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Prejudgment Attachment in England: The Mareva Injunction

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PREJUDGMENT ATTACHMENT IN ENGLAND: The *Mareva* Injunction

I. INTRODUCTION

Compared to some of her European neighbors, England was slow to adopt a principle of prejudgment attachment. In France, for example, the process of *saisie conservatoire* has existed for many years. The words literally mean a "conservative seizure" or a "seizure of assets so as to conserve them for the creditor in case he should afterwards get judgment."[1] In Scotland the law of arrestment achieves basically the same purpose.[2] In England, however, a creditor could not reach a debtor's assets until the court had entered judgment.[3] The case often cited in support of this principle is *Lister & Co. v. Stubbs*, in which Cotton, L.J., stated:

> I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.[4]

In 1975, the English courts created the *Mareva* injunction to afford some prejudgment protection to creditors.[5] Although this new procedure seemed irreconcilable with *Lister*, the court did not expressly overrule *Lister*. Attempts have been made to reconcile the two principles by establishing one as the rule and the other as the exception to it.[6] The continuing vitality of *Lister* has, nevertheless, inhibited the development of the *Mareva* injunction. It is against this background that an overview of the *Mareva* injunction is presented.

Part II describes the nature and scope of the *Mareva* injunction.

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1. A. DENNING, THE DUE PROCESS OF LAW 133 (1980).

2. R.J. WALKER, PRINCIPLES OF SCOTTISH PRIVATE LAW 163-64 (2d ed. 1975) *cited in* Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 657 (C.A.).

3. Siskina v. Distos Compania Naviera SA, 1979 A.C. 210, 259-60.

4. 45 Ch. D. 1, 13 (1890).

5. Mareva Compania Naviera SA v. Int'l Bulkcarriers SA, [1980] 1 All E.R. 213 (C.A.).

6. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1266 (Ch.) (suggesting that *Lister* be the rule and *Mareva* the exception). *But see infra* text accompanying note 73 (suggesting the contrary view that *Mareva* be the rule).

Part III explains why England was ripe for the *Mareva* injunction. A chronology of case law which illustrates the emerging principles follows. Part IV focuses on the application of these principles as they relate to jurisdiction, the balance of convenience, the nature of the assets involved, and the parties affected.

II. NATURE AND SCOPE OF THE PROCEDURE

The *Mareva* injunction does not convert an unsecured creditor into a partially secured creditor by creating proprietary rights in a debtor's assets, nor does it give a creditor priority in insolvency proceedings. Instead, the *Mareva* injunction operates *in personam* to restrain a debtor from dealing with his or her assets until the court enters judgment.[7] Until then, a creditor has no rights in a debtor's assets. For this reason, the *Mareva* injunction cannot strictly be called a prejudgment attachment.[8]

The *Mareva* injunction is granted in most cases as a form of interlocutory relief.[9] The court, however, may continue the injunction to facilitate execution of the judgment so that plaintiff can have the protection when he or she needs it most.[10] On the other hand, the court may discharge the injunction, especially in insolvency cases, where a creditor might get rights he or she otherwise would not have.[11]

The scope of the *Mareva* injunction is not limited to commercial debts. The injunction may support a claim for personal injuries.[12] It has also been used in the following situations: to supplement other remedies,[13] to obtain security in arbitration cases,[14] and to act as a discovery device.[15] With respect to discovery, plaintiff may not conduct a "fishing expedition" for defendant's assets, but plaintiff does have the right to ascertain the whereabouts

7. Rose, *The Mareva injunction—attachment in personam—Part 1*, 1981 LLOYD'S MAR. & COM. L.Q. 1, 5 [hereinafter cited as 1 Rose].

8. Wood, *Protective Measures for Recovering Debts in England and Wales*, 2 INT'L CONT. L. & FIN. REV. 458, 463 (1981) [hereinafter cited as Wood].

9. Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, ch. 49, sec. 45; *see also* 24 HALSBURY'S LAWS OF ENGLAND Para. 917 (4th ed. 1979).

10. Rose, *The Mareva injunction—attachment in personam—Part 2*, 1981 LLOYD'S MAR. & COM. L.Q. 177, 186 [hereinafter cited as 2 Rose].

11. Wood, *supra* note 8, at 463.

12. Allen v. Jambo Holdings Ltd., [1980] 1 W.L.R. 1252, 1256 (C.A.).

13. 2 Rose, *supra* note 10, at 184-85.

