the provinces are part of a federal system. There is a requirement to show "strong prima facie case"[173] on the merits. The plaintiff must give grounds for believing that the defendant has assets in the jurisdiction, and that there is real risk of the assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff would be unable to satisfy a judgment. The requirement of proof of assets within the jurisdiction has been relaxed on the basis that the court is exercising an in personam jurisdiction which is not tied to proof of this.[174] The remedy may be particularly appropriate in fraud cases[175] because "the risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff."[176] There is an established jurisdiction to grant worldwide freezing orders.[177]

1-044 In Jersey, the Court of Appeal in *Solvalub Ltd v Match Investments Ltd*[178] decided that as a matter of Jersey law there could be freestanding proceedings in Jersey brought for the purpose of obtaining Mareva relief against a defendant who was being sued in foreign proceedings. Such proceedings can be brought in England under s.25 of the Civil Jurisdiction and Judgments Act 1982, which by virtue of SI 1997/302 applies to any proceedings commenced or to be commenced anywhere, or in aid of any arbitral proceedings under s.44 of the Arbitration Act 1996. The Royal Court also decided in *Krohn GmbH v Varna Shipyards*[179] that proceedings claiming only Mareva relief could be served out of the jurisdiction under r.7(b) of the Service of Process (Jersey) Rules 1994, which corresponds to what is now CPR PD6B para.3.1(2).[180] This contrasts with the majority decision in *Mercedes-Benz v Leiduck*. In England, there are now specific rules of court directed to enabling there to be permission to serve freestanding proceedings seeking Mareva relief under statute to be served out of the jurisdiction. Whilst the decision of the majority on the scope of the rule relied on to justify service out of the jurisdiction remains good law, the dissenting judgment of Lord Nicholls has been cited around the world as justifying international co-operation on injunction cases and justifying free standing proceedings enabling an injunction to be granted in support of claims which are being litigated abroad. The High Court of Australia has approved freezing orders which can be granted in anticipation of foreign proceedings resulting in an Australian judgment.

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173 *Chitel v Rothbart* (1982), 39 O.R. (2d) 513, which has been consistently followed in Ontario: *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815 (Div Ct) at [24]; *Aetna Financial Services Ltd v Feigelman* (1985) 1 S.C.R. 2.

174 *SFC Litigation Trust (Trustee of) v Chan*, 2017 ONSC 1815 (Div Ct) at [26]–[38].

175 Sibley & Associates LP v Ross, 2011 ONSC 2951.

176 *Sibley & Associates LP v Ross*, 2011 ONSC 2951 at [63] followed in *In 2092280 Ontario Inc. v Voralto Group Inc.*, 2018 ONSC 2305.

177 *Mooney v Orr* (1994) 98 B.C.L.R. (2d) 318.

178 Unreported 13 December 1996.

179 Unreported 24 July 1997.

180 Followed in *Yachia v Levi* unreported 26 March 1998. See also P. Matthews, "*No Black Holes, Please, We're Jersey*" Jersey Law Review (June 1997), "*Sovalub and Black Holes—A Postscript*" Jersey Law Review (February 1998), "*Solvalub Strikes Again*" Jersey Law Review (October 1998) and "*Solvalub Again*" Jersey Law Review (October 1999), and W. Bailhache, "*The Concept of Black Holes—Krohn Revisited*" Jersey Law Review (February 1999). Cf. *Bass v Bass* [2001] C.I.L.R. 317 (where the Grand Court of the Cayman Islands declined to follow *Solvalub Ltd v Match Investments Ltd* and held there was no freestanding interim injunction jurisdiction).

In Scotland there is a procedure of arrestment which is:

> "...a form of attachment brought by the arrester in an action for the payment of money which prevents a third party who holds moveable property or money due to the respondent from parting with it pending the disposal of the action."[181]

But this is very different from the Mareva jurisdiction and there is no equivalent to the English jurisdiction to grant ancillary orders.[182]

In Australia the use of the word "injunction" was not adopted[183] and the jurisdiction is to make a freezing "order", granted to prevent conduct which might frustrate possible future process of the court to enforce a judgment.[184] It is "the paradigm example of an order to prevent the frustration of a court's process".[185] In Australia there is no rule that freezing order jurisdiction can only operate when there is an accrued cause of action. It is justified as being within the inherent jurisdiction of the court, and is regulated by rules of court and practice directions. The jurisdiction takes into account English procedure and case law. Australian cases have led the way on the Chabra jurisdiction which borrowed from the Australian case law and has been developed taking into account the decision of the High Court of Australia in *Cardile v LED Builders Pty Ltd*. In England the case law since 1975 has justified the relief as an "injunction" albeit a special type of injunction with its own set of rules. **1-045**

In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[186] there was a damages claim brought in Singapore for breach of contract which was pending against Bayan. Its assets were in Indonesia and could not be reached through enforcement of a future judgment. Bayan owned shares in KRL, an Australian company which held no assets of Bayan. A freezing order was made in the Supreme Court of Western Ausralia, against Bayan, proleptically, in anticipation of a future money judgment to be granted in Singapore, and when made would then be enforced in Australia under the Foreign Judgments Act. This allowed registration and enforcement of a Singapore final money judgment if and when granted. Bayan argued that that the inherent jurisdiction of the Supreme Court to make a freezing order is always limited to circumstances in which a substantive proceeding in that Court has commenced or is imminent. The High Court held it could be granted under its inherent jurisdiction and under O 52A r.5 of the rules of the Supreme Court of Western Australia which set out criteria by reference to which the Court could grant a freezing order, which included a case concerning a prospective cause of action justiciable in Australia based on a future money judgment to be granted by a court outside Australia.[187] The argument that the freezing order jurisdiction in Australia could only be exercised by reference to a substantive cause of action in Australia was rejected.

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181 R. Aird, "The Scottish Arrestment and the English Freezing Order" (2002) 51 I.C.L.Q. 155 at 157.

182 See Aird, "The Scottish Arrestment and the English Freezing Order" (2002) 51 I.C.L.Q. 155 for a description of the differences.

183 *Cardile v LED Builders Pty Ltd* (1999) 198 C.L.R. 380.

184 *Jackson v Sterling Industries Ltd* (1987) 162 C.L.R. 612 at 617–618, per Wilson and Dawson JJ and at 623, per Deane J; *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia* (1998) 195 C.L.R. 1 at 32; *Cardile v LED Builders Pty Ltd* (1999) 198 C.L.R. 380 at 400–401.

185 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 C.L.R. 1 at [43], citing *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia* (1998) 195 C.L.R. 1 at 32 at [35], quoted in *Cardile v LED Builders Pty Ltd* (1999) 198 C.L.R. 380 at 400 at [41].

186 (2015) 325 A.L.R. 168.

187 The principles which apply in Australia to freezing orders are set out in *Deputy Commissioner of Taxation v Leo* [2019] SASC 146 and are the subject of procedural rules. The jurisdiction was upheld in *Cardile v LED Builders Pty Ltd* (1999) 198 C.L.R. 380.

1-046 In Jersey there is a freestanding jurisdiction enabling Mareva relief to be granted: *Solvalub Ltd v Match Investments Ltd*[188] in which no question arose about service out of the jurisdiction.

In the Cayman Islands s.11A of the Grand Court Law allows interlocutory freestanding freezing injunctive relief.[189]

In Singapore in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*[190] the plaintiff sought to enforce in Hong Kong an arbitration award and sought execution on debts owed to Pertamina, the award debtor, by Petral, a Hong Kong entity, by garnishee order. There was evidence that Petral had sent US$36 million to PES, a Singapore company which was a wholly owned subsidiary, in order to evade execution. A worldwide Mareva injunction was granted against Petral in Hong Kong. Proceedings were brought by the plaintiff in Singapore against PES and Petral, seeking declaratory relief that the $36 million was held by PES on trust for Petral, and a mandatory injunction that PES transfer the US$36 million to Petral in Hong Kong. The Court of Appeal held that the plaintiff had no entitlement to declaratory relief as to the state of accounts between Petral and PES. It also set aside Mareva relief in Singapore against PES on the ground that the plaintiff had no cause of action against it: "...It had no money claim against PES nor did it have the standing to ask for a declaration that PES was holding money in trust for Petral. It had no judgment against Petral that it had registered in Singapore so as to entitle it to garnish moneys that PES might have owed Petral." Mareva relief cannot be granted against a foreign defendant who cannot be served out of the jurisdiction because the Singapore court has no jurisdiction to entertain the merits of a case.[191] There is the power to continue relief in proceedings in Singapore on the merits which are stayed for those merits to be decided abroad.[192] Under s.12A of the International Arbitration Act 2009 there is power to grant orders including an interim injunction in aid of a foreign arbitration.

Hong Kong has a jurisdiction corresponding to s.25 of the Civil Jurisdiction and Judgments Act 1982.[193]

(17) THE BLACK SWAN JURISDICTION IN BVI

1-047 In *Black Swan Investments SA v Harvest View Ltd*[194] there were claims by the applicant in South Africa against an individual alleging fraudulent mismanagement of a company. The applicant applied in BVI seeking continuation of a temporary freezing injunction against BVI companies connected with that individual, restraining dealings with assets pending the obtaining of a money judgement in South Africa and its enforcement in the BVI. This decision followed the dissenting judg-

188 [1996] J.L.R. 361.

189 *Classroom Investments Inc. v (1) China Hospitals Inc. and (2) China Healthcare Inc.* (2015 (1) C.I.L.R. 451.

190 [2006] 1 S.L.R.(R.) 112.

191 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64.

192 *Bi Xiaoqiong v China Medical Technologies, Inc.* [2019] SGCA 50.

193 Section 21M of the High Court Ordinance (Cap 4) (HK) confers power to grant interim relief in support of foreign proceedings when those proceedings are capable of giving rise to a judgment which may be enforced in Hong Kong, irrespective of whether the substantive claim could be brought in Hong Kong; *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* (2016) 19 H.K.C.F.A.R. 586, [2017] 4 HKC 379.

194 BVIHCV 2009/399.

ment of Lord Nicholls in *Mercedes Benz AG v Leiduck*[195] and held that since the BVI companies were within the territorial jurisdiction of the court, no difficulty arose on the rules governing service out of the jurisdiction because the BVI companies could be served without permission. In *Convoy Collateral v Broad Idea International and Cho*[196] proceedings on the merits were brought in Hong Kong against Dr Cho alleging breach of duty and fraud. Freezing relief was sought in the BVI against Dr Cho and against a BVI company called Broad Idea. It was alleged that Dr Cho owned 50.1% of the shares in Broad Idea which in turn owned 18.85% of the shares in Town Health International Medical Group, a Cayman Islands company. In *Convoy Collateral v Broad Idea No.1* the Court of Appeal of the Eastern Caribbean held that there could be no freezing relief against Dr Cho because the rules for service out of the jurisdiction had no gateway permitting him to be sued on the merits. The gateway for an injunction only applied to a final injunction and that for a judgment or award only applied to one in existence. This followed *Siskina* and *Mercedes v Leiduck*. There was no substantive claim against Broad Idea and Dr Cho could not be served as a necessary or proper party on the basis that Broad Idea was the anchor defendant in the BVI because there was no cause of action against it.

In *Convoy Collateral v Broad Idea No.2* the Court of Appeal held that since no substantive claim was made against Broad Idea there could not be any freezing relief against it. There was jurisdiction under the BVI Arbitration Act 2013 to grant interim relief in respect of a foreign arbitration but no equivalent in the BVI to s.25(1) of the Civil Jurisdiction and Judgments Act 1982, so no jurisdiction to grant freestanding relief in support of the proceedings in Hong Kong. In the Cayman Islands there had been statutory intervention by s.11A of the Cayman Islands Grand Court Law (2015 Revision), to allow a free standing jurisdiction to grant interim relief.[197] There was also no risk of dissipation of assets established in Hong Kong where freezing relief had been refused, and it was held that there was no risk of dissipation of assets established in the BVI.

1-048 Even if there had been a jurisdiction equivalent to that under s.25(1), the applicant faced the situation that interim relief had been refused in Hong Kong which was the court seized with the merits,[198] and there was a question why the BVI court should grant relief refused by the court having jurisdiction on the merits over Dr Cho. It was held that Chabra relief could not be granted in the BVI against Broad Idea because there were no proceedings on the merits in the BVI against Dr Cho and there could not be under the gateways. The Court of Appeal also held that risk of dissipation was not established.

There might be a receiver appointed in the foreign court over shares in the BVI company.[199] In a court which exercises Mareva jurisdiction such as Hong Kong, this could be done before or after judgment on the basis that the shares were at risk of dissipation or being rendered of much less value through dissipation of company assets. Also, the defendant in the foreign court could be ordered to execute an assignment of his shares to the receiver. In those circumstances if the BVI court

195 [1996] A.C. 284.

196 BVIHCMAP2019/0026 and BVIHCMAP2016/0030.

197 *Yukos Cis Investments Ltd and others v Yukos Hydrocarbons Investments Ltd, Territory of the Virgin Islands HCVAP*2010/028 (delivered 26 September 2011, unreported) had not decided that Black Swan jurisdiction existed.

198 *Convoy Collateral v Cho* [2020] H.K.C.F.I. 429, leave to appeal was refused by Harris J in Hong Kong at [2020] H.K.C.F.I. 690.

199 In *Mercedes v Leiduck* proceedings on the merits founded on the aval were brought in Monaco.

orders or lack of good faith[203] and the order must be a proportionate response to the conduct which has led to it being made. Furthermore the power must not be used if the claim or defence would be stifled. In relation to a defendant it would require extreme circumstances to justify an order that he make a payment into court because of his previous misconduct in relation to his conduct of the proceedings. Whether being contemplated against a claimant or a defendant the court has to bear in mind that party's right under art.6(1) of the European Convention on Human Rights to a fair trial, and the requirement that he have access to justice.

1-054 Under CPR r.52.3(7) conditions may be imposed on the granting of permission to appeal, and under CPR r.52.9(1)(c) the Court of Appeal has jurisdiction to impose conditions on the prosecution of an appeal including after the granting of unconditional permission to appeal, when there is a "compelling reason" to do so. This can include where the appellant has not satisfied a judgment or costs order made in the court below, there are good reasons for believing that it will continue not to comply with the order of the court, and the evidence does not show that it is not possible for the appellant to comply, or that the appeal will be stifled.[204]

(20) ANTI-SUIT INJUNCTIONS

1-055 For many years anti-suit injunctions were a quiet part of the equitable jurisdiction to grant injunctions. They were part of the jurisdiction of a court of equity to grant a common injunction or to enforce contractual rights or as a remedy when there was fraud committed before a foreign court. With the world becoming increasingly interconnected as a result of increased trade and cultural exchange it is common for litigation to be engaged in before different courts and for a party to seek advantages in different jurisdictions.

