformed into investigators with a certain theory in mind that they will tend to corroborate by finding the appropriate (though not necessarily the best) evidence. Judges in this respect will have to limit as much as possible such evidentiary inputs; if such evidence is admitted, the judge should ensure that all measures are taken to allow the Defence to challenge such evidence.

In this respect one may wonder whether the provisions whereby a victim participating in the proceedings can seek the intervention of the judges to secure evidence is really appropriate. If the judges intervene *in lieu* of the parties (i.e. the Prosecution and the Defence) are they not altering the rules of the truth finding process without having sufficient knowledge to do so? Moreover, it is one thing to intervene to assist the Defence (and originally a similar approach was adopted at the ICTY and used with this purpose e.g. in *Dokmanovic*), but is quite another thing to use this power in favour of other actors to increase the chances of securing a conviction. It is widely acknowledged that the defendant is in a position of inequality and relative weakness vis-à-vis the Prosecutor. Judges do not violate any legal principle in assisting the Defence to secure a certain piece of evidence. However, in so doing at the request of other participants (the Prosecution or the victims) they may become instrumental in gathering evidence leading to the conviction of the accused. This evidence may be false or untrustworthy, but the defendant will be in a difficult position to mount a challenge since it will be considered to be evidence impartially obtained by the judges. This may even result in the judges being (or merely being perceived as being) less objective and sharing the same opinion as the subject for whom the evidence is gathered, and perhaps developing a sort of natural sympathy for the evidence 'they' obtained. Finally, there is also a powerful textual argument based on Article 66 ICC Statute which provides that '[the] onus is on the Prosecutor to prove the guilt of the accused'. Is it permissible for this burden to be collectively shared by the Prosecution, the victims and the judges? Probably the solution that would best ensure consistency with the rights of the accused is to interpret the power of the judges to search for the truth as a mechanism to be used only in favour of the accused.[29]

29 H. Friman, 'The ICC and Victim Participation: A Third Party to the Proceedings', 22 *Leiden Journal of International Law* (2009) 485–500, at 496.

E. The Right to a Fair Trial and the Principle of Equality

The right to a fair trial is a very broad notion that encapsulates a set of (so-called minimum) guarantees. Each of these guarantees must be respected without any infringement (since they set the *minimum* standard), and the participation of victims in no way authorizes any exception. However, it may be asked whether and to what extent victims possess a right to fair trial in ICC proceedings comparable to that of the defendant? Without going into too many details, victims arguably do not have such a right as far as the criminal trial is concerned. Victims enjoy several rights under international law (though not necessarily implemented at the international level), such as the right to justice, the right to the truth, the right to be heard, the right to obtain compensation, and many other rights, including the right to have access to justice, which in some national systems may imply that public authorities are under an obligation to proceed with a criminal case (and in the ICC Statute it justifies their intervention under Articles 15, 19, 68 and, to some extent, 53). However, they cannot claim the same content of rights which in ICC proceedings are granted to the defendant; it is precisely this cluster of rights which embody the notion of a fair trial. As has been rightly pointed out, victims have a right to a fair civil trial, which – transposing the concept at the ICC level — means, at most, that victims can claim the right to a fair trial in that segment of the proceedings dealing with reparations.

Despite some perplexing claims according to which the right to a fair trial is seen as a sort of general public interest — which would imply that the proceedings must be fair towards the Prosecution or society at large — it is important to stress that *only the accused has a right to a fair trial.* Fairness is not a broad 'one size fits all' notion. Fairness is the standard for assessing the behavior of public authorities towards the individual against whom criminal charges are laid and who is then subjected to criminal prosecution. The purpose of criminal procedure is to ensure that the individual is protected against any potential abuse or error by the public authorities carrying out investigations, prosecutions and trials.

Another fundamental misunderstanding must be clarified concerning the principle of equality — this principle is intended to allow the individual who is brought before a court to be assisted by public authorities in the best possible way to ensure that he or she is not disadvantaged compared with the Prosecution. To consider that equality implies that all parties to the trial must be treated on an equal footing is to misinterpret the requirements of fairness and equality. Moreover, it must also be clarified that for the purpose of participation in the form of the presentation of their views and concerns, victims are not parties to the proceedings.[30] For the reasons set out above, they might

30 Cf. Dissenting Opinion of Judge Pikis to the Appeals Chamber Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber's I Decision on Victim's Participation of 18 January 2008, *Lubanga Dyilo* (ICC-01/04-01/06), Appeals Chamber, 11 July 2008, § 14.

assume the role and function of parties only in reparation proceedings under Article 75 ICC Statute after a conviction has occurred.