14. *See, e.g.*, The Rena K, [1979] 1 Q.B. 377, 378-79.

15. *See, e.g.*, A. v. C., [1981] 1 Q.B. 956; A. v. C. (No. 2), [1981] 1 Q.B. 961.

of such assets after he or she has narrowed their location down to either one or two bank accounts.[16]

III. Development of the New Procedure

A. Background

The measures traditionally used for the recovery of commercial debts[17] were not as efficient as the means by which debtors could transfer their assets out of the reach of creditors.[18] The courts saw a need to provide a means by which creditors could effectively prevent such transfers, and thus preserve a debtor's assets for satisfaction of the judgment. The courts created the *Mareva* injunction to meet this need.

The courts initially invoked this procedure in claims against foreign ship charterers who defaulted on the hire. The plaintiffs, usually shipowners, found the English courts to be a "fruitful venue" to litigate their claims[19] since the court often had jurisdiction by virtue of London arbitration[20] or insurance[21] provisions in the charterparties (charter agreements). Upon the charterer's default, the shipowner's main concern was to locate the charterer's assets in order to secretly prevent their removal from England. The *Mareva* injunction by allowing *ex parte* applications succeeds in providing secrecy. This relatively simple procedure has proved very popular with the commercial community, and by 1980, more than 20 applications a month were being filed.[22]

B. Development by Case Law

The Court of Appeal created the *Mareva* injunction in 1975 in the case of *Nippon Yusen Kaisha v. Karageorgis*.[23] This case, according to Lord Denning, touched off the greatest piece of law reform in his time.[24] In this case, plaintiff Japanese shipowners had entered into a charterparty with defendants, the Karageorgis brothers. De-

16. *Id.*

17. *E.g.*, Bankruptcy Act, 1914, 4 & 5 Geo. 5, ch. 59, sec. 44; Companies Act, 1948, 11 & 12 Geo. 6, ch. 38, sec. 320; and Rules of the Supreme Court 1965, Order 14 (1981).

18. Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [1978] 1 Q.B. 644, 661 (C.A.) [hereinafter cited as Pertamina].

19. Siskina v. Distos Compania Naviera SA, 1979 A.C. 210, 216.

20. *E.g.*, The Rena K, [1979] 1 Q.B. 377, 386.

21. *E.g.*, Siskina v. Distos Compania Naviera SA, 1979 A.C. 210, 227.

22. Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 650 (C.A.).

23. [1975] 1 W.L.R. 1093 (C.A.).

24. A. Denning, *supra* note 1, at 134.

fendants defaulted on the hire and disappeared, but plaintiff was able to locate funds of defendants in a London bank. There was a risk, however, that defendants would remove the funds by telegraphic transfer. Lord Denning, Master of the Rolls, said, "We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them."[25] It was time, his lordship decided, to revise such a practice. The court held:

> There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 which says that the High Court may grant a mandamus or injunction or appoint a receiver by interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong prima facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction ex parte and we should continue it.[26]

Lord Denning was so pleased with his decision that he said, "There was no need to wait for the case to be reported. I am quite sure by that afternoon every commercial set of chambers in The Temple buzzed with it."[27] The legal profession quickly recognized the potential of the *Nippon Yusen* decision. Barely a month later the Court of Appeal in *Mareva Compania Naviera SA v. International Bulkcarriers SA*[28] again utilized the new procedure and gave it its name.[29]

Both *Nippon Yusen* and *Mareva* were *ex parte* injunctions. In neither case did defendants apply to discharge the injunctions so that only the creditors' side was heard. For the authority to be complete, both sides needed to be heard. Such a case finally came up

25. Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, 1094 (C.A.).

26. *Id.* at 1095.

27. A. DENNING, *supra* note 1, at 135.

28. [1980] 1 All E.R. 213 (C.A.).