The decision in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)*[205] showed that an injunction could and should readily and quickly be obtained in England to enforce a contractual promise not to sue abroad, by restraining foreign proceedings. This included enforcement of an English arbitration or jurisdiction clause. There was no need to apply first to the foreign court or justification for waiting for the result of a challenge to jurisdiction in the foreign court based on the clause. This has resulted in many injunction applications in commercial cases. A temporary setback was experienced when in *West Tankers Inc v Allianz SpA (The Front Comor)*,[206] the ECJ decided that no injunction could be granted which affected proceedings in the courts of another member state. Afterwards it became apparent in the litigation concerning the Alexandros T,[207] that there were other ways of enforcing the jurisdiction clause in the courts in England

[203] *Olatawura v Abiloye* [2003] 1 W.L.R. 275; *Ali v Hudson* [2003] EWCA Civ 1793 at [39]–[45]; *CIBC Mellon Trust v Mora Hotel Corp NV* [2003] 1 All E.R. 564.

[204] *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065; *CIBC Mellon Trust Co v Stolzenberg* [2004] EWCA Civ 117 (Sir Swinton Thomas: ordering security for costs for an appeal including for past costs unpaid when there had been a previous history of flouting court orders); *Contract Facilities Ltd v The Estate of Rees (Deceased)* [2003] EWCA Civ 1105 (where there was a non-party funding the litigation and the pending appeal, costs orders had not been satisfied by the impecunious claimant, and the Court of Appeal exercised its case management powers in CPR r.3.1 to order that the appeal be struck out unless certain costs orders were satisfied and a sum was paid into court as security for an interim costs order).

[205] [1995] 1 Lloyd's Rep. 87.

[206] [2009] 1 A.C. 1138.

[207] [2014] 1 Lloyd's Rep. 223 (UKSC); [2014] 2 Lloyd's Rep. 544 (CA); [2014] 2 Lloyd's Rep. 579 (Comm).

which could be effective in preventing circumvention of it, and the Judgments Regulation (Recast) has mitigated the effects, albeit relying on courts of Member States to fulfil their responsibilities under the New York Convention 1958 and the Hague Convention on Choice of Court Agreements. The anti-suit jurisdiction and the anti-anti-suit jurisdiction protect English jurisdiction under arbitration agreements and English jurisdiction clauses. It gives a jurisdiction to England when it is the agreed seat to stop proceedings abroad which threaten to circumvent a London arbitration clause. It prevents arbitration agreements and exclusive jurisdiction clauses being outflanked by proceedings against a person who is not a contracting party. It allows non-parties to enforce the contractual regime. The jurisdiction is not confined to enforcing contracts. It also can result in an injunction to protect existing English proceedings, and in other cases which are not based on contract, when there is vexatious and oppressive conduct or when the interests of justice require it, and the proceedings should be in England. The anti-suit injunction has become an important remedy commonly used for the purpose of preventing litigation abroad which should not be taking place.

(21) THE DISCLOSURE ORDER

1-056 The disclosure order started as an ancillary order to obtain information about the assets subject to the injunction so that notices could be served on banks and other asset holders to ensure that the injunction would be effective. The disclosure order would therefore be no wider than the injunction to which it was ancillary. It is an important order, sometimes more important than the injunction because it aids the process of enforcement by identifying assets against which enforcement can be had. It has become recognised that there is no need to constrain the disclosure in this way. Disclosure can be important to enable assets not covered by the injunction to be identified and preserved. CPR r.25.1(g) allows there to be an order for disclosure in respect of assets "…which are or may be the subject of an application for a freezing injunction". The disclosure order can be more important than the injunction.

The *Norwich Pharmacal* jurisdiction enables there to be disclosure ordered from third parties who have become "mixed up" in committing a wrong. This is a wide disclosure jurisdiction available against persons within the jurisdiction which can be used to assist the jurisdiction to grant injunctions.

There are cases in which the disclosure order is ancillary to and in support of the injunctions and cases where it is a free-standing remedy in aid of enforcement of a judgment. Its practical importance lies in the identification of assets which can be preserved and in respect of which proceedings can be brought to compel satisfaction of a judgment. If the defendant wishes to avail himself of exceptions in the order for living expenses, legal costs or payments in the ordinary course of business this will come at the price of specifying the source from which payment is to be made.

(22) NON-PARTIES

1-057 The jurisdiction for granting injunctions against non-parties against there is no cause of action, enables the court to preserve assets which are not in the name of the defendant or owned by him but which can be reached by one legal route or another and used to satisfy a judgment. These "Chabra" defendants or "NCADs" can be companies or trusts which holds assets to which the defendant has access

List,[113] and in such proceedings the power of the county court is the same as it has in substantive proceedings before that court,[114] i.e. power to grant Mareva relief but not to grant a search order.

Particular care must be exercised in considering whether to seek Mareva relief where the claim is relatively small. Thus in *Sions v Ruscoe-Price*,[115] the judge had refused Mareva relief on the ground (among others) that the sum involved was only £2,000. The Court of Appeal upheld the decision of the judge, Woolf LJ observing that in general it was inappropriate for Mareva relief to be granted in respect of a relatively small sum, particularly in view of the costs which might be involved. Staughton LJ emphasised that Mareva relief should not be granted as a matter of routine in every case of an unpaid debt; the risk of removal or dissipation of assets must be viewed in the context of the importance of the case and the sum involved. Accordingly, Mareva relief should not be granted in relation to a relatively small claim unless the court is satisfied that in all the circumstances the possible adverse consequences of the relief sought are in proportion to the objective sought to be achieved.[116]

(5) MAREVA INJUNCTIONS ARE AVAILABLE BEFORE AND AFTER JUDGMENT

3-023 The nature of Mareva relief is such that the majority of applications are made at a very early stage, usually before the claim form has been issued. However, if it emerges during the course of a case that the defendant may be about to remove his English assets from the jurisdiction, the claimant can make an application for Mareva relief at that time. Furthermore, the court has jurisdiction to extend a Mareva injunction which has been granted initially "to judgment or further order", to cover the period between judgment and satisfaction of the judgment, and will normally do so after judgment.[117] A Mareva injunction may be granted to a judgment creditor in aid of execution of his judgment even if he did not apply for or obtain a Mareva injunction originally.[118] The injunction is granted in the action in which the claimant has obtained judgment.[119] Assets acquired by the defendant after judgment and before satisfaction will fall within the scope of any Mareva injunction extended or granted in aid of execution.[120] This is because a Mareva injunction which refers to unspecified assets has:

> "...an ambulatory effect so as to apply to all assets of the defendant which at any time while the injunction remains on foot may be within the ambit of the assets covered by the injunction."[121]

(i) Whether an injunction granted or continued post judgment should contain provisions allowing certain payments to be made

3-024 If a claimant has become a judgment creditor, this is important to the exercise of discretion by the court on an application by the defendant to have the injunction varied to enable assets to be dealt with or disposed of for a particular purpose. Thus, before judgment a claimant who appears to have a clear right to be paid by the defendant still cannot insist on his claim being paid or secured either in priority to or pro rata with other claims made against the defendant. In *K/S A/S Admiral Shipping v Portlink Ferries Ltd*,[122] the plaintiffs had a good arguable claim against the defendants; it appeared that the business of the defendants had been sold to a third party and that the assets of the defendants would probably only suffice to pay ordinary trade creditors, leaving the plaintiffs, if and when they established their claim, with nothing. The plaintiffs could not apply to wind up the defendants because the claim was a disputed one for unliquidated damages, and the statutory provisions in relation to setting aside preferences were unlikely to be applicable in due course, in particular because of the statutory time limit of six months.[123] The plaintiffs sought an order which would permit the defendants to pay their trade creditors, but require sums to be set aside which would be available to be paid towards discharging the plaintiffs' claim, if and when this was established. The Court of Appeal held that the injunction should be varied to enable trade creditors to be paid, without any provision to establish a fund to meet the plaintiffs' claim. It would be wrong for the Mareva jurisdiction to be used to produce a "quasi-winding-up" of the defendants in advance of judgment being obtained.[124]

However, once the claimant has obtained an enforceable judgment the position is different.[125] He may then be able to make an individual defendant bankrupt or have a corporate defendant wound up. Furthermore, he will be in a position to enforce the judgment by executing it on assets of the defendant.

In *Deutsche Schachtbau-und Tiefbohrgesellschaft GmbH v R'as Al-Khaimah National Oil Co (No.1)*,[126] the Court of Appeal upheld Mareva relief granted in aid of enforcement of an arbitration award against a foreign company. Judgment had been obtained but was not yet enforceable under the rules of court, and it was contemplated that garnishee proceedings would be taken in relation to the relevant asset, which was a debt due or accruing due from a third party. In that case Sir John Donaldson MR, with whom the other members of the court agreed, had said "if the injunction is set aside, any assets of Rakoil in this country will disappear overseas in the twinkling of a telex", and observed that the injunction was not, strictly speaking, an injunction which fell into the Mareva category, but was an injunction granted

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113 Arbitration Act 1996 s.105; High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215) reg.5(1).

114 See s.44(1).

115 Court of Appeal (Civ Div) Transcript No.1027 of 1988 (30 November 1988) followed in *American Express Bank Ltd v Cheung Kam Fung Betty*, Hong Kong Court of Appeal No.101 of 2000 (28 March 2000).

116 See also *First Farm Inc v Bob's Backhoe Services Inc* (1993) 108 D.L.R (4th) 551.

117 *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040 at [32].

118 *SPL Private Finance (PF1) IC Ltd and 17 Others v ARCH Financial Products LLP* [2015] EWHC 1124 (Comm) at [13]–[14] (stay of execution pending appeal does not preclude injunction); *Stewart Chartering v C. & O. Managements SA (The Venus Destiny)* [1980] 1 W.L.R 460; *Hill Samuel & Co Ltd v Littaur* (1985) 135 N.L.J. 57; *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 W.L.R .1097; *Deutsche Schachtbau-und Tiefbohrgesellschaft MBH v Shell International Petroleum Co Ltd* [1990] 1 A.C. 295 at 317; *Jet West Ltd v Haddican* [1992] 1 W.L.R 487 at 490E.

119 An application may be made before or after the trial: *Smith v Cowell* (1880) 6 Q.B.D. 75. In *Zeeland Navigation Co Ltd v Banque Worms* unreported 13 December 1995 (Comm), per Waller J, it was held that the court had *jurisdiction* post-judgment to grant an injunction restraining a party to the action from raising matters in a foreign action between the parties when those matters were res judicata or the subject of an issue estoppel by reason of the English judgment. For the position at the trial, see Ch.8, para.8-002.

120 See *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1986] 1 W.L.R. 141.

121 *Cretanor Maritime v Irish Marine Management Ltd* [1978] 1 W.L.R 966 at 973, per Buckley LJ.

122 [1984] 2 Lloyd's Rep. 166.

123 The provisions now applicable are to be found in ss.239, 240 and 241 of the Insolvency Act 1986.

124 Applying *Iraqi Ministry of Defence v Arcepey Shipping (The Angel Bell)* [1981] Q.B. 65. See also *Investors and Pensions Advisory Service Ltd v Gray* (1989) 139 N.L.J. 1415 at 1415–1416.

125 *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] Q.B. 406.

126 [1990] 1 A.C. 295.

Evans LJ pointed out that:

> "…there is in practice a considerable overlap between the circumstances in which a stay may be ordered and what I might call the general Mareva jurisdiction of the court [which] may be exercised to safeguard a creditor, including a judgment creditor…"

Whether a stay will be granted pending appeal involves the exercise of a discretion which, on the one hand, recognises that the claimant has a judgment which prima facie he should be able to enforce[140] and, on the other hand, seeks to avoid a position in which a defendant succeeds on appeal, but in the meantime has been irretrievably prejudiced, e.g. if he has been ruined by being made bankrupt.[141] An appeal in itself does not operate as a stay on any order of the court of first instance and a stay must be sought either from that court or the appeal court.[142] The general principle is that solid grounds must be shown if a stay is to be granted and the normal rule is that a stay is not granted.[143] In *One Life Ltd v Roy*,[144] the judge at first instance (Carnworth J) gave judgment in favour of the plaintiff on tracing claims[145] and declared that the assets belonged to the plaintiff. The judge deleted a provision from the injunction allowing for the defendant to be able to use the money for living expenses, and this was upheld by the Court of Appeal. This was because on the facts there was no good reason for the defendant to be allowed to go on using as living expenses what had been decided to be the plaintiff's money. In *Masri v Consolidated Contractors*,[146] a provision allowing payments in the ordinary course of business from a bank account was omitted after there had been judgment when the evidence showed positively that the absence of such an exception had caused no disruption to the judgment debtor's business. It will sometimes and perhaps usually be inappropriate to include an ordinary course of business exception in a post-judgment asset freezing order when the judgment is immediately enforceable.[147] If the injunction is granted ex parte the omission of a liberty to pay debts incurred in the ordinary course would not preclude an application to vary or discharge. The judge may consider on the ex parte application to include it, pending consideration of the position on the return date when the judgment debtor can rely on evidence and be heard. If there is the real prospect of a judgment being satisfied, perhaps by a parent company, it may not be right to omit the exception and thus risk destruction of the defendant's business.

If there is no stay pending appeal, the purpose of the injunction is as an aid to enforcement of the judgment, by preventing dissipation of assets available for execution or which can be taken to satisfy the judgment[148] (e.g. through the appointment of a receiver).

Ltd v Most Investment Ltd [2002] J.L.R. 424 at [25]–[30] (which treats an injunction granted in aid of possible enforcement of an arbitration award as involving similar considerations as apply to an application for an injunction in aid of a judgment, which is itself subject to appeal).

140 See also *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] Q.B. 406 at 421E–F.

141 *Linotype-Hell Finance Ltd v Baker* [1992] 4 All E.R. 887; *Winchester Cigarette Machinery Ltd v Payne (No.2)*, *The Times*, 15 December 1993; *Combi (Singapore) Pte Ltd v Sriram and Sun Ltd*, Court of Appeal Transcript No.1414 of 1997 (23 July 1997).

142 CPR r.52.7.

143 *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474 at [13]; *Department for the Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257.

144 Court of Appeal (Civ Div) Transcript No.128 of 1997 (30 January 1997). See also Ch.21, para.21-055.

145 [1996] 2 B.C.L.C. 608.

146 [2008] EWHC 2492 (Comm).

147 Cf. *Soinco v Novokuznetsk Aluminium Plant* [1998] Q.B. 406 at 421 which goes too far: see *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040 at [33].

148 If the asset cannot be taken in execution of the judgment, then an injunction over that asset cannot be justified on this basis: *Hitachi Leasing (Singapore) Pty v Vincent Ambrose* [2001] 2 S.L.R. 525 (where the defendant's flat could not be made subject to execution, and in the absence of any evidence of an intended disposal the court declined to grant an injunction in respect of proceeds of sale of the flat); *National Australia Bank Ltd v Blacker* (2001) 179 A.L.R. 97 at [40]–[41] (citing the text, and granting a post judgment injunction in aid of execution of a judgment which had not been stayed pending appeal, over particular sums to be received by the defendants, but the injunction was qualified so as to allow living expenses and legal costs at first instance and costs on appeal. The defendants had not undertaken not to oppose recovery procedures in respect of the judgment.)

3-027 Whether an injunction is granted after judgment to aid execution or to assist the judgment creditor to be paid his judgment debt is discretionary. The court will not grant such relief because it may be helpful to the judgment creditor regardless of the other consequences for the debtor and third parties of granting the relief. Whilst there is a public interest in debtors paying their creditors, it does not follow that the court will grant an injunction to secure this end when it would be liable to have other consequences which would be undesirable.