A slightly different, albeit related, issue is that the structure of the proceedings at the ICC implies that prior to trial the defendant must be in a position to organize his or her defence. The right to be informed in detail of the charges and of the evidence supporting them is an essential component of the right to a fair trial. Any evidentiary element introduced in the proceedings must be subjected to this principle of information, which also entails the prohibition on taking the Defence by surprise. If during a trial, after the Prosecution case has ended and after the Defence has determined its procedural strategy, the judges (*proprio motu* or at the request of the victims) abruptly decide to call new witnesses (which seems permissible under the Statute) or to add new charges (which, at least generally speaking, should not be allowed) there is a clear risk of unfairness. In this respect the decision by Trial Chamber I in *Lubanga* to add new charges by adding five new crimes — resorting to Regulation 55 (which allows the judges to recharacterize but not to add new charges) — is extremely perplexing and would set a worrying precedent if allowed to stand.[31]

Another sensitive issue for the right of the accused to a fair trial is the anonymity for victims. In *Lubanga*, the ICC Pre-Trial Chamber (PTC) allowed the anonymous participation of victims at the confirmation hearing. In so doing the PTC limited their activities to accessing public documents and to being present during public hearings. Nonetheless, victims' representatives were allowed to make opening and closing statements during the confirmation hearing and to intervene upon authorization of the judges. Admittedly, victims were not allowed to raise any point of fact or to request evidence be added to the Prosecutor's case against Thomas Lubanga Dyilo, however, the mere submission of arguments on some aspects of the case could indeed create difficulties for the Defence.[32] In some ways, it is as though the Office of the Prosecutor, which already has many officials working on a case, is additionally assisted by other teams. This certainly affects the balance between the parties and the principle of equality.

Moreover, as a matter of principle, anonymous participation (of both witnesses and *a fortiori* victims) should never be looked upon favourably. There is nothing more odious in a criminal trial than being anonymously accused. Of course, in most of these cases there are very good reasons for victims to be granted anonymity: risks for them and their families, concerns regarding traumatization and re-traumatization. However, if there is a positive contribution that can be made to the proceedings from the participation of victims it is

31 See Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 14 July 2009.

32 See Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, *Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, 22 September 2006.

that they can effectively confront the defendant. If the victims are hidden from the defendant, what is the purpose of their participation? Would it not be better to allow associations of victims to participate and to speak in the name of the individual victims in a more general manner? The presentation of anonymous views and concerns is problematic, as well as the communication of documents relating to the case to actors who remain unknown to the Defence. The ICC Chambers have clearly set out the principle that anonymity cannot be viewed favourably, although they did not rule it out completely, which is unfortunate.[33]

F. Evidentiary Matters and Other Concerns

What is the role of victims during the proceedings? Will they produce evidence and if so, in what way? Will judges filter their demands? Will they assist one party or only the judges in the proper determination of the case? What relationship will they have with Prosecution witnesses? Will there be any victims among the Prosecution witnesses? Can they testify and be cross-examined? How should cross-examination be carried out? All these questions are not answered in the Statute, and are only answered to a limited extent in the RPE. Therefore most of these issues have been treated, and will be treated in the future, as courtroom matters for the Chambers to decide on a case-by-case basis. This is not entirely satisfactory because such decisions should be principled choices made by the drafters and applied consistently in all cases.

As far as evidence is concerned, another sensitive issue is the ability of *victims to appear as witnesses* in the trial. There does not seem to be any specific prohibition in the ICC system and the Chambers have not excluded it.[34] However, at the Lebanon Tribunal, at least in general terms, it has been appropriately excluded.[35] The main problem here is to understand at which stage a

33 See Decision on Victim Participation, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 18 January 2008, §§ 130–131, and Decision on the applications by victims to participate in the proceedings, *Lubanga Dyilo* (ICC-01/04-01/06), Trial Chamber I, 15 December 2008, §§ 123–124.

34 Recently, in *Katanga and Ngudjolo Chui* (ICC-01/04-01/07), the Trial Chamber admitted the possibility that victims appear as witnesses, it specifically clarifies that '[As] a matter of principle, Victims' Legal Representatives will not be able to call witnesses other than the victims they represent (§ 45, at 19), see Directions for the conduct of the proceedings and testimony in accordance with rule 140, 20 November 2009, Trial Chamber II, Presiding Judge Bruno Cotte.

35 The question whether a victim participating in the proceedings may also be a witness is settled in Rule 150(D), which provides that such victim "shall not be permitted to give evidence unless a Chamber decides that the interests of justice so require". The rule therefore provides that a victim must decide at the outset whether he or she wishes to be (i) a participant in the proceedings, or (ii) a witness. Nonetheless, since the situation may change and, for example, parties may realize later in the proceedings that a victim might be important as a witness, an application may be made to the appropriate Chamber to solve the quandary. This is however not very satisfactory since victims participating may have received information which alters their testimony and makes them untrustworthy witnesses.

choice is made between the possibility of participating by presenting views and concerns as a victim and the possibility of taking the oath as a witness. It is submitted that there should be a precise deadline during the proceedings by which victims must decide whether they wish to appear as witnesses (in which case they should not be entitled to receive any case documents — apart from public documents — relating to the proceedings, since this may even involuntarily affect the genuine character of their testimony) or whether they intend to present their views during the proceedings (in which case they would receive case documents, but they should not be allowed to testify).[36] It is worth emphasizing that at the ICC in one of its first proceedings the principle has been confirmed that victims might be allowed to testify, however, Trial Chamber II, in *Katanga and Ngudjolo Chui*, appropriately clarified that 'the Chamber will only grant applications on behalf of victims whose testimony can make a genuine contribution to the ascertainment of the truth' and with a set of guarantees which seeks fully to protect the rights of the accused. Although, the decision is laudable in many respects, what seems to be perplexing is the idea to allow, at least in principle, testimony by victims who are participating to the proceedings. In this, there is a risk of undermining the genuine character of their testimony (or at least the perception of it). Moreover, the procedure for allowing or not allowing these testimonies may result in undesirable delays in the proceedings.