29. Sir Robert Megarry, V.C., believes that the name *Mareva* has been given to the injunction because the *Nippon Yusen* court had not been referred to *Lister* or any of the other cases in that line, and it was in the *Mareva* case that the Court of Appeal held that the injunction should be granted notwithstanding authorities to the contrary. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1262 (Ch.).

two years later in *Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,[30] mercifully short-titled *Pertamina*.[31]

Plaintiff shipowner sued defendant charterer for damages of nearly £2,000,000 for breach of a charterparty. After numerous futile attempts in several countries to attach defendant's assets, plaintiff finally found some equipment purportedly belonging to defendant waiting to be shipped from Liverpool. Plaintiff immediately applied *ex parte* for an injunction to restrain the shipping of the equipment, and the defendant applied to discharge the order. The Court of Appeal discharged the injunction on two grounds.[32] First, there was a serious question as to whether defendant held valid title to the equipment. Second, the value of the equipment to defendant (it was to be used as part of a proposed plant) far outweighed its value to plaintiff if seized and sold under execution of judgment. The court would issue an injunction only if it were "just or convenient" to do so,[33] and since it had grave doubts as to the merits of plaintiff's case,[34] the court did not continue the injunction. Lord Denning, who took part in this decision said later:

> [T]hat decision was a good way of getting things done. By our words we did much to establish the *Mareva* injunction as a new principle—but by our decision we avoided any appeal to the House of Lords. We decided on the merits in favour of the defendants—thus precluding any appeal by them: but we made it clear that that new principle was to be available in future in English law.[35]

His lordship's satisfaction was short-lived, however, as two months later the House of Lords not only reviewed the *Mareva* injunction but reversed an application of it in *Siskina v. Distos Compania Naviera SA*.[36] The pertinent facts were as follows: plaintiff

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30. [1978] 1 Q.B. 644 (C.A.).

31. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1263 (Ch.).

32. Lord Denning said:

> [These questions] must be taken into account considering whether discretion should be exercised or not. . . . While [these questions remain] unanswered, the situation is such that I do not think it would be proper in this case for equity to intervene to assist one side or the other. I am tempted to say, "A plague on both your houses."

Pertamina, [1978] 1 Q.B. at 662-63.

33. *Id.* at 659-60.

34. *See supra* text accompanying note 32.

35. A. DENNING, *supra* note 1, at 140.

36. 1979 A.C. 210.

cargo owners had a substantial claim against defendant shipowners arising out the shipowners' failure to complete delivery of freight-prepaid goods, for wrongfully diverting the vessel, and for discharging the cargo under an unwarranted claim of lien. The shipowners owned only one ship, the *Siskina*, which had sunk. Their only asset was the insurance money due to them from London underwriters for the loss of the ship. The cargo owners wanted to keep the insurance proceeds in England until they could litigate their damage claims in Cyprus. The High Court granted an injunction, and the Court of Appeal upheld it. The case then went to the House of Lords, which reversed on the narrow ground that the *Mareva* injunction could not be extended to provide a general power of attachment where the court had no other basis of jurisdiction over defendants other than plaintiffs' application for an interim injunction.[37]

In this decision, the House of Lords reviewed the *Mareva* principle but did not challenge it.[38] Lord Hailsham of Saint Marylebone said, "Since the House is in no way casting doubt on the validity of the new practice by its decision in the instant appeal, I do not wish in any way to do so myself . . . ."[39] Lord Denning commented on the House's silence two years later in *Third Chandris Shipping Corp. v. Unimarine SA*,[40] "If the House had any doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it."[41] The *Mareva* injunction had become part of English jurisprudence.

IV. Principles of Application

A. Jurisdiction

The source of the courts' *Mareva* jurisdiction is found in section 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[42] which permits the High Court of Justice to grant an injunction "in all cases in which it appears to the court to be just or convenient so to do." The jurisdictional prerequisite is that there exist

37. *Id.* at 217, 254-58.
38. *Id.* at 254.
39. *Id.* at 261.
40. [1979] 1 Q.B. at 645.
41. *Id.* at 666.
42. *Pertamina*, [1978] 1 Q.B. 644, 659-60 (C.A.). Sec. 45(1) has recently been re-enacted as sec. 37(1) of The Supreme Court Act, 1981, ch. 54.

"an action, actual or potential, claiming substantial relief which the High Court has jurisdiction to grant and to which the interlocutory orders . . . are but ancillary."[43] The importance of this prerequisite is illustrated in the *Siskina* case, where the House of Lords held that there was no action or substantive claim before the High Court to which the injunction sought could be ancillary.[44] The court said:

> All that [plaintiffs] have is a claim to monetary compensation arising from a cause of action against the shipowners which is not justiciable in the High Court without the shipowners' consent—which they withhold. To argue that the claim to monetary compensation *is* justiciable in the High Court because *if it were justiciable* it would give rise to an ancillary right to a *Mareva* injunction restraining the shipowners [from] doing something in England pending adjudication of the monetary claim, appears to me to involve the fallacy of petitio principii or, in the vernacular, an attempt to pull oneself up by one's own bootstraps.[45]