In *Camdex International Ltd v Bank of Zambia (No.2)*,[149] the defendant judgment debtor was the Central Bank of Zambia.[150] It had arranged to have high denomination bank notes printed in England, which it planned to have issued in Zambia. The Central Bank had debts which were far in excess of its assets and the unissued bank notes had no value as such. The paper was assets of the defendant. As Phillips LJ said: "The reality is that these bank notes have no value whatsoever. They are a worthless and potentially embarrassing quantity of scrap paper…".[151] But if the Central Bank was prevented by the post-judgment injunction from taking the unissued bank notes to Zambia, this would have caused very considerable hardship in Zambia. The Court of Appeal held that the injunction should be varied so as to enable the bank notes to be dealt with by the bank. The injunction would otherwise operate not to facilitate execution but in order to put pressure on the Central Bank to pay the plaintiff in priority to other creditors.[152]

In *Kensington International Ltd v Republic of Congo*[153] the claimant was an assignee which had obtained summary judgment against the Republic. It sought an injunction to enforce a negative pledge agreement, and an undertaking to pay creditors pari passu. The court declined to grant this relief holding that the claimant should be left to its ordinary remedies as a judgment creditor. The relief, if granted, would be liable to disrupt arrangements which the Republic was making to pay creditors and would potentially interfere with commercial arrangements entered into by third parties including transactions which had no connection with England.

3-028 This can be contrasted with the decisions of the Second Circuit Court of Appeals in *NML Capital Ltd v Republic of Argentina*,[154] which concerned money judgments in New York[155] on bonds governed by New York Law purchased by a vulture fund on which the Republic had defaulted, and in respect of which Argentina had passed domestic legislation prohibiting payment of them. These bonds included a pari passu provision, which was interpreted as meaning that payments had to be

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149 [1997] 1 W.L.R. 632.

150 Sovereign immunity had been waived.

151 [1997] 1 W.L.R 632 at 639.

152 The Court of Appeal indicated that there might be an application for a stay of execution granted in respect of the judgment so as to prevent there being execution on the unissued bank notes: [1997] 1 W.L.R. 632 at 637B.

153 [2003] EWCA Civ 709 at [7], referring to the first instance proceedings.

154 *NML Capital, Ltd v Republic of Argentina*, 699 F.3d 246, 255 (2d Cir.2012); *NML Capital Ltd v Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013); cert. denied *Republic of Argentina v NML Capital Ltd*, 134 S.Ct. 2819 (2014).

155 These were held enforceable in England in *NML Capital Ltd v Republic of Argentina* [2011] 2 A.C. 495.

disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;

(c) if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) above shall be made in the proceedings for the financial relief in question.

(3) Where the court makes an order under subsection (2)(b) or (c) above setting aside a disposition it shall give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property).

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) is a reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

(a) in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or

(b) in a case falling within subsection (2)(c) above, that the disposition has had the consequence,

of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief.

(6) In this section 'disposition' does not include any provision contained in a will or codicil but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise.

(7) This section does not apply to a disposition made before 1st January 1968."

"The starting point of every inquiry in an application for ancillary relief is the financial position of the parties", and that "inquiry is always in two stages, namely computation and distribution".[82] At the computation stage there may be questions as to what assets are to be included as "financial resources" under s.25(2)(a), or available to be made the subject of an order for transfer. These are different concepts. A person's financial resources under s.25(2)(a) include future resources, and resources regardless of ownership rights in property. This may be through a distribution which is likely to be made available by trustees pursuant to exercise of a discretion,[83] even though the spouse has no ownership of the assets. There may be issues involving third parties at the computation stage about who owns what. These need to be resolved before the distribution stage, because there are discretions to be exercised by the court under the Matrimonial Causes Act 1973, and these can only lawfully and properly be exercised once the pool of assets available for

[82] *Edgerton v Edgerton* [2012] 1 W.L.R. 2655 at [36]; *Charman v Charman (No.4)* [2007] 1 F.L.R. 1426 at [67].

[83] *Whaley v Whaley* [2012] 1 F.L.R. 735 at [113].

distribution has been ascertained.[84] Often a dispute about this involving the proprietary rights of third parties will be resolved in the Family Division.[85] Wherever a dispute on the property rights is resolved the same legal rules and principles apply. Often this will be with pleadings, disclosure, witness statements and a trial.

There is also the exercise of discretions under the Matrimonial Causes Act 1973 in the distribution phase. Whilst the extent of the pool of available resources can be expected to be an important consideration it does not follow that in particular cases there will not be other considerations which are relevant. These may be circumstances of serious misconduct having financial consequences. There can be conduct which has taken place on the part of one party which has or has had an impact on his own financial resources, or those of the other party, which it would be positively unjust to disregard. An example could be wanton and profligate dissipation of his assets.[86] Another might be fraud committed by one party on the other, or on children of the family which has substantially decreased their assets. Another might be deliberate physical injury inflicted on a spouse which has diminished their earning power.

There can also be third parties who have a judgment against a spouse and who are seeking a charging order or a third party debt order against the spouse. Normally a judgment creditor is entitled to be paid out of the judgment debtor's assets. However, these are discretionary remedies and may not be granted if in the particular circumstances, the result would be to impose excessive and undue hardship on the other spouse or the children.[87]

7-016 An application for relief under s.37(2) must be made by a spouse or ex-spouse in proceedings for financial relief as defined by s.37(1). Section 37(2) is capable of applying to property[88] wherever situated.[89] This is confined to property of a party to the marriage and does not extend to property of others.[90] Section 37(2) has three jurisdictions within it. Each is discretionary.

The jurisdiction in (a) is in anticipation of a disposition or transfer, and has the purpose of either preventing that disposition or transfer taking place, or is for an order "…otherwise for protecting the claim". The former purpose may be achieved by a Mareva injunction. The latter purpose may be achieved by appointing a receiver by interim order, or by ordering security for the claim to be given over certain assets, for example execution of a mortgage over real estate. The section empowers the court to order a party to give security for the claim. This is because of the words "or otherwise" in s.37(2)(a).[91] These words also enable there to be an order against a person other than the respondent to the application for financial relief, such as a person who owes a debt to that person, and may be asked to pay it in a way which could defeat the claim. Section 37(2)(a) of the 1973 Act confers a

[84] *Tchenguiz v Imerman* [2011] Fam. 116 at [26].

[85] *Edgerton v Edgerton* [2012] 1 W.L.R. 2655; *Goldstone v Goldstone* [2011] 1 F.L.R. 1926; *Fisher Meredith LLP v JH* [2012] 2 F.L.R. 536; *TL v ML* [2006] 1 F.L.R. 1263; *Crowther v Crowther* [2020] EWCA Civ 762 (where the third parties were joined on the basis of a claim that a transaction was a "sham" and that the divorcing spouses through a company which was owned by them still owned shares in one of the ship companies, notwithstanding the impugned transaction).

[86] *Vaughan v Vaughan* [2008] 1 F.L.R. 11 at [14].

[87] *Kremen v Agrest* [2013] 2 F.L.R. 187.

[88] See *Crittenden v Crittenden* [1990] 2 F.L.R. 361.

[89] *Hamlin v Hamlin* [1986] Fam. 11.

[90] *C v C* [2015] EWHC 2795 (Fam) at [63]–[64]; *Crittenden v Crittenden* [1990] 2 F.L.R. 361; *McGladdery v McGladdery* [1999] 2 F.L.R. 1102.

[91] *Re Mordant (A Bankrupt)* [1996] 1 F.L.R. 334.

transfers in the context of a claim for financial relief under the Matrimonial Causes Act 1973. The Mareva jurisdiction developed after enactment of s.37(2)(a), and is not restricted to claims under the Matrimonial Causes Act 1973. As a matter of interpretation, s.37(2)(a) does not limit the availability of Mareva relief. The jurisdictions exist side by side. Jurisdiction under s.423 of the Insolvency Act 1986,[118] and that under s.10 of the Inheritance (Provision for Family and Dependants) Act 1975[119] concerning dispositions made by a deceased intended to defeat applications for financial provision under that Act, can also be engaged in a matrimonial case.

Where a strong prima facie case is made of a disposition or transaction entered into with the statutory intent, disclosure may be ordered of documents which otherwise would be privileged.[120]

Interim relief is available under Pt 20 of the Family Procedure Rules. This includes freezing relief. Section 23 of the Matrimonial Causes Act 1973 only allows financial relief to be granted in respect of a divorce after the decree nisi. Mareva relief cannot be granted ancillary to financial relief in respect of a divorce before a decree nisi, because the court only has jurisdiction to grant an injunction under s.37 of the Senior Courts Act 1981 in aid of a cause of action which exists at the time it is granted.[121] It is thought that this is not affected by r.20.3(1) of the Family Procedure Rules which allows orders to be made at any time including before proceedings are started because that rule is not directed to where the court has no power to grant the injunction under s.37, and because of r.20.3(2)(a) which limits application of r.20.3(1) to where there is no rule to the contrary. In relation to relief under s.37 of the Matrimonial Causes Act 1973 this applies "…Where proceedings for financial relief are brought by one person against another…". This means where proceedings for financial relief are properly brought and not brought prematurely. An application can be made on notice for maintenance pending suit under s.22 of the Matrimonial Causes Act 1973 beginning with presentation of the petition and ending with the date of determination of the suit, without any application for an injunction, which should not be used as a substitute for an application under s.22.[122]

Mareva relief can be granted on a worldwide basis in matrimonial proceedings when there is an issue as to whether the court will take jurisdiction over the proceedings: s.24 of the Civil Jurisdiction and Judgments Act 1982. Such relief should not, however, extend to all the assets of the respondent and should be subject to a proviso as to the effect of the order on third parties who are outside the jurisdiction: *Ghoth v Ghoth*.[123]

7-022 In family proceedings there must be a good arguable case for financial relief to

[118] *AAZ v BBZ* [2018] 1 F.L.R. 153 at [96]–[105]; *Akhmedova v Akhmedov* [2020] 1 F.C.R. 213; *B v IB (Order to set aside disposition under Insolvency Act)* [2013] EWHC 3755 (Fam); *Trowbridge v Trowbridge* [2003] 2 F.L.R. 231 at [150]; See Ch.13 "Claims involving setting aside under statutory provisions prior transfers of assets".

[119] *B v IB (Order to set aside disposition under Insolvency Act)* [2013] EWHC 3755 (Fam).

[120] *C v C (Privilege)* [2008] 1 F.L.R. 115; see Ch.13 "Exception to "privilege" when there has been fraud, dishonesty or iniquity".

[121] *The Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep. 439; *Veracruz Transportation Inc v VC Shipping Co Inc* [1992] 1 Lloyd's Rep 353; *Cooke v Venulum Property Investments Ltd* [2013] EWHC 4288 (Ch). In *Commissioners for Her Majesty's Revenue & Customs v Mr Imtiaz Ali* [2011] EWHC 880 (Ch), there was an existing debt for a quantified amount with time for payment of it, under an assessment to tax and it was held that this sufficed to provide an existing cause of action to which the injunction was ancillary.

[122] *M (Freezing Injunction), Re* [2006] 1 F.L.R. 1031.

[123] [1992] 2 All E.R. 920.

which the Mareva injunction is ancillary.[124] Often it will be unjustifiable to apply without notice.[125] A contract settling a spouse's entitlements by way of ancillary relief is not enforceable.[126] Contracts between spouses which are concerned with other matters and which do not settle ancillary relief claims, are enforceable and can found an injunction.[127]

(7) INSOLVENCY ACT 1986 S.423[128]

7-023 Unlike s.37(2) of the Matrimonial Causes Act 1973, s.423 of the Insolvency Act 1986 does not provide for restraining a transaction before it has been entered into by the parties. The statute itself only applies once a transaction has been entered into for one of the purposes set out in s.423(3), namely putting assets beyond the reach of a person who is making or may at some time make a claim, or of otherwise prejudicing the interests of such a person. Section 423 is capable of applying to assets or property wherever situated.[129] Thus, s.436 of the 1986 Act defines "property" to include "money, goods, things in action, land and every description of property wherever situated" and s.425 of the 1986 Act must be read with this definition of property incorporated into it.[130] Furthermore, the jurisdiction of the courts under s.423 is to be exercised in personam against those who entered into the impugned transaction, and any relevant third parties, and in principle it is to be expected that a jurisdiction which is in personam will not be restricted, in the absence of express provision to the contrary, to property or other assets within the territorial jurisdiction of the court.[131]

A cause of action vests under s.423 in a "victim" immediately a "transaction" is entered into, and "transaction" is defined in s.436 as including an "agreement or arrangement". Accordingly, as soon as even an informal "arrangement" is made, although it is not legally binding, the court would have jurisdiction under s.423(2) of the 1986 Act to make such order as it thought fit for protecting the interests of persons "who are victims". Section 423(5) defines "a victim" in terms which include a person who is "capable of being prejudiced" by the arrangement. Although s.423 does not have an express provision for restraining dispositions or transfers before they occur, nevertheless it is sufficiently wide to catch an intended disposition or transfer as soon as an arrangement is made for it to occur.

The court has jurisdiction quia timet to restrain a disposition or transfer before it is carried out. Thus, it is clear that under the section the court would have the

[124] *S v M (Maintenance Pending Suit)* [2013] 1 F.L.R. 1173; *Crowther v Crowther* [2020] EWCA Civ 762 at [47], [49]–[70].

[125] *O'Farrell v O'Farrell* [2013] 1 F.L.R. 77

[126] *Xydhias v Xydhias* [1999] 1 F.L.R. 683.

[127] *DN v HN* [2015] Fam. Law 1044.

[128] See Ch.12, para.12-028 and Ch.13, "Claims involving setting aside under statutory provisions prior transfers of assets" at paras 13-027 to 13-040.

[129] *Commissioners for Her Majesty's Revenue and Customs, Commissioner for the South African Revenue Service v Ben Nevis (Holdings) Ltd, Metlika Trading Ltd, HSBC Trustee (Guernsey) Ltd* [2012] EWHC 1807 (Ch) at [62]; *Jyske Bank (Gibraltar) Ltd v Spjeldnaes* [2000] B.C.C. 16; *Dornoch Ltd v Westminster International BV* [2009] C.L.C. 226.

[130] *Attorney-General v Corp of Worcester* (1846) 15 L.J. Ch. 398 at 399, per Lord Cottenham LC; *Phoenix General Insurance Co of Greece v Administratia Asigurarilor de Stat* [1988] Q.B. 216 at 267–268. Sections 423, 425 and 436 are reproduced in Appendix 2, below.

[131] Compare the analogous position under s.37 of the Matrimonial Causes Act 1973: *Hamlin v Hamlin* [1986] Fam. 11 at 18 and 22–23.

applicant to have been preparing the application over some time without giving prior notice and this is all the more so when the consequences of granting the order may be serious.[7]

The initial application for a freezing injunction is usually made without notice to the defendant because knowledge by the defendant that the application is pending may defeat the very object which the claimant is trying to achieve. An application for a search order is invariably made on an application made without notice.