Finally, some comments are warranted concerning the *standard of proof*. When it comes to reparation proceedings, there would in principle be no need for the standard of proof of 'beyond reasonable doubt'. The ICC system does not seem to distinguish between the various aspects of the findings and the judgment, but in Article 66 it clarifies that it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; this does not entail that once a person is found guilty the standard of beyond reasonable doubt still applies. One could envisage that in the proceedings against a convicted person victims may obtain reparations (e.g. restitution) according to the standard of 'on the balance of probabilities'. Arguably, however, this would not be a positive development since there may be a more general tendency to lower the standard of proof, irrespective of the clear language of Article 66 ICC Statute.

4. The Ambiguity of the Status and Role of Victims in International Criminal Justice

A. The Rationale(s) of Victims' Participation and Their Proper Role(s) between Truth Seeking and Compensation Claims

There are two main traditional justifications for victim participation in criminal proceedings. On the one hand, there is the intention to satisfy their *right*

36 In this respect STL RPE Rule 150(D) is slightly problematic in that it does not clarify how the choice is to be made and by whom.

to justice and to the establishment of the truth (or, as termed elsewhere, 'to the establishment of guilt or innocence of the accused', though this formula contains a clear paradox). On the other hand, victims are entitled — in accordance with the principle that any illegal act implies a duty of reparation — to exercise their *right to claim compensation* within the context of the criminal process.[37] These rights may be implemented in different ways, and their extent and modes of implementation are normally dependent on the procedural systems in which they operate.

The *participation* of victims in criminal proceedings is not necessarily connected to compensation claims. Participation, in this respect, might already be a form of reparation, in that it satisfies the need to ensure that investigators, prosecutors and judicial authorities properly perform their duties in the administration of justice and make the process as *transparent* as possible. Moreover, there is no doubt that victims may contribute, insofar as their knowledge of the events allows, to the establishment of the truth (as witnesses), although one must always bear in mind that victims have a specific interest in obtaining a conviction.

Victims' involvement through the submission of representations (Article 15 ICC Statute) and opinions (Article 19 ICC Statute) as well as their views and concerns (Article 68 ICC Statute) essentially aims at satisfying their special interest in the good administration of justice.[38] This is why it would have been better to be more explicit in granting powers to victims to interact with the Prosecutor, to establish an express duty on the Prosecutor to reply to their requests and, where appropriate, to provide reasons for not taking their concerns into account, and then to grant victims the right to challenge these decisions by the Prosecutor before a Chamber. An argument could be made that

37 See e.g. the Report of the President of the Lebanon Tribunal accompanying the adoption of the Rules of Procedure and Evidence of that Tribunal (at § 15). It must be stressed that victim participation for the establishment of the guilt or innocence is strictly connected with a request for reparation, and thus it is more a participation which is oriented (a) to obtain a conviction and (b) on the basis of that conviction, to obtain reparation. Therefore, since it is very difficult to imagine a victim participating in proceedings with a view to contributing to the establishment of the innocence of the accused, it seems preferable to understand victim participation as having as a purpose the conviction of the accused.

38 Naturally, different procedural systems have different methods of pursuing the search for the truth. In merely descriptive terms, in the inquisitorial system there is a confidence that objective truth exists and it is up to a public organ (the judge) to identify it on the basis of contributions coming from various sources, including the victim and the defendant. In accusatorial systems, on the other hand, the truth can emerge only as a result of the confrontation of two parties. In such a system introducing a third party (e.g. the victim or any other actor, such as states, non-governmental organizations and so on) per se modifies the scheme of truth seeking. The truth no longer emerges from a debate between two parties as there are more actors involved. Is this even possible? Is it consistent with the epistemological process of criminal trials? As mentioned above, the determination of the procedural system is essential to try to answer these questions. Unfortunately the need to find a solution reached by compromise does not make it possible to identify an answer a priori. It is necessary to look at the procedural provisions of the ICC Statute and to try to discover what kind of system emerges from a set of rather multifaceted provisions.

these rights are somehow implicit in the system, but it must be recognized that the definition of victims adopted in the RPE and the lack of clarity as to the procedural modalities of their intervention does not assist with this argument.

In any case, in the ICC procedural system, as regards the submission of their representations, views, concerns, and opinions *victims should not be seen as parties* to the proceedings (and correctly they are often defined as participants). Only parties are entitled to participate to the evidentiary process by submitting evidence. Victims are persons who have a special interest (and indeed an interest that is perhaps stronger than that of any other participant) in ensuring that justice is administered properly and, accordingly, they should have been granted the necessary rights to satisfy their needs (e.g. the right to ask and obtain proper responses from the Prosecution).[39]

With respect to the right to seek *reparation*, on the other hand, the position of victims is substantially different. In this case, the ICC Statute seems implicitly to consider that victims have a precise claim which they intend to sustain against a convicted person before the Chambers of the Court. On the basis of a finding of guilt by the Trial Chamber, or in any situation where the defendant's guilt has been established (it could even happen as a consequence of an admission of guilt), victims may present their claims for appropriate compensation for the damage suffered. Only at this stage and in this respect might victims be considered as proper parties to judicial proceedings against the convicted person and could possess all relevant procedural rights.