Plaintiffs had attempted to bring their action into the English courts by applying for leave to serve defendants overseas. Leave, however, was granted only to plaintiffs who could meet certain requirements governing overseas service of process. The pertinent court rule provided that leave might be granted "if in the action begun by writ an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of the thing)."[46] The only action brought in England by plaintiffs was the application for a *Mareva* injunction, which, according to their Lordships, did not constitute an action within the meaning of the rule.[47] Since the court had no *in personam* jurisdiction over defendants, there was no action to which the application for a *Mareva* injunction could be ancillary, and, therefore, the court had no power to grant an injunction.[48]

The restrictive holding of *Siskina* has been identified with the *Lister* line of cases.[49] However, an important distinction must be

43. Siskina v. Distos Naviera SA, 1979 A.C. 210, 254. *See also* Mareva Compania Naviera SA v. Int'l Bulkcarriers SA, [1980] 1 All E.R. 213, 214 (C.A.) (an injunction will not be granted to protect a person who has no legal or equitable right whatever).

44. *Id.* at 253.

45. *Id.* at 257.

46. Rules of the Supreme Court 1965, Order 11, Rule 1(i) (1981).

47. Siskina v. Distos Naviera SA, 1979 A.C. 210, 253.

48. *Id.* at 256.

49. Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, 1262-63 (Ch.).

made: the decision of the court not to issue an injunction in *Siskina* turned on the lack of jurisdiction, while in *Lister* it did not. A closer look at the facts of *Lister* will give a clearer picture of the situation.

In *Lister*, defendant agent had corruptly received commission payments from a third party. The principals applied for an injunction to restrain the agent from dealing with the money received. The Chancery Divisional Court held that since the commission was not the property of the principals, they had no right to prevent the agent from dealing with it.[50] The court did not address the issue of personal jurisdiction since the agent was actually in England. Rather, the court denied the injunction as a matter of practice:[51]

> [I]f the money sought to be recovered is not the money of the Plaintiffs, we should be simply ordering the Defendant to pay into court a sum of money in his possession because there is a *prima facie* case against him that at the hearing it will be established that he owes the money to the Plaintiffs. In my opinion, that would be . . . introducing an entirely new and wrong principle—which we ought not to do . . . .[52]

The difference between jurisdiction and practice is important because it diminishes the precedential value of *Lister*. While courts are not free to extend jurisdiction where there is none, they are free to depart from practice whenever it seems just or convenient to do so.[53]

B. Balance of Convenience

Section 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, permits the courts to grant interlocutory injunctions in cases where it is "just or convenient" to do so. The general principles for interlocutory injunctions are set out in the oft-cited *American Cyanamid Co. v. Ethicon Ltd.*[54] The threshhold requirement is that there be a serious question to be tried.[55] The court must be satisfied that plaintiff's claim is not merely vexatious.[56] The court also takes into consideration the uncompensable disadvantages to

50. Lister & Co. v. Stubbs, 45 Ch. D. 1, 13 (1890).

51. *See* Mareva Compania SA v. Int'l Bulkcarriers SA, [1980] 1 All E.R. 213, 215 (C.A.).

52. Lister & Co. v. Stubbs, 45 Ch. D. 1, 14 (1890).

53. *See* 2 Rose, *supra* note 10, at 194.

54. 1975 A.C. 396.

55. *See generally* R.J. WALKER, THE ENGLISH LEGAL SYSTEM 258 (4th ed. 1976).

56. *Id.*

each party should it grant or discharge an injunction.[57] In *Mareva* cases the courts have tended to vary the principles of *American Cyanamid*.[58]

With respect to the "vexatious" test,[59] for example, the Court of Appeal has held that a "good, arguable" case is sufficient to invoke the *Mareva* doctrine.[60] The requirements for a "good, arguable" case have been set out in *Third Chandris*.[61]

First, plaintiff must fully disclose material facts concerning the case. In this connection he or she must give all particulars of the claim, including the size of the claim and the grounds for it.[62] Plaintiff may also be required to reply to any bona fide defenses made by defendant in his or her application to discharge.[63]

Second, plaintiff must show that defendant has assets in England. The existence of a bank account is sufficient.[64]

