The Development of the Mareva Jurisdiction

by

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In the five years since it first appeared in England in *Nippon Yusen Kaisha* v. *Karageorgis*[1] and *Mareva Compania SA* v. *International Bulk Carriers SA*[2] the *Mareva* procedure has been considerably developed—widened in some respects, refined in others. The developments in the jurisdiction to award a *Mareva* injunction and the nature and effect of the order are discussed here in the context of English and New Zealand law. It is argued that these developments clearly reveal the potential of judicial law reform within the common law system.[3]

The principal object of the *Mareva* procedure is to prevent a defendant defeating a prospective judgment against him by disposing of his assets outside the Court's jurisdiction. The effect of the issue of a *Mareva* injunction is to prevent the defendant so disposing of his assets before judgement can be obtained.

The operation of the procedure is however subject to constraints on both the jurisdiction to award a *Mareva* injunction and the nature and effect of the order when made. It is in the development of these constraints that the influence of judicial law reform is demonstrated.

I. The Existence Of The Jurisdiction

A. *The Jurisdiction in England*

Despite the existence in the Court of a power to grant an injunction either before, during or after judgment, injunctions to restrain a defendant from freely using his assets were not a recognised part of pre-judgment procedure until 1975.[4] The two ex parte injunctions

[1] [1975] 3 All E.R. 282.
[2] [1980] 1 All E.R. 213.
[3] The term "common law" is used here in contradistinction to "civil law".
[4] Powles, "The *Mareva* Injunction" [1978] J.B.L. 11; *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 3 All E.R. 282, 283.

granted by the English Court of Appeal in the *Karageorgis* and *Mareva* cases were consequently a source of surprise to many. The jurisdiction exercised in these two cases was founded on section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), which re-enacted the power granted by section 25(8) of the Supreme Court of Judicature Act 1873.[5] The 1873 Act gave a statutory basis to the very wide powers previously exercised by the Courts of Equity when granting injunctions.[6]

Lister & Co. v. *Stubbs*[7] though established the general proposition that the Court would not grant an injunction restraining a defendant from parting with his assets so that they might be preserved in case the plaintiff's claim succeeded. In the *Rasu Maritima* case[8] Lord Denning distinguished statements in support of the *Lister* v. *Stubbs* principle on the basis that they were not made in relation to a defendant who was out of the jurisdiction but had money or goods within the jurisdiction. By distinguishing previous statements to the contrary, Lord Denning was able to claim that the *Mareva* jurisdiction was not against previous authority and should be available on the broad discretion conferred by section 45(1).

The existence of the jurisdiction has been confirmed in a number of later English cases[9] and appears to have been accepted although not expressly approved by the House of Lords in *The Siskina*[10]

In the *Rasu Maritima* case Lord Denning described the historical background to the *Mareva* procedure, beginning characteristically by stating that "it is said that this new procedure was never known to the law of England. But that is not correct".[11] Originating in Roman times, the procedure then known as 'foreign attachment' was used in England in the Mayor's Court and the Sheriff's Court. There are also apparently parallel procedures well known to civil law systems, notably 'arrestment' in Scots law and 'saisie arret' in French law.

This view of the historical background finds support in the judgment of Lawton L.J. in *Third Chandris Shipping Corporation* v. *Unimarine S.A.*,[12] where it was said that:

> Local courts in commercial centres such as the City of London . . . exercised a special jurisdiction over foreign merchants who had left the realm and were sued for debt.[13]

[5] It seems likely that a similar power will be included when the Supreme Court Bill is passed: *A.J. Bekhor & Co. Ltd.* v. *Bilton* Times Law Report, 12 February 1981.
[6] *Holmes* v. *Millage* [1893] 1 Q.B. 551, 557.
[7] (1890) 45 Ch.D. 1.
[8] *Rasu Maritima S.A.* v. *Perusahaan (The Pertamina)* [1978] Q.B. 651.
[9] *Rasu Maritima S.A.* v. *Perusahaan* [1978] Q.B. 651; *Cretanor Maritime* v. *Irish Marine Management* [1978] 3 All E.R. 164.
[10] *Siskina (Cargo Owners)* v. *Distos Compania Naviera,* [1979] A.C. 210, 254, 261; *Chartered Bank* v. *Daklouche* [1980] 1 All E.R. 205, 210.
[11] *Supra,* 657.
[12] [1979] 1 Q.B. 645.
[13] *Ibid.,* 686.