8-002 The general rule is that a copy of the application notice must be served on each respondent[8]; an application may be made without notice if permitted by a rule, Practice Direction or court order.[9] Paragraph 3 of CPR PD 23A set outs the grounds on which an application may be made without serving an application notice.

When, on the facts, an exception does not apply, the general rule in CPR r.23.4 applies; an application for a search order is inappropriate and an application for freezing relief should be made inter partes.[10] Under CPR PD 25A para.2 the normal procedure on seeking an interim injunction is for the application notice and supporting evidence to be served on the respondent in advance. If an application is to be made without notice the evidence must set out why notice was not given.[11] If only short notice is given the evidence must set out why this is the case. If an applicant applies without notice or on short notice for an injunction this must be justified.[12] The more intrusive the order sought without notice and the greater its immediate effects the greater the burden on the applicant if he is to show good reason for allowing the application to be made without giving the notice required under the CPR1 for an inter partes application. In *Moat Housing Group-South Ltd v Harris*,[13] the Court of Appeal set aside without notice relief ousting a mother and her children from their home stating that such an order would only be made in exceptional circumstances and observing that an injunction granted on a without notice application is an "exceptional remedy".

In *Lunn v All Star Video Ltd*,[14] an application was made ex parte to the trial judge during the trial. The judge granted relief, but it was set aside on appeal. The Court of Appeal strongly disapproved of what had been done. In effect, counsel for the

7 *Jain v Trent SHA* [2009] 1 A.C. 853 at [56].

8 CPR r.23.4(1). See also CPR PD 23A para.4 and CPR PD 25A (Interim Injunctions) para.2.

9 CPR r.23.4(2).

10 *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272; *The P* [1992] 1 Lloyd's Rep. 470 at 474, per Evans J where the parties were already in dispute and were corresponding through solicitors; *Williamson v Crosthwaite*, Court of Appeal (Civ Div) Transcript No.314 of 1993 (25 February 1993) where the person intended to be restrained did not have possession or control of the relevant funds.

11 *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272, referring to what is now CPR PD 25A (Interim Injunctions) para.3.4; *Mayne Pharma (USA) Inc v Teva UK Ltd* [2004] EWHC 3248 (Ch) (where there can be an effective inter partes hearing date in the near future and there is insufficient evidence to show serious risk of damage before that date, the court may refuse ex parte relief to restrain alleged infringement of a patent leaving injunctive relief to be dealt with at the later hearing); *Cinpres Gas Injection Ltd v Melea Ltd* [2006] F.S.R. 36; [2005] EWHC 3180 (Pat) at [19]; *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm) at [12] (the applicant must fairly present the case for and against proceeding without notice); *Franses v Al Assad* [2007] EWHC 2442 (Ch) at [72] (there should be a proper reasoned explanation of why the application had been made without notice); *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB) at [255]; *O'Farrell v O'Farrell* [2013] 1 F.L.R. 77 at [66]; *Jewel Owner Ltd v Sagaan Developments Trading Ltd* [2012] EWHC 2850 (Comm) at [28]–[29] (application made on two hours' notice when there had been delay in making the application); *Bouvier v Accent Delight International Ltd* [2015] S.G.C.A. 45 at [115]–[121].

12 *CEF Holdings Ltd v Mundey* [2012] EWHC 1524 (QB) at [231]–[250].

13 [2006] Q.B. 606.

14 *The Times*, 25 March 1993.

applicant had made a speech to the trial judge in the absence of the other party and his representatives. There was an obvious risk of unfairness. The application could have been made to the trial judge at the trial when the other party was present in court, albeit without prior notice if it was genuinely urgent. It is in general highly undesirable that the trial judge should be faced with such an application, because it may mean reaching and expressing premature conclusions, albeit expressed provisionally, before hearing all the evidence and argument on the evidence. The judge should be seen to be keeping an open mind so that all the evidence, when given, is taken into account in a fair and balanced way. Also, such premature expressions of opinion may in themselves affect individual witnesses and interfere with the giving of their evidence at the trial, and affect the conduct of the trial by the representatives of the parties. These considerations show that the court should be reluctant to entertain an application at the trial unless there is a good reason for its not having been made earlier. The trial judge could deal with such an application ex parte after he has announced the result of the trial.[15] If an attempt is made to apply ex parte to another judge during the trial, this may give rise to a highly unsatisfactory situation. It will be difficult to give the second judge an accurate picture of what is happening at the trial and this may give rise to material non-disclosure. The usual procedure is to make the application inter partes to the trial judge. If it is essential, this can be done at short notice to the defendant's counsel and the judge can be invited to make an immediate order to preserve the status quo whilst the matter is argued.[16]

8-003 The application for a search order or freezing injunction must be made to a judge.[17] The general rule under CPR r.39.2 is that a hearing is to be held in public but in a proper case where one of the subparas in r.39.2(3) is satisfied, for example where publicity would defeat the object of the hearing[18], the court will sit in private to hear the application. When an order is made to hear an application, or any part of it, in private, the order must be limited to what is required in the particular circumstances of the case.[19]

CPR PD 25A lays down the procedure to be followed for an urgent application to be made without notice.

The Queen's Bench Guide[20] in section 14 addresses "Interim remedies including injunctions and interim payments". Without notice applications are made to the Interim Applications Court or by arrangement out of hours, except for freezing injunctions or search orders. These and applications on notice should be filed in the QB Judges' Listing Office, Room WG08 for a hearing to be listed. The Guide refers in section 14.4 to CPR PD 25A.

The Commercial Court Guide[21] in para.F15.2 provides that a party who wishes to make an application for an interim injunction must give the Commercial Court Listing Office as much notice as possible, and in F15.3 provides that on applications of any weight, and unless the urgency means that this is not possible, the applicant should provide the court at the earliest opportunity with a skeleton argument. This can usefully include a chronology and a dramatis personae. It should clearly identify the legal tests to be applied by the judge.

Applications for search orders and freezing injunctions must be supported by af-

15 *Gas & Fuel Corp Superannuation Fund v Saunders* (1994) 123 A.L.R. 323.

16 *Mooney v Orr* (1994) 100 B.C.L.R. (2d) 335 at 339–342.

17 CPR PD 25A (Interim Injunctions) para.1.1.

18 CPR r.39.2(3)(a).

19 *G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB) at [17].

20 6th edn (2018).

21 10th edn (2017).

advocate, the nature of the application, why it is urgent and contact telephone numbers and email addresses. Any order will require the applicant to file relevant documents on the same or the next working day together with two copies of the order for sealing.

Freezing relief must be sought with reasonable promptness, once all the facts and matters on which the application is to be founded are known to the claimant. The failure to make the application for several weeks may suggest to the court that the motive in seeking the relief is not to protect the claimant's position, but instead to put pressure on the defendant. This may lead to a refusal to grant the injunction. This should not be the case, however, if the delay arose because the claimant was investigating matters relevant to the application, with a view to ensuring that he had sufficient information to support his case and that he had complied with his duty to make full disclosure of all relevant facts and matters. This is of particular relevance in cases in which the claimant is a large organisation and several people are involved as sources of information.

(2) DOCUMENTATION

8-009 It is of the utmost importance that as far as is possible the documents should be in good order for the judge. On an application for a freezing order, there should be a skeleton argument, a reading list including a time estimate from the advocate for pre-reading, a chronology, a dramatis personae, a numbered, indexed bundle containing affidavits[57] and exhibits, and a bundle of legal materials. Bundles should be numbered on the spine, the outside and the inside, there should be an index for each bundle, an index covering all the bundles, and it is good practice to have on the outside and the inside cover a list of what documents are in the bundle.

The court listing should be informed whether a request is being made for the ex parte hearing to be in private and it should be explained why a private hearing is being requested. Whether a hearing is in private or in public has consequences on whether documents and information are subject to restrictions on their use. Ch.25 "Restrictions on the use which may be made of documents or information". An application to hear in private should be made at the outset of the hearing.[58]

There should be an issued[59] claim form and particulars of claim which comply the applicable Court Guide, in the case of the Commercial Court Guide, section C1. This should not exceed 25 pages, be verified with a statement of truth. and set out the primary allegations and particulars of them.

There should be two copies of a draft order, and a schedule showing differences from the example order and why these have been made. The order should expressly state that the hearing was in private if this is the case. Whether the hearing is in private or in public should be made clear to the judge and attention drawn to CPR r.39.2 if what is sought is a hearing in private.

The draft should include the period for acknowledgment of service taken from CPR Part 6 and CPR PD 6 B including the Table. It should include a provision permitting acts to be done with the prior consent in writing of the solicitors acting

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57 Affidavit evidence is required for an application for a freezing injunction: CPR PD 25A para.3.1, Commercial Court Guide para.F15.3(c).
58 Queen's Bench Guide at para.14.5.
59 Commercial Court Guide para.F15.3(a).

for the applicant.[60] This avoids the need to come back to court for agreed variations. A freezing injunction which applies to assets outside the jurisdiction should permit overseas branches of banks or similar institutions which have offices within the jurisdiction to comply with what they reasonably believe to be their obligations under the laws of the country where the assets are located or under the proper law of the relevant contract relating to such assets.[61]

In the Commercial Court, in applications of any weight the applicant should provide a skeleton argument at the earliest opportunity unless the urgency means that this is not possible. It is almost invariable practice to provide a skeleton argument on an application for a freezing injunction, in whatever court the application is made. The skeleton provides information to the court and will be an important document if there is an application to discharge the order, including an application to set it aside for non-disclosure.

8-010 The skeleton argument should set out clearly each cause of action relied upon against each defendant, the amount of the claim and how this has been calculated, the relief claimed, possible defences, the facts and matters relied upon with references to the evidence, the facts which need to be disclosed and why they are being disclosed, any weaknesses in the case advanced or the evidence relied upon, the order sought, the grounds on which it is sought, relevant legislation and case law, what losses may be caused to the defendant or third parties by the order, what undertakings are being offered, whether they need to be fortified with security and how this has been calculated.[62] It is good practice to set out in the skeleton argument and affidavit evidence potential non-disclosure points so that the client can check that material disclosure has been made,[63] and because those points are highlighted for the judge.

Security might be through a payment into court, a bond issued by an insurance company, a first demand guarantee or standby credit issued by a first-class London bank, money held by the applicant's solicitors under an undertaking given by them to the court, or the undertaking of a parent company may be acceptable.[64] Undertakings which are required are at CPR PD 25A para.5.1, and include a cross-undertaking as to damages, an undertaking to serve on the respondent the application notice, evidence in support and any order made as soon as practicable, an undertaking to file the application notice and pay the appropriate fee on the same or next working day, and to issue the claim form and pay the appropriate fee on the same or next working day.

Insofar as any information or evidence or documentation is incomplete or has not been fully investigated, this should be disclosed.

The applicant should set out in the skeleton argument and the affidavits its case going to territorial jurisdiction over each defendant, what tests are to be applied and the evidence relied upon. There should be set out a plan on how it is proposed to serve the proceedings on each defendant. If the Hague Convention on Service applies, this should be stated. If an order is to be sought for service by another means the grounds for this should be set out, the evidence relied upon should be identified and the judge's attention drawn to the case law on service where the Convention applies.

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60 Commercial Court Guide para.F15.6.
61 Commercial Court Guide para.F15.10.
62 Assets within the jurisdiction to show whether a cross-undertaking can be relied upon and payment will be made if it is enforced, should be set out, and the position on fortification dealt with on affidavit: Commercial Court Guide para.F15.4
63 *Ambassadeurs Club Ltd v Albluewi* [2020] EWHC 1313 (QB) at [97].
64 Commercial Court Guide para.F15.4(b) and (c).

be "inexpedient" to grant interim relief under s.25(2) because of absence of connection with the jurisdiction.[288] Where the relevant defendant abroad has no connection with the jurisdiction and the relevant assets are not located within the jurisdiction and are not controlled by someone who is in the jurisdiction, it is rarely appropriate or expedient for the court to assume jurisdiction under s.25 of the 1982 Act.[289]

(e) Category (4)

13-054 This category is discussed in Ch.6, para.6-032 under the heading, "The new law—Arbitration Act 1996 s.44; arbitral proceedings commenced on or after 31 January 1997 or not yet commenced".

In arbitration cases s.44 enables the court to grant interim relief against a third party. Section 44 only applies when arbitral proceedings are about to be commenced or are in being. It does not apply before there is any arbitration or once an award has been made and the arbitral tribunal has become functus officio. Section 44 was enacted after the emergence of the Mareva and Anton Piller jurisdictions, after the Australian case law had been reviewed in this work, and the decisions in *TSB v Chabra* and *Mercantile v Aiyela*. In *Cruz City 1 Mauritius Holdings v Unitech Ltd*[290] a distinction was drawn between an interim order which directly affects a third party and one addressed to the third party, suggesting obiter that the former but not the latter are within s.44 because the section does not clearly state that an order can be made against a third party. The Departmental Advisory Committee was aware of the potential for injunctions and search orders affecting third parties, and in the case of injunctions, the jurisdiction to grant injunctions against third parties. The jurisdiction under s.44 is exercised by the court and has the consequence that third parties affected by interim relief could be heard by the court and would not be involved in the arbitral proceedings. There is no wording in s.44 excluding the jurisdiction to grant injunctions against third parties. There was good reason for including it, so that equivalent interim relief could be obtained in relation to pending arbitral proceedings as in relation to pending court proceedings. It is considered that the words:

> "...the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings..."

considered in the context of the list of matters includes power to make orders against a third party. For example, there can be a witness summons requiring a witness to attend an arbitration, produce specific documents and give evidence. This view is also confirmed by the policy underlying the Arbitration Act 1996 of supporting arbitration. Section 44 includes jurisdiction to make interim orders affecting or against third parties. It is also considered that CPR r.62.5(1)(b) is a gateway

[288] *Belletti v Morici* [2010] 1 All E.R. (Comm) 412.

[289] *Belletti v Morici* [2010] 1 All E.R. (Comm) 412; *Motorola Credit Corp v Uzan* [2003] 2 C.L.C. 1026; [2004] 1 W.L.R. 113 applied; *Mobil Cerro Negro v Petroleos de Venezuela* [2008] EWHC 532 (Comm); [2008] 1 C.L.C. 542. *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK* [2011] 2 C.L.C. 988 was a case after judgment involving voluntary submission by the third party, and an injunction against the third party was not granted over assets abroad because of lack of subject-matter jurisdiction.

[290] [2015] 1 All E.R. (Comm) 305 at [46]–[50].

for service out of the jurisdiction for any order to be made under s.44 and includes power to permit service on a third party of an application made against him.[291]

Once an award has been made and the arbitral tribunal is functus officio, s.44 does not apply because there are no arbitral proceedings. Enforcement of an award is available in England by summary process or an action brought on the award. There could be enforcement proceedings in a foreign jurisdiction to enforce an award there and s.25 of the Civil Jurisdiction and Judgments Act would be available in England ancillary to proceedings abroad to enforce the award. Ancillary relief could be granted under s.25 in England, against a third party who controls assets and is present in England,[292] for the purpose of assisting the enforcement proceedings abroad.