Third, plaintiff must show that there is a risk that defendant would remove his or her assets before the judgment is satisfied.[65] The risk of removal or disposal of assets is the core of the *Mareva* injunction. Indeed, it has been said that the risk factor distinguishes *Mareva* from *Lister*.[66] In commercial cases it is sufficient if there are facts "from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction."[67]

Fourth, plaintiff must give an undertaking in case his or her claim fails or if the injunction turns out to be unjustified.[68] The rule is that plaintiff will only get such security in return as he or she has been required to furnish.[69] On the question of security, one commentator has noted:

> Not only would the general principle in *Lister v. Stubbs* be doubly circumvented if the *Mareva* procedure were used specifi-

57. *Id.*
58. *See* Fellowes & Son v. Fisher, [1976] 1 Q.B. 122, 133 (C.A.).
59. *See* R.J. WALKER, *supra* note 55, at 258.
60. *Pertamina*, [1978] 1 Q.B. 644, 661 (C.A.).
61. Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 668-69 (C.A.).
62. *Id.*
63. Meisel, *The Mareva Injunction—Recent Developments*, 1980 LLOYD'S MAR. & COM. L.Q. 38, 14.
64. Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 668 (C.A.).
65. *Id.* at 669.
66. 2 Rose, *supra* note 10, at 194.
67. Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 671 (C.A.).
68. *Id.* at 669.
69. R.J. WALKER, *supra* note 55 at 256.

> cally for the purpose of requiring the defendant to put security, albeit the consequences of actually doing so may be unavoidable, but the procedure itself would be narrowed if it were in some way confined to cases where the defendant were able to obtain some security. This, fortunately, is unlikely, and of course, a defendant's inability to obtain security may well prove the wisdom of granting the injunction in the first place. It remains for Parliament to consider, however, whether the procedure should be extended to provide the plaintiff with real security for, as will be seen, the procedure in principle creates not interest in the assets in question and so may afford minimal protection where the defendant and anyone in possession of them are prepared to risk being in contempt of court and to disappear out of the jurisdiction with the assets.[70]

A conflict exists because *Lister* denies to plaintiff a general means of obtaining security from defendant before judgment. Yet *Mareva* prevents defendant from dealing with his or her assets before judgment. To avoid this conflict, *Mareva* decisions have ostensibly emphasized the "risk of removal" aspect. The fact that assets were less easily transferable in the 19th century may explain why the risk factor, so crucial in *Mareva*, was not significant in *Lister*. In fact, some suggestions have been made that the two principles may be reconcilable. In *Barclay-Johnson v. Yuill*,[71] Sir Robert Megarry, V.C., said:

> I think that [the defendant] should be able to rely on the *Lister* principle except so far as it cannot be reconciled with the needs of the *Mareva* doctrine. I would regard the *Lister* principle as remaining the rule, and the *Mareva* doctrine as constituting a limited exception to it.[72]

Since the *Mareva* principle does incorporate the concerns of *Lister*, there is a strong argument in favor of establishing *Mareva* as the rule:

> The clearly and widely drawn words of the statute, the powerful arguments in favour of the *Mareva* procedure, the fact that it does not *per se* establish proprietary rights and the tenuous distinction between it and the *Lister v. Stubbs* principle (which can survive as a factor relevant to discretion) all, it is submitted, provide ample justification for the House of Lords abolishing the

70. 2 Rose, *supra* note 10, at 183.
71. [1980] 1 W.L.R. 1259 (Ch.).
72. *Id.* at 1266.

distinction and favouring the expansion of the *Mareva* principle as the general practice.[73]

C. Assets Affected

The nature of defendant's assets is a major consideration in the court's evaluation of whether it is just or convenient to grant an injunction. The most common asset subject to a *Mareva* injunction is a bank account. The freezing of such an asset, however, may seriously affect a defendant whose commercial survival depends on a good cash flow.[74] An undertaking by plaintiff may not always be sufficient indemnity for the loss which defendant might suffer.[75] This has been an area of concern to the courts, and Lord Denning has cautioned against the granting of an injunction over assets that would bring defendant's business to a standstill.[76]

More recent examples of assets subject to a *Mareva* injunction include money payable under a bank guarantee. In *Intraco Ltd. v. Notis Shipping Corp.*,[77] the Court of Appeals held that although it generally would not grant an injunction to prevent a seller from demanding payment from a bank under its guarantee, it could impose a *Mareva* injunction on the fruits of the guarantee once received by the beneficiary. In *Iraqi Ministry of Defence v. Arcepey Shipping Co. SA*,[78] an intervenor was successful in seeking a variation on the *Mareva* injunction to enable defendants to repay a loan. The Queen's Bench Division held that since plaintiffs were not considered judgment creditors before judgment, defendants should be allowed to repay a loan to intervenors.[79] The loan had arisen in the ordinary course of business, and in repaying the loan defendants were not seeking to avoid their responsibilities to plaintiffs.