B. The Definition of Victim Adopted at the ICC

One of the key problems in organizing the participation of victims is the identification of an appropriate definition. Reaching such a definition however presupposes a clear understanding of the purpose of victim involvement in the proceedings.

The ICC RPE defines victims in Rule 85 as follows: 'For the purposes of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or

39 It is important to clarify that there is nothing intrinsically unfair towards defendants in allowing victims to play an active role in the proceedings provided that this occurs without transforming them into additional parties to the proceedings. For example, it would not be prejudicial to the defendant to grant victims the power to control what the Prosecution does through motions to the Chambers. While one may have sympathy for arguments according to which victim participation is seen as problematic with regard to a defendant's rights, the claim that victim participation damages the interests of the Prosecution, although potentially true, does not find any basis in the Statute, since nowhere does it require victim participation to be subjected to respect of prosecutorial powers. On the contrary, the participation of victims is an appropriate tool to control an otherwise broad discretion on the part of the Prosecutor and could increase the chances that the right choices are made. In this respect, victim participation would indeed be a positive development in the ICC system.

institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.

The definition is based on a strange misunderstanding of the role of victims in criminal proceedings; it unduly emphasizes the harm suffered (which, in addition, is left undefined), it is highly ambiguous and it creates conditions for endless debates.[40] Such a definition, rather than contributing to clarifying the Statute — which should have been the intention — increases uncertainty regarding the procedural framework for victim participation.[41] The main defect is that the RPE fail to capture the need to distinguish between the two different rationales behind victim participation.

In the ICC framework the most serious flaw has been that the Statute does not define the notion of victim by linking it to the rights that were granted to such a person. The Statute indifferently uses the term 'victims' in Articles 15, 19, and 68, relating to the submission of their representations, views and concerns at various stages of the proceedings, in Article 64 referring to protective measures, and in Article 75 where it refers to reparation 'including restitution, compensation and rehabilitation'. Moreover, the definition adopted in the ICC RPE is too ambiguous for practical use as it is intended to serve the indefinite purpose of being applied to victims in all their different forms of involvement — ranging from those presenting views and concerns to victims seeking compensation, to victims in need of protective measures.

However, the situation of victims presenting their views and concerns is not at all the same of that of victims claiming reparation. Unfortunately the ICC definition is the same in both contexts, irrespective of what victims have to do in the proceedings. It has taken some time for the Chambers to disentangle the various aspects of the participation of victims and square the circle. As far as the definition is concerned, the Appeals Chamber Decision of 11 July 2008 is an example of how the question of participation in trial proceedings was addressed and the Decision clarified that only the victims of the crimes charged by the Prosecutor have the right to participate since they are those

40 Recently, an eminent author with substantial insights in the negotiations rightly described Rule 85 ICC RPE as a 'catch-all provision', without however explicitly criticizing the broad scope of the rule, which is in many respects the cause of many problems (Friman, *supra* note 29, at 490).

41 The notion of 'harm' or 'damage' may be useful for the purpose of determining the circle of those entitled to reparations; it may be useful to identify those who could be entitled to the status of *'partie civile'*. The ICC Statute however does not consider victims as *'parties civiles'*; it did not add a third party to the trial process (otherwise it would be very strange to deny victims the right to trigger the proceedings or not to provide a specific right to present evidence or to cross examine witnesses). It would be wrong and simplistic to consider that the Statute followed civil law systems in this respect. On the contrary, as on very many issues the ICC drafters created a very special status for victims (or rather two statuses), which are not the product of a mere transposition from any national system, but which nevertheless require more precise definitions.

whose personal interests are affected by the trial.[42] This could be seen as an attempt to fix the problem of the relatively wide definition of victims in Rule 85, but it has taken several months, even years, to reach this determination. The adoption from the outset of a narrower and more precise definition and of clearer rules for participation would have been extremely helpful in this respect.

C. Victims as the Direct Target of the Crimes and the Relevance of Their Views and Concerns

Rule 2 of the ICTY RPE defines the victim as '[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[43] This definition captures the position of *the victim as the person targeted by the crime.* This does not exclude that there may be other persons who have been otherwise damaged or harmed by the crime (which can indeed constitute a broader category), but it emphasizes the existence of a first circle of victims, composed of those directly offended by the crime, which are undoubtedly in a particular situation and whose interests to participate to the proceedings are not necessarily related to any reparation claim.[44] Thus, this category of victims is certainly entitled (and perhaps more than any other category) to obtain justice and the establishment of the truth. Such a right, which is at the heart of the provisions on the rights of victims to present their views and concerns, is only broadly taken into account in international criminal law and assumes the form of a specific interest in enhanced transparency in the proper administration of justice.