The modern procedure is clearly more than a mere revival of previous practice. That the development of the jurisdiction provides a palpable example of judicial law reform was acknowledged by Lord Denning in the following terms:[14]

> It [the Mareva Procedure] is a field of law reform in which the judges can proceed step by step. They can try out a new procedure and see how it works.

Whatever the historical basis and the judicial gyrations involved in "updating" the previous practice, the jurisdiction in England is now well recognised and firmly established.

B. *The Jurisdiction in New Zealand*

In 1977 Cain raised the point that in view of the differently worded enactments applicable in New Zealand it was arguable that the New Zealand Courts would not have jurisdiction to grant a *Mareva* injunction. He suggested that Rule 462 of the Code of Civil Procedure would not justify an injunction on the facts of the *Pertamina (Rasu Maritima)* case. It was admitted though that:[15]

> [Rule 462] cannot be regarded as the exclusive indicator of the power of the Court to grant an injunction; resort is frequently had by our Courts to inherent jurisdiction to justify some extension of the Code.

It is this inherent jurisdiction which was apparently accepted without question in *Systems and Programs (NZ) Ltd.* v. *P.R.C. Public Management Services & Others,*[16] and was expressly invoked by Quilliam J. in *Mosen* v. *Donselaar.*[17] Quilliam J. observed that Lord Denning regarded the jurisdiction as having extended back for a long time and stated that:[18]

> It may be regarded as implicit in what he says that the present statutory provision is only declaratory of the jurisdiction of the Court of Chancery. The jurisdiction of the [High Court] of New Zealand is set out in section 16 of the Judicature Act: '16 General Jurisdiction—The Court shall *continue* to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand. [Emphasis added.]

Quilliam J. then concluded that:[19]

> This is sufficiently wide to include an inherent jurisdiction to make the kind of orders which the Court of Chancery could have made and it therefore seems that there is no jurisdiction bar to the making in New Zealand of a Mareva order.

It is interesting to note the Courts' manifest desire to justify the assumption of jurisdiction by reference to a thread of precedent of respectable antiquity. This is repeated in the judgment of Barker J. in

[14] *Rasu Maritima S.A.* v. *Perusahaan* [1978] Q.B. 651, 661.
[15] Cain, "The Mareva Injunction" [1977] N.Z.L.J. 246, 247.
[16] [1978] Recent Law 264; see also *Hunt* v. *B.P. Exploration (Libya) Ltd.* [1980] N.Z.L.R. 104, 118.
[17] Supreme Court, Wellington, 13 October 1978 (A325/75); noted [1979] Recent Law 52.
[18] *Ibid.*, 9.
[19] *Idem.* The jurisdiction in New Zealand can be traced to the unique jurisdiction exercised by the Courts of Chancery, initially adopted in New Zealand under the Supreme Court Act of 1860.

Hunt v. *B.P. Exploration Co. (Libya) Ltd.*[20] where after remarking that "it does appear that the question of this Court's jurisdiction was not fully argued [in *Mosen*], at least with the same degree of care as it was argued before me",[21] the judge reaches a similar conclusion, that "there appears to have been an old English procedure of 'foreign attachment' which provides a perfectly respectable ancestry for the procedure".[22]

The use of this rather tenuous strand of antiquated precedent by a variety of judges does appear a little strained and more than a little artificial in its application.[23] Nevertheless, it is suggested here that a very useful result has been achieved, albeit behind something of a façade built on the doctrine of precedent. The realist might argue that the common law is moving in rather mysterious ways in establishing this jurisdiction, but it must be admitted that the techniques of the common law have enabled a flexible approach to be taken, and so have facilitated the useful and eminently practical result which has been reached.