Immovables, such as real property, are not considered any less suitable for a *Mareva* injunction. "The property lawyer's concern with creation of novel interests in land should be groundless, for the *Mareva* injunction is supposed to operate *in personam* and to create no proprietary interest in or lien over assets."[80]

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73. 2 Rose, *supra* note 10, at 194.
74. Third Chandris Shipping Corp. v. Unimarine SA, [1979] 1 Q.B. 645, 653-64 (C.A.).
75. *Id.*
76. *Pertamina*, [1978] 1 Q.B. 644, 662 (C.A.).
77. [1981] 2 Lloyd's L.R. 256 (C.A.).
78. [1981] 1 Q.B. 65.
79. *Id.* at 73.
80. 1 Rose, *supra* note 7, at 15.

D. Parties Affected

In *Siskina* the House of Lords left open the question of whether a *Mareva* injunction could be used against an English defendant.[81] Indeed, defendant's domicile, residence, or presence within the jurisdiction has played an important part in a court's determination as to whether it will exercise its discretion in *Mareva* cases. In *Gebr Van Weelde Scheepvaart Kantoor v. Homeric Marine Services Ltd.*,[82] the Queen's Bench Division refused an injunction because defendant was an English company.

The prevailing trend injunction, however, has been to apply the *Mareva* injunction to English defendants. In dictum in *Pertamina*, Lord Denning stated that the *Lister* prohibition was inapplicable to defendants outside English jurisdiction.[83] In *Chartered Bank v. Daklouche*,[84] a Lebanese couple operated a business in Abu Dhabi but had substantial contacts in England. The wife had bought a house in Hampshire, and had £70,000 in an English book. The couple's two daughters were being educated in England. The Court of Appeals considered the couple "English-based" for the purposes of a *Mareva* injunction and froze the wife's bank account.

Any doubt as to whether the procedure applied to an English defendant was dispelled after *Barclay-Johnson v. Yuill*.[85] In that case, the plaintiff had obtained an *ex parte* injunction restraining defendant, who was not a foreigner, from removing certain assets from the jurisdiction. The court reasoned that if the risk of removal of assets was the core of the *Mareva* injunction, then the procedure should not be confined to foreign defendants.[86]

Finally, in *Kirby v. Banks*,[87] the Court of Appeal issued an injunction against an English defendant who was both a resident of and present within the jurisdiction. The risk factor has replaced defendant's nationality as a test for whether the *Mareva* injunction should issue.

With respect to the rights and liabilities of third parties in a

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81. This question was recently resolved by the codification of the *Mareva* injunction. The Supreme Court Act, 1981, ch. 54, sec. 37(3).

82. [1979] 2 Lloyd's L.R. 117, 120 (Q.B.).

83. *Pertamina*, [1978] 1 Q.B. 644, 659 (C.A.).

84. 1 W.L.R. 107 (C.A.).

85. [1980] 1 W.L.R. 1259 (Ch.).

86. *Id.* at 1264.

87. 1978 K No. 976 (C.A. Jul. 1, 1980) (available Feb. 25, 1983, on LEXIS, Enggen Library, Cases file), *cited in* 1 Rose, *supra* note 7, at 10.

Mareva injunction, the Queen's Bench Division has recently held that an injunction may issue against third parties if there is a risk of removal or disposal of assets by the third parties in collaboration with defendant.[88]

Finally, in *Clipper Maritime Co. Ltd. v. Mineralimportexport*,[89] the Queen's Bench Division considered the possible adverse effect an *ex parte* injunction might have on innocent third parties not represented in the action. In this case, lawyers for the port authority where the arrested vessel was docked told the court that the injunction would affect the port's activities. As a result, plaintiffs were required to give an undertaking to reimburse the port's lost income and administrative costs attributable to the injunction.

V. Summary of Established Principles

In the seven years since the first *Mareva* cases were decided, the English courts have developed consistent rules which carefully balance the interests of the parties involved. It may be helpful to summarize the basic elements of the *Mareva* injunction as discussed in the preceding sections.