In addition, these victims possess first-hand knowledge of the events — at least insofar as the offence against them is concerned — which can be very useful for establishing for the entire community how the crimes occurred on a large scale. For this reason, these victims may also be called as witnesses by the Prosecution.

This situation certainly justifies some degree of involvement of victims in the proceedings, irrespective of any consideration relating to compensation for the harm suffered, and it would have justified the adoption of a more focused definition of victims and the distinction of at least two categories of interested victims. A narrow definition of victims, however, has not been explicitly adopted in the ICC RPE.

42 See Appeals Chamber Decision, *supra* note 30, §§ 53–66.

43 Naturally, for the purposes of this paper, the expression 'a crime' in Rule 2 ICTY/ICTR RPE should be interpreted as referring to the crime(s) charged in a specific indictment against a specific defendant. As is widely understood, in criminal procedure a crime exists only after the proceedings have ended. Prior to a final judgment there is no crime, there is no guilt, there is no convicted person, there is no criminal responsibility and, equally, for the purposes of assessing any civil liability that the accused may have towards victims, there is no responsibility to pay compensation. All these are consequences of a finding of guilt or of other forms of justice (e.g. in some systems guilty plea agreements may include paying compensation to victims).

44 They may simply want to confront the person they believe committed the crime against them.

This is not to say that persons who have suffered harm as a consequence of the crime must not be authorized to any form of participation, but perhaps their involvement should have been explicitly limited by the RPE to the proceedings relating to compensation.

D. Victims and Compensation Claims

Turning then to the second aspect of victim participation in the proceedings: the right to obtain compensation and restitution. The recognition in the ICC Statute of the right of victims to seek reparation from the convicted person implies that victims have a claim which belongs to them and entitles them to be *party to proceedings against the convicted person.* Although the decision on reparation is part of the sentencing process of an international criminal trial, it is a totally different process than the one in which victims may participate as proper parties and assume a more proactive role, insofar as the additional sanctions relating to civil liability are concerned.

The involvement of victims in ICC reparation proceedings necessarily implies the recognition of two key aspects of the situation of victims of international crimes in international law which, although not directly related to the issue of this paper, are worth emphasizing. First, this implies, from a theoretical standpoint, that victims possess a right of compensation under international law — the ICC is simply the *forum* where they are entitled to exercise such a right. It would seem dubious that the ICC Statute itself created such a right of compensation. The language of the Statute (the provisions do not seem to attribute the right of compensation but simply the right to *claim* compensation) and the fact that these provisions apply irrespective of whether the state is the *locus commissi delicti* (i.e. the state on the territory of which the crime was committed), or the state of nationality of the convicted or of the victims, or is party to the Statute, appear to reinforce the idea that in this respect the Statute is essentially procedural law. In other words, the Statute provisions are based on the assumption and recognition that the right of compensation for victims of international crimes pre-exists under international customary law.[45] Thus, despite the widespread contrary opinion[46] it has become harder to argue that victims of international crimes do not possess an individual right of compensation under international law (otherwise how could the ICC exercise jurisdiction over a compensation claim when a case concerns a crime committed in a state which is not party to the Statute or the national of a state which is not party?).

Secondly, this right of compensation can be satisfied in the framework of international *criminal* proceedings. Normally, at the national level, the right of compensation can also (and in many countries can only) be exercised before

45 The right of compensation is also provided for by human rights and humanitarian law treaties, see for example, Art. 3 Hague Convention IV, 1907 and Art. 14 Torture Convention, 1984.

46 N. Ronzitti, 'Access to Justice and Compensation for the Violations of the Law of War', in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford: OUP, 2007) 95–135.

civil courts. At the international level, on the other hand, a sort of criminal law 'euphoria' implies that, although there is *no international civil jurisdiction*,[47] a claim for compensation can be brought before an international criminal court. This is a unique feature of international criminal law. At the national level the right to claim compensation in criminal trials normally derives from the primary right under tort law to claim compensation before civil courts.[48] There is no need to say that bringing the compensation claim within the context of the criminal process (the exception at the national level) becomes nearly the *only available remedy at the international level* since any civil claim will have to be filed with municipal courts — and as things stand now — there are few alternatives.[49] This 'reparation gap' will certainly create a number of problems for the ICC. For example, it might lead to an enormous number of victims filing non receivable claims at the ICC (either because the crimes of which they were victims will not be investigated or prosecuted, or because the defendant will not be apprehended or simply because the case may turn out to be inadmissible), with the risk of great disillusionment for victim communities.[50]

E. What Are the Proper Modes of Victim Participation?

To allow victims to have their voice heard within the context of criminal proceedings, in particular in cases of heinous crimes, does respond to some primordial needs of human beings. After all, criminal trials are a sort of substitute for the desire of victims to punish the offender by themselves. This desire was at the origins of criminal procedure and it included, in some systems, not only the power of victims to prosecute the offender by themselves, but also their power to impose the sanction on the offender.[51] For example, there have been times in Roman law when victims were entitled to bring a case against the alleged offender.[52] Subsequently, with the development of legal systems such a right to justice was proceduralized and, in some systems, it assumed the form of a right for victims to trigger criminal investigations and prosecutions, which were, however, then normally carried out by public authorities.