Following the decision in *Hunt* then, it seems clear that the *Mareva* jurisdiction does exist in New Zealand.[24]

II. Limitations On The Jurisdiction

A. *A Substantive Cause of Action*

In *The Siskina*,[25] judgment was sought against insurance money in the United Kingdom by plaintiffs who had a substantive cause of action only in Italy or Cyprus. It was anticipated that the money would have been removed from the United Kingdom by the time judgment was obtained in either Italy or Cyprus (despite such judgments being enforceable in the U.K.). In the House of Lords it was agreed unanimously that a substantive cause of action was essential. As the plaintiffs had no legal or equitable right in the assets which would support a substantive action within the jurisdiction a *Mareva* injunction could not be granted. Nor would the granting of an injunction suffice to satisfy the requirement.[26] It may be that the need for a substantive cause of action was also recognised by Jeffries J. in the *Systems &*

[20] [1980] 1 N.Z.L.R. 104.
[21] *Ibid.*, 115.
[22] *Ibid.*, 118.
[22] *Ibid.*, 118.
[23] Including notably Lord Denning M.R., Quilliam J. and Barker J.
[24] There has not been such ready acceptance in Australia; *Pivovaroff* v. *Chernabaeff* (1978) 16 S.A.S.R. 329; *Re Hunt* [1979] 2 N.S.W.L.R. 406.
[25] [1979] A.C.210.
[26] *Ibid.*, 257, *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] 1 Q.B. 645, 667. There may however be a limited exception to this requirement where the Reciprocal Enforcement of Judgments Act 1937 applies.

Programs case,[27] where it was held that the available facts did not permit adequate indentification of the probable legal issues.

B. *A "Foreign" Defendant?*

On the question of whether a *Mareva* injunction is only available against a foreigh defendant (being either a foreigner or foreign-based) the cases are not consistent. The more recent cases indicate that the *Mareva* doctrine is not restricted to foreign defendants. Rather, "in a proper case it [depends] only on the existence of a sufficient risk of a defendants assets being removed from the jurisdiction with a consequent danger of a plaintiff being deprived of the fruits of the judgment he was seeking".[28]

In the *Rasu Maritima* case Lord Denning found that the "present law" gave English-based defendants immunity from seizure of their assets by way of pre-trial attachment.[29] Lord Denning did not consider it relevant whether the defendant was within the jurisdiction or outside it.[30] The authority in favour of the immunity of English-based defendants was recognised in *The Siskina* by Lord Hailsham who was however of the opinion that sooner or later "either the position of a plaintiff making a claim against an English-based defendant will have to be altered or the principle of the *Mareva* cases will have to be modified".[31]

Fortified by the opinion of Lord Hailsham but despite the High Court decision in *The Agrabelle*,[32] Lord Denning then suggested that English-based defendants are not necessarily immune.[33] Support was drawn from his own decision in *Chartered Bank* v. *Daklouche*[34] which was however more a case of a foreign-based defendant served while in England, than a truly English-based defendant.[35]

Until the *Yuill* case[36] there was no express authority for the proposition that other than foreign-based defendants could be subject to the *Mareva* procedure. In *Yuill*, Sir Robert Megarry V.C. held that the fact that the defendant was not a foreigner nor foreign-based was no bar to the grant of a *Mareva* injunction. To Megarry V.C. it seemed

[27] [1978] Recent Law 264.
[28] *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190; confirmed in *Prince Abdul Rahman Bin Turki Al Sudairy* v. *Abu-Taha* [1980] 3 All E.R. 409 (C.A.).
[29] *Rasu Maritima* v. *Perusahaan* [1978] Q.B. 651, 659.
[30] *Ibid.*, 663.
[31] *Siskina (Cargo Owners)* v. *Distos Compania Naviera* [1979] A.C. 210, 261.
[32] *Gebr Van Weelde Scheepuaart Kantoor* v. *Homaric Marine Services Ltd. (The Agrabele)* [1979] 2 Lloyds Rep. 117, which also notes *Adler Commetica* v. *Minnahurst* at 119.
[33] *Third Chandris Shipping Corp.* v. *Unimarine S.A.* [1979] 1 Q.B. 667.
[34] [1980] 1 All E.R. 205.
[35] See remarks of Lord Denning *ibid.*, 209-210 and Eveleigh L.J. *ibid.*, 211.
[36] *Barclay-Johnson* v. *Yuill*, [1980] 3 All E.R. 190; see also *Prince Abdul Rahman Bin Turki Al Sudairy* v. *Abu-Taha*, [1980] 3 All E.R. 409.

that the heart and core of the *Mareva* injunction was the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given in the action. This view gained the support of Cato who has submitted that:[37]

> There is no reason to distinguish the foreign debtor from the residential debtor. What is crucial is that the evidence establish that a debtor is likely to remove or there is a danger that his assets if any, will be removed from this country.