Jurisdiction for the procedure is derived from section 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925,[90] which gives the High Court wide discretion in granting interlocutory injunctions. This section was recently re-enacted with no substantial changes as section 37(1) of the Supreme Court Act, 1981.[91] The injunction sought must be part of plaintiff's substantive claim for relief. If defendant is not present within the jurisdiction, plaintiff must comply with the rules governing overseas service of process.

The two most important factors to be considered in determining whether it is "just or convenient" for the court to exercise its discretion are the strength of plaintiff's case[92] and the balance of convenience to both parties.[93] Plaintiff must show that he or she has a "good, arguable case."[94] If plaintiff passes this hurdle, the court will then consider whether damages would be sufficient to compensate either party for losses suffered in the action should either party

88. Iraqi Ministry of Defence v. Arcepey Shipping Co. SA, [1981] 1 Q.B. 65.
89. [1981] 1 W.L.R. 1259, 1262 (Ch.).
90. *See supra* text accompanying notes 43-53.
91. *See supra* text accompanying notes 44-48.
92. *See supra* text accompanying notes 58-67.
93. *See supra* text accompanying notes 70-76.
94. *See supra* text accompanying notes 54-68.

prevail against the other.[95] In this connection, plaintiff's interest in freezing defendant's assets must outweigh defendant's interest in preventing irreparable disruption of his or her commercial interests.[96] Plaintiff's burden of proof, apart from showing a good, arguable case, is to persuade the court that the defendant has assets in the jurisdiction and that there is risk of their removal.[97]

If defendant wishes to discharge the injunction, his or her burden is to show that his or her business would be irreparably injured or that he or she has given sufficient security to cover the debt should the court enter judgment against defendant.[98] The court's responsibility is to find where the balance of convenience lies.[99] In this connection, the nature of the assets sought to be restrained is considered only to the extent of its relative value to both parties and the ease with which it could be removed from the jurisdiction.[100]

With respect to persons affected by the *Mareva* injunction, both foreign and English defendants may be affected insofar as the threatened removal of assets is the crucial factor in determining whether the injunction will be granted.[101] Finally, innocent third parties adversely affected by such an injunction may apply to the courts for relief.[102]

VI. The Future of the *Mareva* Injunction

The *Mareva* procedure has recently been codified as section 37(1) of the Supreme Court Act, 1981, which contains the following subsection:

> The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.[103]

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95. *Id.*
96. *See supra* text accompanying notes 74-79.
97. *See supra* text accompanying notes 61-69.
98. *See supra* text accompanying notes 69-70.
99. *See supra* text accompanying notes 54-88.
100. *See supra* text accompanying notes 74-79.
101. *See supra* text accompanying notes 80-88.
102. *See supra* text accompanying notes 87-88.
103. Supreme Court Act, 1981, ch. 54, sec. 37(1).

This subsection apparently does no more than statutorily confirm the existence of the *Mareva* injunction, which could just as easily have been accomplished by Parliament's re-enactment of section 45. Thus, it has been suggested that

> [u]nless Parliament is prepared to elaborate on the factors governing the exercise of the procedure (e.g. as to the degree of strength displayed in the applicant's case), or to define or to alter the circumstances in which the jurisdiction exists (e.g. by overturning The *Siskina*), it might best decide not to single out for mention this particular area of the court's jurisdiction to grant injunctions unless it is for some more positive purpose. The courts can be trusted to develop the procedure any further if necessary.[104]

Lord Denning, smarting from the reversal of *Siskina* also commented, "I hope that the Courts may of themselves develop their own jurisdiction so as to be ahead of the Legislature. But they cannot, of course, overrule the House of Lords in The Siskina—without the help of Parliament."[105] Although Lord Denning has on several occasions been rebuked by the House of Lords for usurping the legislative function,[106] much can be said for his brand of judicial activism. One view is that the courts, in exercising their wide discretion in various unpredictable circumstances, are not creating new laws but only new interpretations of established principles.[107] Whatever the rationale, the *Mareva* injunction would never have come into existence without judicial inventiveness, and it is in this same spirit that the new procedure will flourish.

May Lee

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104. 2 Rose, *supra* note 10, at 197.
105. A. DENNING, *supra* note 1, at 151.
106. *See, e.g.*, Siskina v. Distos Compania Naviera SA, 1979 A.C. 210, 262.
107. 2 Rose, *supra* note 10, at 192-93.