(f) Voluntary submission

13-055 Whether there has been a voluntary submission to the jurisdiction and if so its scope depends on the particular circumstances.[293] In *JSC BTA Bank v Ablyazov and others (No.11)*[294] the applicants applied for removal of certain shares from the scope of a receivership under a court order and post-judgment freezing orders. By making the application as third parties affected by the appointment of the receiver and the injunction, the applicants voluntarily submitted to the jurisdiction of the court in respect of their application. They did not submit in respect of a claim made by the claimant bank to reverse the transfer of beneficial ownership in the shares on the ground that it had been transferred in breach of the court orders. The applicants had made an application to the court under the court orders, and by doing so had not made a claim against the bank and exposed themselves to a counterclaim under the rules governing the making of counterclaims. In *Stichting Shell Pensioenfonds v Krys*[295] the pension fund voluntarily submitted to the injunction jurisdiction of the court through putting in a proof in the liquidation for its claim, and by contesting the application for an injunction against it without challenging the jurisdiction. Putting in a proof for its claim submitted to the rules governing that claim under the statutory scheme and required the pension fund to abide by those rules. It was not allowed to outflank those rules by proceeding abroad in respect of that claim and disregarding the statutory scheme. A submission may consist of any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In *Parbulk II A/S v PT Humpuss Intermoda Transportasi TBK (The Mahakam)*[296] there was a voluntary submission by not challenging the jurisdiction and agreeing to the continuation of the injunctions, making submissions to the court in June and July 2011, and participating in the proceedings. Relief was refused as against the third party in respect of assets outside the jurisdiction because of absence

[291] *Tedcom Finance Ltd v Vetabet Holdings Ltd* [2011] EWCA Civ 191; *BNP Paribas SA v OJSC Russian Machines* [2011] 2 C.L.C. 942; *Western Bulk Shipowning III A/S v Carbofer Maritime Trading ApS* [2012] 1 C.L.C. 954; *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov* [2013] EWHC 3203 (Comm).

[292] There needs to be some sufficient connection with England, and this does not appear to have been present in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 All E.R. (Comm) 305.

[293] *Astro Exito Navegacion SA v WT Hsu (The Messiniaki Tolmi)* [1984] 1 Lloyd's Rep. 266.

[294] [2015] 1 W.L.R. 1287.

[295] [2015] A.C. 616.

[296] [2012] 2 All E.R. (Comm) 513 at [82].

The Court of Chancery regularly granted anti-suit injunctions against proceedings in the English courts of common law. Such injunctions (called "common injunctions") enabled the Court of Chancery to maintain its own jurisdiction, and to gain pre-eminence over the common law courts. They were granted according to rules of equity including cases where the plaintiff relied on an "equity". As between the courts of Chancery and common law, no questions of comity were involved, because they were part of a single judicial system.

14-002 The Court of Chancery exercised jurisdiction which included jurisdiction to grant what are now described as anti-suit injunctions. Because equity acted in personam and the injunction was granted against the individual, the Court of Chancery was not confined to making orders concerning matters within England. For example, it could make an order by way of specific performance of an agreement about property abroad including land.[5] After a false start,[6] it could make orders affecting proceedings whether in England or abroad.[7]

It was natural to consider that an anti-suit injunction concerning proceedings abroad should be available on the same grounds as for an injunction granted in respect of domestic proceedings. This became established principle.[8] The grounds were when (i) there was something to affect the conscience of the party,[9] or (ii) allowing the foreign proceedings was contrary to meeting the ends of justice.[10]

Limb (i) involved showing some "equity" on which the plaintiff was relying. An example of this is a contract. Furthermore, if under English law a defence would be available to the injunction-seeker, that defence may be given anticipatory effect as a right not to be sued that is enforceable by injunction[11] in an action for a declaration of non-liability. Those can include defences which originate from equity, such as

> "...estoppel in pais[12] (which was also a defence at common law), promissory estoppel, election, waiver, standing by, laches, blowing hot and cold—to all of which the generic description of conduct that is 'unconscionable' in the eye of English law may be given."[13]

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of the Court of Common Pleas, became in 1613 Chief Justice of the Court of King's Bench, which heard cases concerning the King, including crime, from which he was dismissed in 1616 following a dispute with James I over the in commendam writ, used by the King as a means of appointing a bishop who did not have to perform any duties and could enjoy the revenues.

5 *Penn v Lord Baltimore* (1750) 1 Vesey Senior 444; *Lucasfilm Ltd v Ainsworth* [2012] 1 A.C. 208 at [103]; *William Ewing v Malcolm Hart Orr Ewing* (1883) 9 App. Cas. 34 at 40.

6 *Love v Baker* (1665) 1 Chan. Cas. 67. The subsequent inconclusive case law leading to *Bushby v Munday* (1821) 5 Madd. 297 is set out in T. Raphael, *The Anti-Suit Injunction* (Oxford: Oxford University Press, 2010) at pp.42–47.

7 *The Carron Iron Co Proprietors v James Maclaren* (1855) 5 House of Lords Cases 416; *Lord Portarlington v Soulby* (1834) 3 Mylne & Keen 104.

8 *The Carron Iron Co Proprietors v James Maclaren* (1855) 5 House of Lords Cases 416 at 439; *Lord Portalington v Soulby* (1834) 3 Myl & K 104.

9 *The Carron Iron Co Proprietors v James Maclaren* (1855) 5 House of Lords Cases 416 at 439 (contrary to equity and good conscience); *Pennell v Roy* (1853) 3 De GM & G 126 at 138–139.

10 *Stichting Shell Pensioenfonds v Krys* [2015] A.C. 616 at [17] citing *Bushby v Munday* (1821) 5 Madd. 297, which is considered in *The Carron Iron Co Proprietors v James Maclaren* (1855) 5 House of Lords Cases 416 at 438. It was more appropriate and just for the merits of that case to be tried in England because it was governed by English law, and the English court could give a more complete remedy.

11 *Compagnie Europeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep. 301.

12 Estoppel "in pais" gives a barring effect based on prior conduct of a defendant and reliance on it, such as non-contractual promises and representations: see *Watt (formerly Carter) v Ahsan* [2008] A.C. 696 at [30]. It includes estoppels from the "diverse origins" identified in *Legione v Hateley* (1983) 152 C.L.R. 406, per Mason and Deane JJ at [2]–[3]. An example is agreement to a recital in a deed or contract giving rise to an estoppel by convention: *Dixon v Blindley Heath Investment Ltd* [2017] Ch. 389 at [72].

13 The description by Lord Diplock of "unconscionable conduct" in *British Airways Board v Laker Airways Ltd* [1985] A.C. 58 at 81 is based on the principles on which the old Court of Chancery would have granted common injunctions so as to give effect to an equitable defence or principle: *Barclays Bank Plc v Homan* [1992] B.C.C. 757 at 762 per Hoffmann J, who had been counsel in Laker.

Limb (ii) was concerned with meeting the interests of justice and did not require proof of an "equity". It was sufficient that the foreign proceedings were unnecessary and vexatious, or were ill adapted to achieving the interests of justice.[14] This is illustrated by *Bushby v Munday*[15] in which proceedings in England were preferable to proceedings in the Court of Session because the merits depended on English law and the English court could give the plaintiff a more complete remedy than the Court of Session. The equitable jurisdiction exercised by the Court of Chancery therefore did not rest upon identifying some legal or equitable right, or a cause of action, to which the injunction was only ancillary. It was an aspect of the court's general equitable jurisdiction, to grant common injunctions. This could be exercised in personam to restrain threatened or actual unconscionable conduct. To start from whether there is a "legal and equitable right of the applicant not to be sued in a foreign court" assumes that there are rules in English law which set out clear lines on what conduct would or would not be regarded as unconscionable, and not merely precedents which provide examples of unconscionable conduct or threatened unconscionable conduct sufficient to justify granting an injunction, a question which depends on objective analysis of the particular facts.[16] **14-003**

Lord Diplock in *British Airways Board v Laker Airways Ltd*[17] considered that the anti-suit jurisdiction when granted to avoid injustice resulting from proceedings in the foreign court continuing, lay outside the constraints stated by him in *The Siskina* case, which required that an injunction be based on a legal or equitable right. This was because of precedent. In contrast the Mareva injunction had no counterpart in the injunction jurisdiction formerly exercised by the Court of Chancery, and this gave rise to a question as to its legitimacy which was resolved by the enactment of what is s.37(1) of the Senior Courts Act 1981.

(2) THE JURISDICTION TO GRANT ANTI-SUIT INJUNCTIONS: LEGAL AND EQUITABLE RIGHTS, EQUITIES, CAUSES OF ACTION AND OTHER CASES

In England the jurisdiction to grant anti-suit injunctions is now found in s.37(1) of the Senior Courts Act 1981.[18] The order is not directed at the foreign court,[19] it does not call into question the jurisdiction of the foreign court, and it is granted **14-004**

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14 *The Carron Iron Co Proprietors v James Maclaren* (1855) 5 House of Lords Cases 416 at 438–439.

15 (1821) 5 Madd. 297.

16 Lord Diplock recognised this in *British Airways Board v Laker Airways Ltd* [1985] A.C. 58 at 81 in agreeing with Lord Scarman in *Castanho v Brown & Root (UK) Ltd* [1981] A.C. 557 at 573 ("...the width and flexibility of equity are not to be undermined by categorisation...") cf. Obesi and Nyombi, "Enforcement of Anti-Suit Injunctions" [2015] *European Competition Law Review* 513 at 518.

17 [1985] A.C. 58 at 81.

18 *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] A.C. 24 at 39G–40H.

19 *Turner v Grovit* [2002] 1 W.L.R. 107 at [23].

agreement or an agreement providing for exclusive jurisdiction. The US Circuit Courts of Appeals differ in their approaches to the granting of anti-suit injunctions in respect of foreign proceedings which overlap with proceedings in the United States.[33] The Courts of Appeals for each of the District of Columbia, the First,[34] Second, Third,[35] Sixth and Eighth[36] Circuits follow a restrictive approach[37] to the granting of anti-suit injunctions, in which the general rule is to permit parallel proceedings to go on abroad without interference by injunction at least until final judgment is achieved which can be pleaded as res judicata in the other jurisdiction.[38] These courts emphasise that the injunction should be used sparingly, with great restraint, recognising the need to uphold respect and comity for foreign states and their courts, but recognise that it may be granted if the parties before the US court and the foreign court are the same and the issues are the same or substantially identical, in (1) the protection of the jurisdiction of the court or (2) the protection or the advancement of important national policies.

The First Circuit Court of Appeals has declined to view it as essential to cross one of these two thresholds before an anti-suit injunction could be granted, and to that extent has endorsed a less restrictive approach than the other Circuits.[39] The Second Circuit Court of Appeals has also adopted an intermediate approach.[40]

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33 The law and practice in the United States is reviewed in Professor Strong, "Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States" (2018) 66 *American Journal of Comparative Law* 153–179 with different standards being applied by different courts in different situations. In general, the courts show restraint in granting injunctions which would impact or halt proceedings in another court. The seminal decision is *Laker Airways, Ltd v Sabena, Belgian World Airlines* 731 F.2d 909 (D.C. Cir. 1984). The standard for review on appeal can be highly deferential. 28 USC 2283, the Anti-suit Injunction Act 1793, precludes a federal court from enjoining proceedings in a state court with few exceptions, and a state court cannot restrain in personam proceedings in a federal court: *Donovan v Dallas* 377 U.S. 408, 412–13 (1964).

34 *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* 361 F.3d 11 (1st Cir. 2004), upholding an anti-suit injunction restraining an application by the defendant in Belgium for an order which would have placed penalties upon the plaintiffs if they sought to take any step to obtain the disclosure ordered by the US District Court; this came within both (1) the protection of the jurisdiction of the US District Court and (2) the protection or the advancement of important national policies.

35 *Stonington Partners Inc v Lernout & Hauspie Speech Products N.V.* 310 F.3d 118 (3d Cir. 2002) in which the case was remitted to first instance to reconsider the question of an anti-suit injunction which was sought to prevent a creditor achieving in insolvency proceedings in Belgium a higher priority than would be accorded to it in Ch.11 proceedings in the US; *General Electric Co v Deutz AG* 270 F.3d 144 at 161 (3d Cir. 2001); *Younis Brothers & Co v Cigna Worldwide Ins. Co* 167 F.Supp. 2d 743 (2001) (US District Court, Eastern District Pennsylvania), where an anti-suit injunction was granted against plaintiffs who had failed on the merits and were seeking to bring the same claim in Liberia.

36 *Goss International Corp v Man Roland Druckmaschinen Aktiengesellschaft* 491 F.3d 355 (8th Cir. 2007).

37 *Gau Shan Co v Bankers Trust Co* 956 F.2d 1349 at 1354–58 (6th Cir. 1992); *China Trade & Dev. Corp v M.V. Choong Yong* 837 F.2d 33 at 36–37 (2d Cir. 1987); *Paramedics Electromedicina Commercial, Ltda v GE Medical Systems Information Technologies Inc* 369 F.3d 645 (2d Cir. 2004) and *Laker Airways Ltd v Sabena* 731 F.2d 909 at 937–945 (D.C. Cir. 1984).

38 *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F.2d 909 at 926–927 (D.C. Cir. 1984).

39 *Quaak v Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren* 361 F.3d 11 at [14]–[26] (1st Cir. 2004) (considerations of international comity establish a rebuttable presumption against the issuance of an anti-suit injunction but the presumption may be counterbalanced by the totality of the circumstances including the nature of the two actions, the conduct of the parties and the extent to which the foreign action has the potential to undermine the forum court's ability to reach a just and speedy result).

40 *China Trade & Dev. Corp v M.V. Choong Yong*, 837 F.2d 33 at 35–36 (2d Cir. 1987) (listing various factors to be considered including whether the foreign action threatened the enjoining court's jurisdiction or public policies and whether it would result in delay, inconvenience, expense, inconsistency or a race to judgment); *Ibeto Petrochemical Industries Ltd v M/T Beffen* 475 F.3d 56 (2d Cir. 2007); *Karaha Bodas Co v Perusahaan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007).

The Fifth, Seventh and Ninth Circuits adopt a "lax" or "liberal" approach.[41] Those courts place greater emphasis on the desirability of avoiding the same actions going on both in the US and abroad and the need to avoid the risk of conflicting decisions.