It is suggested that this support for the view taken by Megarry V.C. and the English Court of Appeal is clearly justified. The earlier statement though that "It would appear entirely possible that *Mareva* will be extended to cover resident debtors and thereby abrogate the long established principle in *Lister* v. *Stubbs* (1890), 45 Chd 1. . . . ."[38] deserves further comment. That the *Mareva* procedure should cover resident debtors is not questioned. That this would necessarily abrogate the principle in *Lister* v. *Stubbs* though is not clear, given that the term "abrogate" means "To repeal, to do away with".[39] It is suggested that the view of Megarry J. is to be preferred—the *Lister* principle should be regarded as remaining the rule and the *Mareva* doctrine as being a limited exception to it.[40] That Cato is correct in saying that it is *possible* that the *Lister* principle will be abrogated is not doubted. Rather it is hoped that this possibility does not eventuate, and that the *Lister* rule remains, albeit subject to the *Mareva* exception.

In the *Mosen* case Quilliam J. did not grant a *Mareva* injunction on the now discredited ground[41] that there was insufficient evidence of an existing specific asset against which an order could be made.[42] While the point was not argued the judge did remark that he was inclined to the view that the jurisdiction should be limited to the case of a defendant who is out of the country.[43]

The better view now appears to be that the *Mareva* procedure is not to be limited to foreign defendants.[44]

C. *A Limitation to Commercial Actions for Debt?*

Powles in 1978 wrote that: "The restraining hand of the House of Lords on the Court of Appeal's apparently insatiable appetite for

[37] Cato, "The Mareva Injunction and its Application in New Zealand" [1980]; Cain, "The Marva Injunction" [1977] N.Z.L.J. 246, 247.
[38] Cato, *loc. cit.*, 272.
[39] Shorter Oxford English Dictionary.
[40] *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190.
[41] *Cretanor Maritime* v. *Irish Marine Management (The Cretan Harmony),* [1978] 3 All E.R. 164.
[42] *Mosen* v. *Donselaar* Supreme Court, Wellington, 13 October 1978 (A 325/75); noted [1979] Recent Law 52.
[43] *Ibid.*, 9, cf: *Chartered Bank* v. *Daklouche* [1978] 1 All E.R. 205.
[44] See also Meisel, "The *Mareva* Injunction—Recent Development", [1980] L.M.C.L.Q. 38; cf. *A.* v. *C.* [1980] 2 All E.R. 347, 351b-351c.

judicial legislation has left the commercial community with a useful and commonsense remedy and the cases reveal an excellent example of the judiciary's awareness of commercial needs".[45] But can it really be said that the jurisdiction is limited to commercial situations?

A survey of the cases certainly reveals a very strong commercial flavour with many of the English decisions involving shipping interests.[46] This was recognised by Lord Hailsham in *The Siskina* where he said that "So far such injunctions seem to have been confined to the commercial list, and perhaps entirely to shipping cases."[47]

More recently it seems that the *Mareva* procedure has begun to be applied outside the commercial sphere. In the *Yuill* case Megarry V.C. acknowledged that the *Mareva* doctrine grew up in commercial surroundings, particularly with regard to ships, but he found no authority for confining it to commercial matters. Lord Denning too in *Allen* v. *Jambo Holdings*[48] said that "In the past *Mareva* injunctions have been confined to the Commercial Court. The judges of that Court have granted injunctions to restrain foreign companies from removing moneys so as to defeat their creditors. The leading case is *Rasu Maritima* . . . coupled with a very recent case, *Third Chandris*. . . . Those were commercial cases. But this is new".

No longer then does the *Mareva* jurisdiction appear to be restricted to commercial actions.

Along similar lines to the argument for the restriction to commercial situations, it originally could have been argued that the *Mareva* jurisdiction should be restricted to actions for debt. In the *Mareva* case Lord Denning found that the jurisdiction enabled the Court to grant an injunction "to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it".[49]

When referring to the historical basis for the jurisdiction (in England) in the *Rasu Maritima* case Lord Denning quoted from Pulling (1842)[50] to the effect that [51]

> This remedy by attachment is not confined to citizens or even residents within the city; it is a common process, open to any person when his *debtor* has property within the jurisdiction of the Court. [Emphasis added.]