47 *Ibid.*, at 104–114, where, however, the author does not deny the existence of a right to compensation but rather highlights a variety of 'obstacles to victims obtaining compensation' (at 104).

48 See e.g. the Italian Code of Criminal Procedure which allows those who would be entitled to file a claim before civil courts to do so in the context of the criminal trial against the alleged offender.

49 Apart from those cases in which it will be possible to trigger the jurisdiction of regional human rights courts.

50 The suggestion had been made to let the Trust Fund handle all these proceedings, see Jorda and De Hemptinne, *supra* note 1, at 1415–1417.

51 See in this respect G. Alessi, *Il processo penale. Profilo storico* (8th edn., Roma-Bari: Laterza, 2009), chap. I.

52 B. Santalucia, *Diritto e processo penale nell'antica Roma* (Milano: Giuffrè, 1989), 6–8.

At the international level, victims have more limited rights. In the ICC system they can participate in proceedings, but they do not possess any right to trigger the investigation or the prosecution (though their representations and observations can be heard and must be taken into account by the Prosecution and the judges from the very initial stages of the proceedings). Secondly, victims have no right to seek a judgment of guilt or innocence: they can simply put forward their views and try to persuade the Chambers that the case or the charges should not be dropped. Nor do victims have a right of appeal or a right to force the authorities in any way to hear their case.

There is no doubt that the inclusion in the ICC Statute of victim participation in the proceedings was not the result of thorough reflection on the status and role of victims of international crimes in international law. Nor was there any room for broad institutional changes that would have been needed in the international legal system to achieve consistency with the theoretical underpinnings of recognizing the right to claim compensation within international criminal proceedings (e.g. the establishment of a parallel claim commission for examining the request for compensation relating to all international crimes within the jurisdiction of the ICC, irrespective of whether or not the individual perpetrator was prosecuted before the ICC).[53]

The decision to include victims' concerns in the ICC system was motivated by the widespread support of civil society, the commitment of some academic circles, and the support of some delegations. However, the difficulties of negotiations and the presence of several other more problematic issues to be tackled at the Rome Conference did not allow for a deeper debate (nor would any state have dared take the unpopular position that victims should not participate in the proceedings).

Subsequently, when drafting the RPE, the diverging legal traditions and ensuing difficulties of some delegations in accepting the very notion of victim participation in the proceedings, necessarily perpetuated what can be characterized as an *ambiguous normative framework*.

The drafters of the ICC Statute and the RPE should have at least adopted a bifurcated definition of victims distinguishing between the victim as the person against whom the crime under investigation was committed and the victim as the person who suffered damages or harm as a result of the crime. The first definition would appositely capture and identify the unique situation of the person against whom the crime was carried out (which may or may not coincide with the person seeking reparation). The second definition could refer to other categories of persons. Perhaps they could have used the notion of victim, on the one hand, and the broader notion of person entitled to reparation, on the other. While the definition in Rule 85 ICC RPE is appropriate for the purpose of determining those who may claim compensation, it is too broad and too vague to identify properly victims who should be entitled to present their views and concerns (who arguably constitute a narrower category). This creates the risk of granting participatory rights to persons who can

53 A similar proposal was hinted at by Jorda and de Hemptinne, *supra* note 1, at 1415–1417.

merely claim compensation or restitution and have little or nothing to say about the crimes that were committed.[54]

From the perspective of the rights of the accused it would certainly have been better to clarify that only persons against whom a crime has been committed can present their views and concerns after charges have been formulated by the Prosecutor and linked to those charges. This would have implied a narrower circle of potential participants in the proceedings and a precise moment for their appearance at the confirmation hearing. It would have been also beneficial to specify that victims had to apply for participation at the stage of the confirmation proceedings within a given deadline, and after the expiration of such deadline they would not be allowed to participate in trial proceedings.[55] Additionally, it would have been advisable to distinguish this category of victims from that of other persons who have suffered harm or damage as a consequence of the crime and thus could be granted the right to reparation, and for this purpose they could have been entitled to file a claim once a determination of guilt had been reached.

Notwithstanding the confusing normative framework of the ICC Statute and RPE, the Chambers and the Registry have managed to keep this distinction in mind in most of their pronouncements and in their administrative forms.[56] Victims are informed that there are several forms of participation, and they are requested to specify whether they intend to participate in the proceedings to present their views, or merely intend to claim reparation, or intend to exercise both sets of rights. It is clearly explained that the two rights need not be exercised cumulatively. Moreover, the Chambers have set out as clearly as possible the various capacities in which victims (a term which as defined remains a term of art) may be involved in ICC proceedings.

In any case, under the current legal framework — in order to ensure the highest standards of respect for the rights of the accused — victims (narrowly defined as those directly offended by the crime) should be given very limited powers to intervene in the trial process,[57] and all their interventions should be channelled through the judges. On the other hand, in the proceedings to obtain reparation there would be no obstacle to allowing the victims themselves to be much more active participants.