The resolution on anti-suit injunctions adopted in 2003[42] by the Institut de Droit International recognised that they have a limited place and considered that there should be restraint because of the needs of comity, and that injunctions ought not to be granted outside of (1) enforcing contractual jurisdiction clauses or arbitration agreements, (2) where a plaintiff has acted oppressively or unreasonably in a foreign jurisdiction, or (3) in the protection of a court's own jurisdiction in matters such as insolvency or administration of estates. Whilst there is a spectrum of different views in the US, in Europe and elsewhere, about the proper use of the jurisdiction, the intrusion on to the sovereignty of other nations and the rights of their citizens, which is involved in granting an anti-suit injunction restraining proceedings in a foreign court, means that "comity" takes on a sense in this context which goes well beyond mere courtesy, mutual respect, and even the desirability of co-operation between states. It concerns the sovereignty of a foreign state.[43] **14-006**

In Australia, besides the jurisdiction derived from the Court of Chancery, there is also an inherent jurisdiction of the court to act so as to prevent abuse of its process or to protect the integrity of those processes.[44] Criticism has been made in the High Court of Australia of the English case law not recognising the existence of this inherent jurisdiction of the court.[45] In *CSR Ltd v Cigna Insurance Australia Ltd*[46] an injunction was sought to restrain proceedings brought in the United States seeking treble damages under the Sherman Act. Brennan CJ (dissenting) would have upheld the injunction on the ground that the conduct had taken place in Australia and it would be unjust to obtain damages based "...on conduct that the insurers were free to engage in in that place without incurring a risk of liability for damages save under local laws". The majority judgment held that the absence of a remedy in Australia under the Sherman Act justified the US proceedings which were

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41 Professor Strong, "Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States" (2018) 66 *American Journal of Comparative Law* 153 at 160–164; *Kaepa Inc v Achilles Corp* 76 F.3d 624 (5th Cir. 1996); *Allendale Mutual Insurance Co v Bull Data Systems, Inc* 10 F.3d 425 at 431–32 (7th Cir. 1993) (restraining a French company suing in France on an insurance taken out to cover the contents of a French warehouse, because of doubts on whether the commercial court at Lille would be capable of fairly disposing of the insurer's defence based on arson); *Seattle Totems Hockey Club, Inc v Nat'l Hockey League*, 652 F.2d 852 at 855–56 (9th Cir. 1981); *Gallo Winery v Andina Licores SA* 446 F.3d 984 (9th Cir. 2006) (considering whether there are factors justifying an anti-suit injunction, for example, the foreign litigation is vexatious or oppressive, and whether the injunction's impact on comity is tolerable); *Applied Medical Distribution Corp v The Surgical Co BV* 587 F.3d 909 (9th Circ. 2009); *Microsoft Corp v Motorola Inc* 696 F.3d 872 (9th Cir. 2012).

42 "*Le recours à la doctrine du forum non conveniens et aux 'anti-suit injunctions' principes directeurs*", Session de Bruges, 2003; Rapporteur: Sir Lawrence Collins, Co-Rapporteur: M. Georges Droz (text available at *http://justitiaetpace.org* [Accessed 11 March 2016]).

43 The classic US definition of comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens": *Hilton v Guyot*, 159 U.S. 113, 164 (1895).

44 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 C.L.R. 345 at 390–392; *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 C.L.R. 199 at [93]–[95]. Where the foreign proceedings would if continued impact adversely on the integrity of the processes of the court or enforcement of a judgment, this resulted in an injunction being granted in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty* [2013] VSCA 237 at [31].

45 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 C.L.R. 199 at [93]–[95].

46 (1997) 189 C.L.R. 345.

ahead. Prima facie it is for the foreign court to decide whether it is going to proceed and the assumption must be that justice will be equally available and will be done in the foreign court. The principles of comity,[66] and restraint in interfering in the conduct abroad of foreigners,[67] inhibit the exercise of the jurisdiction to grant an anti-suit injunction. It is for these reasons that the jurisdiction to grant an anti-suit injunction should only be granted with caution.[68] An argument which shows only that there could be differences in view between the English court and the foreign court about where is the natural forum and where a case could more appropriately be tried, cannot justify the granting of an anti-suit injunction.[69] The English court will not arrogate to itself the right to decide this through granting an anti-suit injunction.[70] In cases in which there is a non-exclusive jurisdiction clause, if it is to be interpreted as not only making the English jurisdiction an appropriate forum but also so as to enable the English court to decide where the underlying case on the merits ought to be tried then there would be no impermissible arrogation.[71]

(5) THE BRUSSELS-LUGANO REGIME AND JURISDICTION AGREEMENTS BEFORE THE RECAST REGULATION[72]

14-009 Under the Judgments Regulation[73] when the English court was second seised, it was not able consistently with arts 27–30 to rule that the court first seised had no jurisdiction. In *Continental Bank v Aeakos SA*,[74] the Court of Appeal had decided that art.17 of the Brussels Convention,[75] which concerns jurisdiction clauses, took precedence over art.21. This had been criticised[76] and the decision, and the cases which follow it,[77] were inconsistent with the subsequent decisions of the European Court of Justice in *Erich Gasser GmbH v Misat Srl*[78] and *Turner v Grovit*.[79]

In Erich Gasser GmbH v Misat Srl the question was whether if there was an exclusive jurisdiction agreement in favour of a court which was second seised under

66 *Turner v Grovit* [2002] 1 W.L.R. 107 at [25]; *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119 at 133.

67 *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 A.C. 260; *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] Ch. 482.

68 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep. 87 at 96 LHC, a consideration which does not normally apply to enforcement of a clear covenant not to sue in the foreign court. See also A. Briggs, "Anti-suit Injunctions in a Complex World" in F. Rose (ed.), *Lex Mercatoria* (Abingdon: Informa Law, 2000), Ch.12.

69 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] A.C. 871 at 895.

70 *Royal Bank of Canada v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] 1 Lloyd's Rep. 471; *E.I. Du Pont de Nemours v Endo Laboratories Inc* [1988] 2 Lloyd's Rep. 240 at 244 RHC.

71 See paras 14-058 to 14-061.

72 Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012.

73 Council Regulation (EC) No.44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

74 [1994] 1 W.L.R. 588.

75 The Convention on Civil Jurisdiction and the Enforcement of Judgments, signed at Brussels in 1968 by the members of the European Economic Community, and published in the Official Journal ((1982) OJ L388/1).

76 A. Briggs, "Anti-European Teeth for Choice of Court Clauses" (1994) L.C.M.L.Q. 158.

77 *Evialis SA v SIAT* [2003] 2 Lloyd's Rep. 377 at [90]–[96]; *O. T. Africa Line Ltd v Hijazy* [2001] 1 Lloyd's Rep. 76 at [40] and [53].

78 [2004] 1 Lloyd's Rep. 222.

79 European Court, 27 April 2004.

the Brussels Convention, that court could proceed with determining the merits before the court first seised had pronounced on its jurisdiction. The European Court decided that the court second seised could not so proceed and that it had to stay its proceedings pending the decision by the court first seised. Before that court the defendant might not wish to rely on the jurisdiction agreement or there might be a dispute as to its validity and effect which has to be resolved by that court.

In *Turner v Grovit*, Mr Turner had successfully sued a company in the Chequepoint Group for damages for unfair dismissal before an Employment Tribunal in London. Subsequently another company in the same group sued Mr Turner in Spain for substantial damages in respect of alleged misconduct. The Court of Appeal granted an anti-suit injunction restraining pursuit by the company of the Spanish proceedings on the ground that those were brought in bad faith to vex Mr Turner. The House of Lords referred the issue to the ECJ, whilst supporting the decision of the Court of Appeal.[80]

14-010 The House of Lords expressed the opinion that since the jurisdiction to grant an anti-suit injunction is not concerned with the jurisdiction of the foreign court but with the improper conduct of the defendant in bringing and continuing with the foreign proceedings the Convention does not exclude the anti-suit jurisdiction.[81] The ECJ decision in *Turner v Grovit*[82] followed the same approach as had been adopted by the Advocate General,[83] and decided that it was inconsistent with the Convention to grant anti-suit relief restraining proceedings commenced before the courts of another Member State in respect of matters falling within the scope of the Convention. Problems which would have resulted from allowing a jurisdiction to grant anti-suit injunctions in respect of proceedings before the court of another Member State would have been that this would have been inconsistent with each court being equal to each other and the principle of reciprocal trust between courts which underlay the Convention, and it would have given rise to the possibility of clashes between courts of different states such as that which took place in the *Laker Airways* litigation[84] between the English courts and those in the US. Furthermore, if allowed the procedure might have resulted in anti-suit injunctions granted by courts restraining proceedings before the other court.

The decision in *Turner v Grovit* did not concern an injunction based on a jurisdiction agreement. But in principle its reasoning, taken together with that in *Erich Gasser GmbH v Misat Srl*, also prohibited anti-suit injunctions granted by the court second seized based on a jurisdiction clause. This was not because the same cause of action is before the two courts; the causes of action are different, one being the substantive claim, and the other being the cause of action based on the jurisdiction clause supporting the claim for the injunction. It is because the claim for the injunction restraining pursuit of the foreign proceedings is itself inconsistent with the proper working of the Regulation as declared by the European Court.[85] *Continental*

80 [2002] 1 W.L.R. 107.

81 *Turner v Grovit* [2002] 1 W.L.R. 107 at [25] and [26], referring to the Brussels Convention; the same is true of the Judgments Regulation.

82 [2005] 1 A.C. 101.

83 *Turner* [2004] 1 Lloyd's Rep. 216.

84 See *British Airways Board v Laker Airways* [1984] Q.B. 142 at 185–186, *Laker Airways v Sabena Belgian Airlines*, 731 F.2d 909 at 937 (1984), Court of Appeals for the DC circuit, *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119 at 136–137, and for a full account, see L. Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford: Clarendon Press, 1994), pp.110–117.

85 Where this factor was not present, the Cour de cassation in France has recognised an anti-suit injunction granted by the Superior Court of Cobb County in Georgia, US, based on breach of an exclusive jurisdiction clause: Cour de cassation 1st Civil Chamber, 14 October 2009—Decision No.08–

engaged in a continuing course of conduct to hide and transfer assets so as to defeat enforcement of the judgment, and that this would defeat any claim to confidentiality or legal professional privilege.[84] There had already been a finding that the husband had engaged in an "elaborate and contumacious campaign to evade and frustrate enforcement of the judgment debt against him". The court gave directions enabling there to be use of the documents including documents which related to the obtaining of legal advice.

(4) GRANTING RELIEF IN RESPECT OF SELF-INCRIMINATING MATERIALS TO WHICH THE CLAIMANT OR THE SUPERVISING SOLICITOR HAS HAD ACCESS OR TAKEN INTO THEIR HANDS UNDER A SEARCH ORDER OR OTHER MANDATORY ORDER

18-010 Privilege against self-incrimination under art.6 of the Human Rights Act does not apply to pre-existing documents[85] which pre-date the order for production,[86] as opposed to documents to be created in carrying out the order by a witness. This may also be the case at common law,[87] although the point is not settled. A search order can be made, notwithstanding the possibility of the respondent having self-incriminating documents or materials, if it contains a proviso that the mandatory terms shall only come into effect once the respondent has taken legal advice and has waived the privilege against self-incrimination.[88] It is open to a respondent to waive this privilege, but in the circumstances of execution of a search order this is not lightly to be inferred. The respondent may be highly emotional over what has happened. If the respondent has taken independent legal advice, the court will consider whether in all the circumstances there has been effective consent to waive privilege.[89] But leaving this aside, the respondent will not be taken to have given his voluntary consent to waive privilege.[90] An order can only properly be made if it provides for the claim to privilege, and execution of it is only proper if on the facts true consent has been obtained to the voluntary waiver of the privilege.

Leaving aside the possibility of waiver of the privilege against self-incrimination, the order should not compel production of documents protected by the privilege against self-incrimination.

If documents which are privileged against self-incrimination are removed by the applicant on execution of the order, can the respondent obtain the return of them?

18-011 First, this privilege is only a privilege against being forced to produce materials

[84] See Ch.13 "(ii) Exception to 'privilege' when there has been fraud, dishonesty or iniquity" at para.13-041.

[85] *Saunders v United Kingdom* [1998] 1 B.C.L.C. 362, (1996) 23 E.H.R.R. 313, at [68]–[69] "...material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect...".

[86] *Saunders v United Kingdom* (1996) 23 E.H.R.R. 313; *Jalloh v Germany* (2006) 20 B.H.R.C. 575 (forcible administration of an emetic to obtain a bag filled with cocaine was a violation of art.6).

[87] *Milsom v Ablyazov* [2011] EWHC 1846 (Ch); *C Plc v P* [2008] Ch. 1; *R v S* [2009] 1 W.L.R. 1489 at [18].

[88] See Ch.17 paras 17-050 to 17-053; *Tate Access Floors Inc v Boswell* [1991] Ch. 512 at 530 and 532; *IBM v Prima Data International* [1994] 1 W.L.R. 719 at 728–729.

[89] *IBM v Prima Data International* [1994] 1 W.L.R. 719 at 730–731 (the defendant was a businessman of some experience and so this procedure could be used without unfairness).

[90] *Columbia Pictures Inc v Robinson* [1987] Ch. 38 at 77; *J.C. Techforce Pty Ltd v Pearce* (1996) 138 A.L.R. 522 at 526–527.

or answer questions compulsorily. In *Bell Cablemedia Plc v Simmons*[91] the defendant was subject to a Mareva injunction and disclosure order in respect of a claim alleging acceptance of bribes. He was asked to return a laptop computer, which he did together with a diskette containing incriminating material. The Court of Appeal refused to order the return of the information or to prevent the plaintiff from relying on the material in evidence, and upheld the summary judgment given against the defendant. The privilege against self-incrimination is only an answer to compulsory production. It does not in itself result in the material being confidential and thus within the scope of the equitable jurisdiction[92] of the court to grant an injunction to protect confidentiality and order the return of confidential materials.[93] In that case information about the receipt of bribes whilst acting in the plaintiff's employment was not confidential to the defendant. Even if the material had been confidential, the defendant would have had no assistance from the court's equitable jurisdiction because the defendant's mistake had been unforced, and equity would not assist a dishonest man from the consequences of mistakenly disclosing evidence of his dishonesty.[94]

Secondly, if the documents are both privileged and confidential, the court can protect the privilege and the confidentiality by injunction.[95] However, this is a discretionary jurisdiction and subject to considerations which include whether it is right to protect someone who is guilty of wrongdoing from the consequences of this.

In *Universal City Studios v Hubbard*,[96] the defendant sought unsuccessfully to assert that s.72 of what was then the Supreme Court Act 1981 (now the Senior Courts Act 1981) did not apply, and that he had a right to privilege against self-incrimination. At first instance Falconer J. had thought that if s.72 did not apply, then he should have ordered return of the documents, but this conclusion was the subject of "serious doubt" on appeal. In that case, however, the privilege relied upon was solely that against self-incrimination and there was a serious question[97] whether the defendant had any rights of confidentiality in the documents.

18-012 Thirdly, where the documents have been obtained compulsorily under a court order, the court has jurisdiction to discharge the search order or to vary it so as to exclude from its ambit the information and materials. The order may be set aside either because it was wrongly granted or because of its mode of execution. In *Universal City Studios*,[98] no argument appears to have been addressed to the court on its jurisdiction to restore to a party what has been taken from him under an order which is subsequently set aside, and in *Bell Cablemedia Plc v Simmons*[99] that point did not arise.

The court may order restoration of documents pursuant to its jurisdiction to restore to a party what has been taken from him under an order which is set aside.[100] This is a discretionary jurisdiction to take away any advantage from a party who

[91] Decided on 29 April 1997 and reported at [2002] F.S.R. 551.

[92] *Lord Ashburton v Pape* [1913] 2 Ch. 469; *Goddard v Nationwide* [1987] Q.B. 670.

[93] *ISTIL Group Inc v Zahoor* [2003] 2 All E.R. 252; *Webster v James Chapman & Co* [1989] 3 All E.R. 939; A.L.E. Newbold, "Inadvertent Disclosure in Civil Proceedings" (1991) 107 L.Q.R. 98.