Lord Denning also described the development of the process in the

[45] Powles, "The *Mareva* Injunction" [1978] J.B.L. 11.
[46] *Mareva Compania Naviera* v. *International Bulk Carriers (1975)* [1980] 1 All E.R. 213; *Rasu Maritima* v. *Perusahaan* [1978] Q.B. 644. *The Rena K* [1979] 1 All E.R. 397.
[47] *Siskina (Cargo Owners)* v. *Distos Compania Naviera S.A.* [1979] A.C. 210, 261, 262.
[48] [1980] 2 All E.R. 502, 504.
[49] *Mareva Compania S.A.* v. *International Bulk Carriers,* [1980] 1 All E.R. 213, 215.
[50] *The Laws Customs Usages and Regulations of the City and Part of London* (1842), 187-192.
[51] *Rasu Maritima* v. *Perusahaan* [1978] Q.B. 644, 657-658.

United States of America:[52]

> It was adopted throughout as a remedy for collecting debts due from non-resident or absconding debtors. But it was *not* extended to cases where there was no debt due from the defendant but only a remedy in equity by way of injunction: see *De Beers Consolidated Mines Ltd.* v. *United States* (1945) 325 US 212.

The original English process was identified with the origins of the present European procedure which is "applied universally on the continent".[53] The European procedure according to Lord Denning "enables the seizure of assets to preserve them for the benefit of the creditor".[54] It is this procedure which Lord Denning concludes should be followed, allegedly harmonising the procedures used within the Common Market.

The historical foundations of the jurisdiction, so important in justifying the development of this new procedure,[55] seem squarely based on actions for debt.

After the *Rasu Maritima* case came *The Siskina.* In the Court of Appeal Lord Denning said that:[56]

> *Mareva* is a procedure by which the Courts can come to the aid of a *creditor* when the *debtor* has absconded or is overseas, but has assets in this country. The Courts are ready now to issue an injunction so as to prevent the *debtor* from disposing of those assets or removing them from this country. [Emphasis added.]

In the House of Lords however Lord Diplock said that a *Mareva* injunction "is ancillary to a substantive pecuniary claim for debt or damages".[57] More recently Lord Denning has acknowledged this change in the scope of the jurisdiction in the *Jambo Holdings* case that:[58]

> [In the past] the judges . . . have granted injunctions to restrain foreign companies from removing moneys so as to defeat their creditors. . . . But this is the first case we have had of a personal injury . . . where a *Mareva* injunction has been sought.

Templeman L.J. added that:[59]

> So far as the question of jurisdiction is concerned, I can see no difference between a *Mareva* injunction in a commercial action and a *Mareva* injunction for personal injury or any other cause of action save this [i.e. Amount of argument as to cross-undertaking damages].

This view also accords well with the principle, expounded by Megarry V.C. in *Yuill,* that "in a proper case it depended only on the existence of a sufficient risk of a defendant's assets being removed from the jurisdiction with a consequent danger of a plaintiff being deprived of the fruits of the judgment he was seeking".[60]

[52] *Ibid.*, 658.
[53] *Idem.*
[54] *Idem.*
[55] Ante.
[56] *Siskina (Cargo Owners)* v. *Distos Compania Naviera S.A.*, [1979] A.C. 210, 229; This statement was later approved by the Court of Appeal in *Montecchi* v. *Shimco* [1979] 1 W.L.R. 1180, 1184 per Bridge L.J.
[57] *Siskina (Cargo Owners)* v. *Distos Compania Naviera S.A.*, [1979] A.C. 210, 253.
[58] *Allen* v. *Jambo Holdings Ltd.* [1980] 2 All E.R. 502, 504.
[59] *Ibid.*, 506.
[60] *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190.

No longer then is a restriction to actions for debt really arguable.