54 The drafters should have defined more precisely the modes of participation of the two categories of victims. As mentioned above, the two statuses should be seen as wholly distinct and also the sets of rights and powers deriving from each position should have been explicitly organized accordingly. The problem here is that the drafters overestimated the relevance of the UN Basic Declaration on Victim Rights. This document was essentially drafted aiming at imposing a variety of obligations on states and thus a broad definition of victims was instrumental to achieving the purposes of the declaration.

55 In this respect it is worth praising the ICC Trial Chamber in *Lubanga* which has ordered that any victim wishing to participate should file an application by 9 January 2009, see ICC Decision, 15 December 2008, § 137(f).

56 See e.g. the booklet 'Victims Before the International Criminal Court – Guide for the Participation of Victims in the Proceedings of the Court' prepared by the Registry.

57 Since the purpose of their participation is mainly to allow them to verify that justice be done properly.

The existence of this bifurcated status, and the fact that the *locus standi* of victims in international criminal proceedings is not merely based on their right to reparations, are highlighted by the evolution of international criminal law since the Rome Statute. The provisions of the procedural system of the STL, for example, while admitting some measure of victim participation, clearly rule out the possibility of victims claiming compensation before the Tribunal (see Article 25 STL Statute).[58] This confirms that victim participation in international criminal proceedings should not be seen as exclusively, nor primarily, related to compensation, and thus their participation should not be based on any parallelism with the *'constitution de partie civile'*. Compensation, to which victims are entitled under international law, will occur after the close of the trial proceedings during the sentencing process against a convicted person. In other words, until the verdict is issued victims take part in international criminal proceedings essentially to control the action of prosecuting and judicial authorities, after a conviction has been entered they can directly claim compensation from the author of the crimes and fully participate in the proceedings to obtain reparation.

Indeed, as suggested above, *victim participation* through the submission of representations, views, concerns and opinions *aims at contributing to the transparency of the process* and thus, albeit indirectly, to the establishment of the truth (i.e. victims have a right to justice and to the truth). The main reason for allowing victim participation in international criminal justice through the presentation of their views and concerns is to allow victims to *exercise monitoring and control* over the accuracy of the work of the Prosecution and the judges. Victims are given a procedural role to ensure that the process of establishing the truth and, as a consequence, of determining the guilt or innocence of the accused, does not involve distortion of the facts or easy procedural shortcuts, which transform the charges in a way which does not reflect the scope of what they suffered (wrong selection of charges, doubtful guilty pleas and/or dropping charges) to the detriment of the reasons why the proceedings were commenced in the first place.[59]

In this respect, in the ICC system victims' demands are appropriately channelled through the judges: victims can address the judges, interact with the Prosecution and lodge claims and applications at several stages in the proceedings. However, they are not parties to the proceedings. Moreover, if need be

58 As clarified by the Report of the UN Secretary-General, UN Doc. S/2006/893 (15 November 2006), at §§ 31-32 'the possibility for victims to present their views does not imply that they are recognized as "parties civiles"'.

59 Another concern which seems misplaced from a 'rights' perspective is that the victims may interfere with the Prosecution. This might be a concern from the viewpoint of the preservation of investigations and the protection of sources of information. It is not, however, a source of direct concern for the rights of the accused, nor is it inconsistent with any fundamental principle relating to international criminal procedure. Prosecutorial discretion means the ability to select situation and cases, but under no circumstances does it mean arbitrariness. At the international level victims were granted several procedural rights precisely to put the Prosecution under some form of control and to render it accountable towards victim communities.

they can become witnesses, called by the parties or the judges, and contribute their version of the truth to the proceedings. Certainly, the ICC Statute did not create a purely adversarial procedure; there are several elements of the inquisitorial process that have been incorporated in to the ICC Statute and the RPE in order to meet the concerns of those supported some aspects of the inquisitorial system. However, although the drafters adopted provisions which imply that the judges have an objective responsibility for actively searching for the truth and even to gather evidence where appropriate,[60] the evidentiary process appears to be essentially accusatorial. Hence, the participation of victims can be consistent with the procedural system of the ICC insofar as one considers it as aiming at suggesting to the judges how to orientate their fact finding powers (and thus the victims are entitled to suggest that the judges should collect evidence and ask specific questions to the witnesses). What seems to be impermissible is allowing the victims to directly become active parties in the trial proceedings for the determination of guilt or innocence. This is because their presence in the courtroom as active parties would create a serious inbalance in the fact finding mechanism and would be inconsistent with the rights of the accused — the defendant would be forced to confront more than one party (which would be in clear violation of the principle of equality and would alter the balance of the process in many other respects).[61]

5. Conclusion

As shown above, there is no doubt that there are numerous areas of potential conflict between the rights of the accused and the participation of victims. In this respect, the inability of the drafters to strike the appropriate balance between potentially conflicting interests has left the situation somewhat uncertain. As a consequence, the violation of the fundamental principle of legal certainty and the many delays resulting from the time needed by the Chambers to interpret the provisions specifically relating to victim participation have already amounted to a violation of the rights of the defendants involved in the very first proceedings.