[94] *Bell Cablemedia Plc v Simmons* [2002] F.S.R. 551.

[95] *Naf Naf SA v Dickens (London) Ltd* [1993] F.S.R. 424 at 427–428; *Lord Ashburton v Pape* [1913] 2 Ch. 469; *English & American Insurance Co Ltd v Herbert Smith* [1988] F.S.R. 232; *Goddard v Nationwide Building Society* [1987] Q.B. 670; *Marcel v Commissioner of Police of the Metropolis* [1992] Ch. 225 at 235–239 (unaffected on this point by the subsequent appeal).

[96] [1984] Ch. 225.

[97] [1984] Ch. 225 at 233F–234A.

[98] [1984] Ch. 225.

[99] [2002] F.S.R. 551.

[100] *Naf Naf SA v Dickens (London) Ltd* [1993] F.S.R. 424; *Guess? Inc v Lee Seck Moa* [1987] F.S.R.

has obtained documents or information from an Anton Piller order which is subsequently set aside. Factors to be taken into account include the culpability of the conduct which resulted in the original order, whether such an order would interfere with the court doing justice in the suit and the practicality of implementing such an order.[101]

This is an aspect of the court's powers to reverse the effects of a judgment or order which is set aside.[102] It is a jurisdiction available against the party who had the benefit of the order, as a restitutionary remedy to restore to him what was taken from him under the order which has been set aside. It also affects third parties who derive their possession of the documents from having acts done under the authority of the discharged order. The defendant having been in possession of the documents has a superior title.

(5) GRANTING RELIEF IN RESPECT OF MATERIALS PROTECTED BY LEGAL PROFESSIONAL OR LITIGATION PRIVILEGE TO WHICH THE OTHER PARTY OR HIS ADVISERS HAVE HAD ACCESS

18-013 The jurisdiction depends upon an enforceable duty of confidence but its application depends upon the way in which the other party has obtained access to the materials.

If counsel's papers are sent by mistake to the other side, it will be obvious to the other side that a mistake has been made and an injunction will be granted[103] which could include preventing the other side's lawyers from acting.[104]

If documents protected by legal professional privilege are disclosed by mistake, listing the document does not waive the privilege which also applies to production of the list. Once the document has been produced and inspected ordinarily the privilege is lost and the court will not interfere to protect the confidentiality of the document. This is because parties and their advisers have to be careful in the steps they take in litigation and the client cannot use the equitable jurisdiction to relieve himself of an unforced error made in the course of conducting litigation, when the other party has in no way contributed to the mistake by any fraud or dishonesty, and is unaware that an error has been made.[105] If the circumstances are such as to make it obvious to the recipient,[106] putting in the place of the actual recipient a reasonable person having the attributes of that recipient,[107] and who gave detailed

125; *Bond Brewing Holdings Ltd v National Australia Bank Ltd (No.2)* [1991] 1 V.L.R. 580 (Supreme Court of Victoria, Full Court); see also *Dubai Bank v Goladari* [1990] 1 Lloyd's Rep. 120 at 131–135 (jurisdiction to order return of documents where the order was set aside for non-disclosure); see Ch.17, para.17-077.

101 *Naf Naf SA v Dickens (London) Ltd* [1993] F.S.R. 424 at 428.

102 D. M. Gordon, QC, "Effect of a Reversal of Judgments on Acts Done between Pronouncement and Reversal" (1958) 74 L.Q.R. 517 and (1959) 75 L.Q.R. 85, which discuss the authorities.

103 *English & American v Herbert Smith* [1988] F.S.R. 232.

104 *Ablitt v Mills & Reeve, The Times,* 25 October 1995.

105 *Re Briarmore Manufacturing Ltd* [1986] 1 W.L.R. 1429.

106 *Pizzey v Ford Motor Co Ltd* [1994] P.I.Q.R. P15; Court of Appeal (Civ Div) Transcript No.315 of 1993 (the small volume of discovery was consistent with the documents being disclosed intentionally).

107 *IBM Corp v Phoenix International (Computers) Ltd* [1995] 1 All E.R. 413 at 422, proposition (6).

consideration to the question,[108] that a mistake had been made,[109] and this is proved by the applicant for the relief,[110] then equity will intervene[111] unless there are good reasons not to do so. Those include not assisting on a public policy ground such as not suppressing evidence of serious misconduct in the public interest, not intervening because the clock cannot satisfactorily be turned back and the trial court might otherwise be misled,[112] and inordinate delay by the applicant in seeking the relief.[113]

18-014 The position is different for public interest immunity privilege[114] because the reason for the privilege is based on the public interest and the privilege should not be lost through an inadvertent mistake.

CPR r.31.20 provides:

> **"Restriction on use of a privileged document inspection of which has been inadvertently allowed**
>
> **31.20.—** Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court."

This provides machinery for what is to happen when there is disclosure by mistake, but does not affect the governing principles.[115] It requires the receiving party to apply to the court so that the position can be resolved so that he cannot simply deploy the document and thus create a fait accompli.

(6) GRANTING RELIEF IN RESPECT OF MATERIALS PROTECTED BY LEGAL PROFESSIONAL OR LITIGATION PRIVILEGE TO WHICH THE CLAIMANT OR THE SUPERVISING SOLICITOR HAS HAD ACCESS OR TAKEN INTO THEIR HANDS UNDER A SEARCH ORDER

18-015 If, as a result of the order, privileged materials come into the hands of the supervising solicitor or of the applicants or their solicitors, they remain confidential. They are not inadmissible in evidence.[116] But they are subject to the court's equitable jurisdiction to protect confidential information, and relief can be granted so as to ensure that they are not available to be adduced into evidence or to be produced to a third party.

This situation is to be distinguished from those in which a solicitor on disclosure, or in the conduct of the proceedings, has made an unforced mistake in disclosing privileged materials to the other side in circumstances where it is not clear that an

108 *Mohammed v Ministry of Defence* [2013] EWHC 4478 (QB) at [33] and [38].

109 [1995] 1 All E.R. 413 at 423d–f.

110 [1995] 1 All E.R. 413 at 422, proposition (6).

111 [1995] 1 All E.R. 413 at 422, propositions (5) and (6) (discovery carried out carelessly on the cheap, therefore greater risk of error, and the mistake about production of the legal bills would have been obvious to a reasonable solicitor); *Breeze v John Stacey & Sons Ltd, The Times,* 8 July 1999 (continuously paginated exhibit which included privileged material did not make it obvious that an error had been made); *Derby & Co Ltd v Weldon (No.8)* [1991] 1 W.L.R. 73 at 96–97; *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027.

112 *ISTIL Group Inc v Zahoor* [2003] 2 All E.R. 252 at [115].

113 *Goddard v Nationwide Building Society* [1987] Q.B. 670 at 684–685.

114 *Tchenguiz v Director of the Serious Fraud Office* [2015] 1 W.L.R. 797.

115 *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, *The Times,* 17 June 2002; *Breeze v John Stacey & Sons Ltd* [2001] N.P.C. 2.

116 *Calcraft v Guest* [1898] 1 Q.B. 759.

is unqualified and subject to strict liability. It is not a duty to act reasonably or in good faith. It is not limited to a duty not to disclose it; it is a duty not to misuse it including using it against the client even unconsciously. The risk must not be merely fanciful or theoretical. The impact of granting an injunction on the other client is in general not relevant to how the discretion will be exercised.[130] The client can object to his confidential information being used when his interests are or may be adverse to those of the new clients and even when the client is not a party to the litigation concerning the other client,[131] as long as that information is or may be relevant to the litigation.[132]

The position was different from that of auditors where competitors instructed the same auditors and consented to them acting provided that their confidential information was kept confidential.[133] This was like the position of solicitors in relation to litigation.[134] The House of Lords refused to approve any of the various tests expressed in the judgments in *Rakusen v Ellis Munday & Clarke*[135] because they placed an unfair burden on the client who was seeking to protect his confidential information. Where a solicitor has received confidential information under a retainer by two or more persons such that each of them was entitled to share the confidential information, if the solicitor subsequently acts for one against another an injunction will not be granted because each is entitled to use the information.[136]

In *Bolkiah v KPMG* part of the new retainer was simply what the accountants would have been expected to do as auditors to the Brunei Investment Authority and so within the scope of what the prince must have been taken to have consented because of their relationship as auditors which already existed at the date of their acceptance of instructions from the prince. Had this been the full extent of the new retainer, no injunction would have been granted because of consent by the prince. But it was not, the new retainer went well beyond that and was adverse to the interests of the prince. It included litigation support services. The Chinese wall which was put in place was not effective to ensure that there was no risk of confidential information being used. It was an ad hoc arrangement within a single department, there were not separate offices in different buildings, there were many personnel involved, and the personnel had a constantly rotating membership making enforcement of confidentiality all the more difficult.

18-019 Once it appears that one or more persons who have confidential information entrusted to them by the applicant as professionals acting for him who are subject to a fiduciary duty of trust and confidence, are part of the firm acting against the client, the burden is upon that firm to satisfy the court that the arrangements to safeguard the information are effective to eliminate the risk of leakage, including inadvertently or unconsciously. This includes leakage which might arise through social or professional contact including internal meetings. It is a question of fact. The starting point is that unless special measures are taken information moves

tors [1992] Q.B. 959 was correctly decided by the majority and the judge at first instance because the wall was not impregnable and still gave rise to a real risk of leakage, in particular because of the notoriety of the alleged wrongdoing which was part of the confidential information. The references to the tests in *Rakusen v Ellis Munday & Clarke* and to the Law Society's guide have been overtaken by *Bolkiah v KPMG*.

130 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86 at [78].

131 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86 at [81].

132 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86 at [82].

133 *Bolkiah v KPMG* [1999] 2 A.C. 222 at 235, referring to the analogous case of estate agents being free to be retained by competing clients—*Kelly v Cooper* [1993] A.C. 205.

134 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86.

135 [1912] 1 Ch. 831.

136 *Winters v Mishcon de Reya* [2008] EWHC 2419 (Ch).

around a firm. The later that arrangements are put in place to create information barriers after the situation of potential leakage has arisen, the more difficult it will be for the firm to show that such arrangements are effective,[137] and that information has not already passed within the firm to those who would be acting against the client or to persons to whom they have access. The court will look for arrangements which will work,[138] usually arrangements which include clear and workable undertakings by both those who have the information and other members of the firm, and physical separation of personnel and their places of work.[139] This does not mean that the two groups must have no contact at all whether on a social level or professionally.[140]

In *Koch Shipping Inc v Richards Butler*[141] two solicitors had moved to the defendant firm at which two solicitors were engaged in the arbitration for the other side. One of the solicitors who moved had acted for the claimant in the arbitration, and the other had acted for the claimant. Undertakings were offered, which included an undertaking by the solicitor, who had moved and was the only potential discloser of the confidential information which was to be protected, not to talk to anyone about the arbitration. The Court of Appeal held that this eliminated any risk of disclosure even inadvertently and therefore no injunction should have been granted against the firm continuing to act. It was not necessary to ban her from the defendant's building, and to require her to work from home.[142] There is no rule that when a solicitor has acted for a person he may not act against that person, and where there is no risk of misuse of confidential information, an injunction will not be granted.[143] If there is unreasonable delay in the claimant seeking an injunction and this has caused real prejudice for the new client then as a matter of discretion an injunction may be refused.[144]

18-020 In the case of a solicitor who has acted for the applicant for the injunction, the policy considerations are that the client should have absolute confidence that whatever he tells his lawyer will remain secret and should not be exposed to any risk of disclosure. This is required as part of the due administration of justice, and public confidence in solicitors. It does not apply where there has been no prior relationship between the solicitor and the applicant and the solicitor has not acted against the applicant in prior litigation, but in the current litigation has come into possession of privileged information of the applicant's, usually but not always because of inadvertent disclosure by the applicant or his lawyers.

In *Glencairn IP Holdings Ltd v Product Specialities Inc (t/a Final Touch)*,[145] there had been a mediation between the claimant and a third party under which all participating had signed an undertaking to keep information disclosed at the mediation confidential. One of those was a solicitor from the solicitors' firm acting for the third party, adversely to the claimant. A settlement agreement was eventually reached which imposed a duty of confidentiality on the parties to it who did not include the solicitor. The same solicitor firm was instructed in other proceedings

137 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86 at [85]–[87].

138 *Young v Robson Rhodes* [1999] 3 All E.R. 524 at [42] and [43].

139 *Halewood International Ltd v Addleshaw Booth & Co* [2000] P.N.L.R. 788.

140 *Young v Robson Rhodes* [1999] 3 All E.R. 524 at [42].

141 [2002] 2 All E.R. (Comm) 957.

142 See also *In the Matter of a Firm of Solicitors* [2000] 1 Lloyd's Rep. 31 where the evidence that the information barrier put in place would work was "most compelling" and an injunction was refused.

143 *Winters v Mishcon de Reya* [2008] EWHC 2419 (Ch).

144 *Georgian American Alloys Inc v White and Case LLP* [2014] 1 C.L.C. 86 at [89]–[96], in which the objection failed on the facts.

145 [2020] EWCA Civ 609, not following *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343.

"...because of the penal consequences of breaching a freezing order and...the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed".[59]

"...[The order] must be expressed in terms that are 'sufficiently precise to admit of its ready or convenient enforcement' and are such that 'the person to whom it is directed should be able, by reading it without more, at once to know what it is that he must do, or refrain from doing in order to comply with its terms'."[60]

What assets are frozen by a freezing injunction? This question is addressed in Ch.3 under "(2) Disposing of or dealing with his assets", at paras 3-007 to 3-017 and at paras 19-009 to 19-030.

Interpretation of a freezing injunction is governed by the same general principles as apply to all court orders. This type of order is addressed both to the defendant and to third parties such as banks. The order must have the same meaning whether read by a defendant or a bank.

A bank may not have access to much information about the reasons for making a particular order and may have to act without delay. It should not find itself embarrassed through what is said to be "background" but which was not in practice readily and promptly available to it. Freezing injunctions commonly have to be acted on at short notice by banks or other third parties, they may have to take urgent decisions based on what the order means, and they can be expected only to have limited knowledge about the circumstances in which an order has been made. The order must have the same meaning for the parties to it, and affected third parties. This limits what qualifies as relevant background for the interpretation of the order.[61]

Normally there should not be taken into account information only to be found on a transcript of the hearing at which it was granted. In *JSC BTA Bank v Solodchenko*,[62] a copy of the transcript of the hearing before the judge who made an order in the form used in the Admiralty and Commercial Courts Guide was regarded as irrelevant to interpretation because the judge had intended to adopt whatever was the meaning of the standard form, and this was unaffected by what was said at the hearing. It is thought that this would also have been irrelevant because this is information not readily available to third parties, who may be affected by the order.