The policy decision to admit victims into the courtroom of international criminal trials was seen by many commentators as a positive development. Certainly this is not a matter to be taken lightly since it affects the very philosophy of international criminal justice.[62] Once and for all it has been clarified that international criminal trials are not merely about punishing a few individuals. Rather, the purpose of international criminal justice is broader,

60 In the ICC system, Art. 69(3) allows the judges to request the submission of all evidence that it considers necessary for the determination of the truth; however, this does not necessarily entail an inquisitorial element, since the submission of evidence can be ordered to the parties, only if the judges appoint a court official that will submit the evidence this would entail an inquisitorial element.

61 See the Dissenting Opinion of Judge Pikis, *supra* note 30.

62 See Damaška, *supra* note 11.

comprising victim rehabilitation through participation and assuming a pedagogical dimension involving the affected communities.

Moreover, if victim participation in international criminal proceedings is reinterpreted in this sense, it could be seen as a strong (though often symbolic) tool for increasing control over the Prosecution and enhancing the transparency of international criminal proceedings, rather than a procedural avenue for securing individual reparations.[63] Hence, it becomes clear that the primary goal of international criminal courts and tribunals should be to help victims to find suitable organizational structures to present their views and their side of the story within the proceedings. A good relationship between the Prosecution and victims would normally ensure that this occurs smoothly without jeopardizing the rights of the accused. Of course, whenever the judges are forced (for whatever reason) to replace the Prosecutor in this task, this can cast serious doubts on their impartiality, or at least create the perception of a lack of impartiality. The best solution, at least in theory, would be to require the Prosecutor to provide specific reasons concerning the grounds on which a decision not to take into account the views of victims has been made, and subsequently to give victims a right to challenge that decision before a Chamber.

In the ICC Statute victims are entitled to participate in the proceedings in a very broad and undefined manner. It is essentially left up to the judges to determine the modalities and the manner in which victims ought to participate. However, a general principle has been established: participation must be consistent with the rights of the accused. The judges are entrusted with the task of ensuring the appropriate balance, but they should always keep in mind that primacy is to be given to the rights of the accused.

The first decisions of the ICC in this respect have not been particularly enlightening or coherent, nor do they take sufficient account of the potential impact of victim participation on the rights of the accused (which would include the issue of the length of proceedings, their fairness, and the respect of all minimum guarantees laid down in Article 67 ICC Statute). It was correctly suggested that victim participation should be left for after the trial — when the bulk of the evidentiary process run by the parties has ended.[64] However, the choices made so far are different and may create varying degrees of unfairness. In this respect, the recent decision of Trial Chamber I to add new charges at the end of the Prosecution case in *Lubanga* at the request of victim representatives is perplexing.

Victim participation should never entail turning the status of victims into that of parties to the proceedings. Victim participation at trial, as well as at the earlier stages of the proceedings, may entail powers of control (potentially even very incisive control) over prosecuting authorities, but it should never

63 See in this respect J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-inquisitorial Dichotomy', 7 *JICJ* (2009) 17–39 and Zegveld in this issue, at notes 119–120.

64 Jorda and de Hemptinne *supra* note 1, at 1415–1417.

lead to a real confrontation with the defendant on an equal footing. Therefore, victims should be allowed to participate provided that they are not considered as parties (and in case they are, even for limited purposes, e.g. in case they be granted the right to cross examine witnesses and/or to lead evidence, they should be subject to a set of additional duties).

In any case, participation in the proceedings from the outset should be reserved only for those against whom a crime has been committed and the mode of their participation necessarily requires the judges' mediation.

There are also a number of other courtroom matters which should be solved on a case-by-case basis by the judges resorting to their skills of courtroom control. What is important to stress, however, is that these decisions must be based on the fundamental principles governing international criminal procedure, which grant clear primacy to the rights of the accused and the notion of fair trial. Under no circumstances may the rights of victims prevail over the rights of the defendant, nor may the interest in discovering the truth. There is no need to recall that one of the main teachings of the Nuremberg legacy is that the fairness of the proceedings to the defendants is the main yardstick against which the legitimacy of the whole exercise will be measured.[65]

Finally, it is also worth recalling that the conflict with victim rights is only one of the potential risks for the rights of the accused in international criminal justice. The risks are much broader and may derive from misconduct or errors by state officials, prosecution or judicial staff (including the Prosecutor and the judges). Generally speaking the point must be made that since violations can indeed occur (even without the participation of victims) there is the need for a set of rigorous procedural sanctions and for a mechanism of external monitoring of human rights violations by international criminal tribunals. This could take the form of special human rights bodies within the individual courts' systems: for the ICC, the Assembly of States Parties to the Rome Statute could appoint a panel of three to five members to examine allegations of human rights violations committed by the Court; for the ad hoc Tribunals, it could be the UN; for the STL, the UN and Lebanon; and for the ECCC, it would be for Cambodia and the UN. This solution seems unlikely. Another possibility would be for the international criminal courts and tribunals based in The Hague to decide to accept the jurisdiction of the European Court of Human Rights. As mentioned above, all this may be considered as purely utopian. There is nonetheless a need for utopian thoughts; the ICC itself was probably no more than a utopian notion 20 years ago.

65 R. Badinter, 'Réflexions générales', in A. Cassese and Delmas Marty, *Crimes internationaux et juridictions internationales* (Paris: PUF, 2002), at 50.