The applicant can choose the words for which he makes an application for an injunction. It is well established that the words of the order are to be strictly construed.[63] This is because breach can result in imprisonment and because the order invades what would otherwise be the rights of the defendant to deal with assets and should be clear, and not oppressive through lack of clarity. It is potentially draconian in effect. All the more reason for the applicant to propose words which are clear. Ambiguity requires the narrower meaning to be adopted.[64] This is a separate point from where the defendant has acted in breach of an order and is therefore in contempt of court but may have done so not contumaciously and

[59] *JSC BTA Bank v Ablyazov* [2015] 1 W.L.R. 4754 at [19].
[60] *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1993) 10 W.A.R. 59 at 78.
[61] *Trump International Golf Club v The Scottish Ministers* [2015] UKSC 74 at [33].
[62] [2011] 1 W.L.R. 888 at [14].
[63] *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1028 at [22]; *JSC BTA Bank v Ablyazov* [2015] 1 W.L.R. 4754 at [19].
[64] *JSC BTA Bank v Ablyazov* [2015] 1 W.L.R. 4754 at [19]; *Yukong Line Ltd v Rendsburg* [1998] EWCA Civ 2795, which is put into the context of the litigation as a whole in P. Devonshire, "Freezing Orders, Disappearing Assets and the Problem of Enjoined Non-parties" (2002) 118 L.Q.R. 124 at 132–136.

through an honest mistake. An order which requires a person to "... use his best endeavours to file and serve ..." certain information can be sufficiently certain to ground a finding of conmtempt based on its breach.[65]

Judicial statements about the general purpose of the Mareva jurisdiction are part of the background, but they do not answer what particular words mean. **19-010**

Freezing orders are usually granted using a standard form of wording, which is now to be found in Appendix 11 to the Commercial Court Guide. This includes:

"**5.** Until the return date or further order of the Court, the Respondent must not—
(1) remove from England and Wales any of its, her or his assets which are in England and Wales up to the value of £.....; or
(2) in any way dispose of, deal with or diminish the value of any of its, her or his assets whether they are in or outside England and Wales up to the same value.

6.(1) Paragraph 5 applies to all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise.
(2) For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own.
(3) The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions." (numbers added)"

The wording of the injunction in *The Siskina* restrained the defendant shipowners from disposing of any of their assets within the jurisdiction "...including in particular the insurance proceeds in respect of their former vessel". A freezing injunction usually refers to particular assets which are to be frozen. It is the practice of the court to grant an injunction which not only refers in general terms to the defendant's assets, but also refers to particular assets of the defendant which are described in the order. Paragraph 7 of the example order adopts this practice: **19-011**

"**7.** This prohibition includes the following assets in particular—
(a) the property known as [title/address] or the net sale money after payment of any mortgages if it has been sold;
(b) the property and assets of the Respondent's business [known as [name]] [carried on at [address]] or the sale money if any of them have been sold; and
(c) any money in the account numbered [account number] at [title/address].
(d) any interest under any trust or similar entity including any interest which can arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever."

The "in particular" clause refers to particular assets which are referred to in evidence on the application. The example freezing injunction applies to assets in which the defendant has a beneficial interest, or the extension of this in para.6. The first sentence of para.6 uses the expression "all the Respondent's assets". If an injunction were granted limited to these words an asset would only qualify if the respondent has a beneficial interest in it; a bare legal title is not enough. If the words "whether the respondent is interested in them legally, beneficially or otherwise" are used the order applies to assets of the defendant whether or not they are owned beneficially. The second and third sentences extend para.5 so as to cater for situations in which the respondent does not have any interest in the asset, but has the power "directly or indirectly, to dispose of or deal with as if it were his own". These

[65] *Kea v Watson* [2020] EWHC 2599 (Ch) at [40]–[43].

of those assets. It is unsurprising that the court may grant an order which is widely formulated so as to catch assets, require disclosure of information and then refine the order subsequently, if appropriate. It is to be expected that the respondent will know about the history of the asset and the terms on which it is held. He can adduce evidence and make submissions about the width of the injunction being excessively wide.

19-025 In *FM Capital Partners Ltd v Marino*[123] there was judgment on liability against an individual (O) for dishonest assistance for breach of fiduciary duty and bribery, channelling commissions away from the claimant. Real risk of dissipation of assets was established and a worldwide freezing injunction was granted based on the standard form. The order made referred by name to a holding company in which the judgment debtor held 100% of the shares. Two other named companies were owned 100% by the holding company, one of which had no employees. The judgment debtor and his sister were directors of each company.

The standard form had been adapted. The words "(which shall include a body corporate)" were inserted after a third party in the third sentence of para.6 of the standard form. These words appear to have been inserted as a matter of caution so as expressly to alert the defendant that his companies were third parties within para.6, and did not alter its scope. Paragraph 7 had been adapted to include assets of the three companies which were wholly owned (directly or indirectly) by O, including the bank accounts of those companies. There was a notification requirement which applied to "any company whose assets are frozen". The issue was whether the injunction should be varied by deleting these, and also the words "and whether the respondent is interested in them legally, beneficially or otherwise" in the first sentence of para.6 of the standard form order. That issue should have been approached by considering (1) what scope of injunction should be adopted to prevent unjustified dissipation of assets which could result in a money judgment being unsatisfied; and (2) drawing up an order giving effect to that scope. On (1) it was relevant to consider how a money judgment might have been enforced and whether assets could be compulsorily applied to satisfy that judgment. That would include enforcement abroad by a foreign court.

The judge proceeded by first considering what was prohibited under the unvaried injunction. The deputy judge set out[124] certain proposition which he derived from *Group Seven Ltd v Allied Investment Corpn Ltd*[125] and of the Court of Appeal in *Lakatamia Shipping Co Ltd v Su*[126] on the meaning of the standard form freezing injunction. These propositions overlooked that (1) the decision in Group Seven had mistakenly excluded from para.6 situations where the defendant was acting as agent for or on behalf of a third party or as the third party or as an organ of a company; (2) *Lakatamia Shipping* had concerned a different form of order which omitted the concluding words of the first sentence of para.6. Using statements from the judgments of the Court of Appeal in that case as applying mutatis mutandis to the standard form order without taking into account the omission was incorrect. Interpretation of the standard form order should have interpreted that order, and done so applying the enforcement principle and that of strict construction.

19-026 Proposition (2) was "...In order that the extended definition should apply to a particular asset, that asset must be one to which the respondent is beneficially entitled or in which the respondent is beneficially interested...". This is inconsistent with the concluding words of the first sentence and with the ratio of the decision of the Supreme Court which held there was breach by reference to assets of the BVI companies in which the defendant had had no legal or beneficial interest. It treated the order as if it did not contain para.6. The judge recognised this.[127]

Proposition (3) was "....When the respondent, in his or her capacity as a director or shareholder of a company, exercises control to dispose of or deal with a company's asset, the respondent is acting as an organ or agent of the company, not as an individual in his or her own right. While the conduct or knowledge of an individual may be attributed to a company for a variety of reasons, the reverse is not true, that is the conduct or knowledge of a company is not to be attributed to the individual director or shareholder...". This mis-stated the position, repeating the error in *Group Seven* in its interpretation of para.6, and because the order in *Lakatamia Shipping* was in a different form. Statements by the Court of Appeal about the effect of that order should not have been transposed to interpretation of the standard form order.

Proposition (5) was "...There may be occasions where the freezing order could be expressed by the court to apply to the assets of a company wholly owned or controlled by the respondent, where that company is not a defendant to the substantive litigation but that jurisdiction is to be exercised only exceptionally, for example, where in truth the company's assets are the respondent's assets ([for example] non-trading companies which have no active business and "which are in truth no more than pockets or wallets of that respondent..."). This is a proposition about what form of words should be used and when. It overlooks that para.6 is part of the standard form order in the Commercial Court Guide, and that it is common as a matter of experience for a defendant to exercise control over assets of offshore companies which he owns, which are assets which may be compulsorily applied to satisfy a judgment. That control may be through agency or because he is the 100% shareholder. The wording to be adopted in an order should address the risks of unjustified dissipation of assets resulting in a judgment going unsatisfied. Its interpretation should take into account the purpose of the order, the enforcement principle.

19-027 The deputy judge decided[128] that:

(1) The third sentence of para.6 did not "...mean that the [R]espondent had "control" over the company's assets..., because any decision taken by the [R]espondent as to the disposition of or dealing with the company's assets was not taken by the [him] in his or her own right, but was taken in his or her capacity as an organ or agent of the company." This is the error in interpretation of para.6 in *Group Seven*.

(2) Each company's bank accounts were therefore outside of "assets" frozen by the order, and this should be made clear through deleting from the order references to the companies' bank accounts as being within the prohibition imposed on the Respondent by the injunction. This conclusion was based on the premise in (1).

The judge[129] decided that para.6 of the standard form order including the words added out of caution that third party includes a body corporate "...does not, by its terms, apply to the assets of the companies in which [O] has a direct or indirect shareholding." The reasoning was that where an asset belongs to a company in

[123] [2019] 1 W.L.R. 1760.
[124] At [32].
[125] [2014] 1 W.L.R. 735.
[126] [2015] 1 W.L.R. 291.
[127] At [53].
[128] At [53].
[129] At [54].

which the Respondent is 100% shareholder and a director, his only ability is to give instructions on behalf of the company, or as an organ of the company, and he has no ability to use the asset "...as if it were...his own" within the meaning of para.6. It is considered that on the standard form wording there is no such limitation and the reasoning in *Group Seven*, and the judge's reasoning are incorrect. The judge decided[130] to omit the concluding words to the first sentence of para.6. This was because "...there [was] no evidence that [O owned] any assets as a trustee or nominee or...on any basis other than as the owner of the legal and beneficial interest....There was no...evidence that there are proper grounds for believing that assets ostensibly held by the defendant on trust or as a nominee for a third party in fact belong to him". This overlooked that the words used contained no such limitation and that treating them as if they did was inconsistent with the enforcement principle and not justified by the strict construction principle. As a result of the judge's interpretation of the standard form order he decided to limit its application in the case before him to assets beneficially owned by the defendant.

19-028 The Chabra jurisdiction is not limited to cases where the third party holds, or has received, assets beneficially belonging to the principal defendant or assets in which the latter has some sort of proprietary entitlement.[131] The jurisdiction includes protecting assets from dissipation when assets can be reached through compulsory process and used to satisfy a judgment.[132] The judge's decision to vary by deletion bank accounts held by a company in which the defendant owned all the shares, might have been justified if there was no route for the claimant to compel use of the bank accounts to satisfy the judgment, once it had been quantified. But that was not considered, and there was a possible route. A receiver might have been appointed over the shares owned by the defendant to aid in enforcement of a money judgment,[133] once it had been quantified. A dividend could then have been declared by the receiver voting the shares, paid out of the bank accounts and other assets of the companies, including from realisation of the shares in the subsidiaries, and used to satisfy the judgment. There could have been a charging order over the shares in the holding company imposed by a foreign court having jurisdiction to do so by way of enforcement of a money judgment, which would through sale of the shares in the holding company have realised the net value of the assets of the three companies. There appeared to be routes for the assets of the three companies to be reached and used compulsorily to satisfy a money judgment against the defendant. These were relevant to the enforcement principle. They were also relevant to what should have been considered, which was what scope of injunction ought to be imposed in order to avoid the defendant causing a future judgment to be unsatisfied by unjustifiable disposals of assets. The judge did not consider this.

The companies were outside the jurisdiction. The English court should not make orders against a foreign company over assets abroad owned by that company, with no presence within the jurisdiction and against which the claimant has no cause of action, and in the absence of identification of a gateway enabling service on the company outside of the jurisdiction.[134] However, the judge was only being asked to maintain an order against the defendant personally, and any concerns about comity should have been addressed through using the Babanaft proviso.

130 At [56].

131 *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] 2 C.L.C. 988 at [46].

132 Ch.13, "Mareva relief against non-parties": see *Parbulk II AS v PT Humpuss Intermoda Transportasi TBK (The Mahakam)* [2011] 2 C.L.C. 988 at [46]–[48].

133 *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 All E.R. (Comm) 336.

134 *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2015] 1 Lloyd's Rep. 191.

Billington v Davies[135] was a post-judgment case involving fraud. There was a committal application and the judge held that the defendant judgment debtor had acted in contempt. He had had a bank account which had not exceeded a credit balance of £1,000, and therefore had not had to be disclosed under the disclosure order. He used it "under the radar" without disclosure of its existence, to make payments out of that account which was funded by payments from his wife and shell companies associated with him. The defendant did not attend and was unrepresented. The judge found contempt based on the holding of the Supreme Court, that the transfers into the account came from assets which came within para.6, second and third sentences. But the judge agreed with the claimant's submission, that a freezing order does prevent a defendant from incurring new liabilities, and accordingly the defendant is not free to write cheques to be debited to an account in overdraft, or to use a credit card, thereby committing the credit card company to pay the supplier.[136] That reasoning is inconsistent with the ratio of the Supreme Court which held to the contrary.[137] **19-029**

The breach by the defendant in *JSC BTA Bank v Ablyazov*,[138] was dealing with the assets from which transfers were made into the account, using the overdraft draw downs as a means of using the assets of the BVI companies, which were within the meaning of his assets in the freezing injunction. That reasoning can be applied to a credit card in the name of the defendant, because it gives a contractual right to use assets of the credit card issuer, use of it deals with those assets and those assets are to be "regarded" as assets of the defendant within the prohibition in para.3, because of the second and third sentences of para.6.

As a matter of caution it may be appropriate in particular cases where companies wholly owned and controlled by a defendant, or their wholly owned subsidiaries, are involved, to insert an extra restraint into the order which prohibits the defendant from "causing or procuring the assets of [the company] to be dealt with or disposed of, whether by acts of the defendant purportedly on behalf of or as agent for the company, or as shareholder in [the company], or otherwise howsoever". Whether there are to be exclusions permitting company assets to be dealt with and if so their terms, would need to be considered on a case-by-case basis. These changes would need to be raised specifically with the judge on the application for the injunction.

The defendant's assets include "goodwill".[139] A consequence is that if a third party takes advantage of the goodwill of a business of a defendant to make profits for itself this can be a breach of the injunction. **19-030**

The court has jurisdiction to grant a declaration as to the meaning of an order. This is a discretionary jurisdiction. In general if the question is whether the defendant has acted in contempt of court, this should be dealt with in contempt proceedings brought against the defendant and not starting with a declaration in proceed-

135 [2017] EWHC 3725 (Ch).

136 [2017] EWHC 3725 (Ch) at [42]. This is also the reasoning in *ASIC v Sigalla* [2010] NSWSC 606 at [24] which treated the contractual rights to use the card as "an asset", and considered that the asset was dealt with when used to satisfy a debt.

137 *JSC BTA Bank v Ablyazov* [2015] 1 W.L.R. 4754 at [31]–[38]; *JSC BTA Bank v Ablyazov* [2012] EWHC 1819 (Comm) (Christopher Clarke J) citing *Gee on Commercial Injunctions*, 5th edn (London: Sweet & Maxwell, 2004), at para.19-022.

138 [2015] 1 W.L.R. 4754.

139 *Templeton Insurance Ltd v Thomas* [2013] EWCA Civ 35 at [18] (use of a "phoenix" company which exploited the goodwill of the business owned by the defendant was in breach of a freezing injunction); *Sloane House Ltd v Fleury* unreported 4 July 2014 (QB); *Darashah v UFAC (UK), The Times*, 30 March 1982 ("goodwill" expressly included in the injunction as an asset).