Again it can be seen that in the five years in which the *Mareva* jurisdiction per se has developed, the scope of the jurisdiction has widened considerable as it has progressively "shed the limitations of its origin".[61]

III. The Nature And Effect Of The Order

The mischief against which the *Mareva* procedure operates is the frustration of a judgement by the removal of assets from the jurisdiction. The object of the procedure is thus to keep in the jurisdiction such assets as may be required to satisfy the judgment. Lord Denning has described *Mareva* as a modern form of "foreign attachment".[62] Foreign attachment operates as a seizure of specified assets to satisfy a prospective judgment. If a *Mareva* injunction were a form of foreign attachment it would take precedence over even secured claims. That this would be the case is shown by Lord Denning's remarks in the *Rasu Maritima* case that "Under the foreign attachment procedure if the defendant was not to be found within the jurisdiction of the court, the plaintiff was enabled instantly as soon as the plaint was issued, to attach any effects of the defendant whether money or goods, to be found within the jurisdiction".[63] In Lord Denning's opinion a modern equivalent was available in the form of a *Mareva* injunction. In the *Cretanor* case[64] the Court of Appeal was called on to consider the relationship between the claim of a secured creditor and the claim of a holder of a *Mareva* injunction. An Irish charter company had executed a debenture secured by a floating charge which was duly registered. The debenture was guaranteed. Subsequent to the execution of the debenture a *Mareva* injunction was granted to the ship owners in respect of assets owned by the charterers. Although judgment was obtained in respect of the substantive claim it was never fulfilled and the injunction remained in force. The guarantor of the debenture appointed a receiver who applied to discharge the injunction. Insufficient assets remained to satisfy either the judgement debt or the guarantor's claim. The question arose therefore as to which claim had priority, the answer depending on the nature of the injunction.

Buckley L.J. stated that:[65]

> Lord Denning was not, I think, saying that the *Mareva* injunction was capable of operating as a form of attachment, but that, applying the principle which underlay the old practice of foreign attachment, English Courts should now employ the

[61] *Ibid.*, 197.
[62] *Rasu Maritima* v. *Perusahaan* [1978] Q.B. 644.
[63] *Ibid.*, 657.
[64] *Cretanor Maritime* v. *Irish Marine Management,* [1978] 3 All E.R. 164.
[65] *Ibid.*, 170.

> remedy of an interlocutory injunction to achieve a broadly similar result. Indeed it is, I think, manifest that a *Mareva* injunction cannot operate as an attachment.

The debenture holders could therefore claim for the discharge of the injunction, as their right to the assets dated from the issue of the debenture. The receiver, by joining the debenture holder as a party was thus able to have the *Mareva* injunction discharged.

As Powles points out,[66] the *Cretanor* decision usefully limits the extent to which rights are created for the plaintiff over the defendant's property. The priority accorded other creditors is, quite properly, not affected by the use of a *Mareva* injunction. The *Mareva* jurisdiction then is limited to the granting of an interlocutory injunction and does not alter the priorities of the various creditors.[67]

Again it can be seen that the nature of the present procedure has changed considerably since its origins in the form of "foreign attachment".

As an interlocutory injunction the *Mareva* injunction gives rise only to relief against the *person* enjoined[68] and does not affect the asset itself. Thus the rights of any transferee over the money or goods are also unaffected.[69]

A further effect of the assurance of relief *in personam* is that the defendant is encouraged to offer security for the amount of the claim and so have the injunction discharged.

In the *Rasu Maritima* case Lord Denning saw "no objection in principle to an order being made in respect of assets: in the expectation that this will compel the defendant as a matter of business, to provide security".[70]

In the *Cretanor* case though while Buckley L.J. agreed that the defendant would be encouraged to provide security but expressed doubt as to the propriety of such a practice, stating that:[71]

> In what circumstances it is justifiable for the Court to lend its authority in the exercise of a discretionary jurisdiction and one based fundamentally on equitable principles to bring pressure to bear on a party in this way is I think, still open to debate.

In *Allen* v. *Jambo Holdings* Lord Denning reiterated his view stating that:[72]

> I can see no reason in this case, as is done in shipping cases all over the world, why security should not be given. . . .

He reinforces the applicability of this view to the facts in that case by referring back to the parallel jurisdiction he had described earlier in

[66] Powles, "Limitations on the *Mareva* injunction" [1980] J.B.L. 59.
[67] *Iraqi Ministry of Defence* v. *Arcepey* [1980] 1 All E.R. 480, 486.
[68] *Cretanor Maritime* v. *Irish Marine Management* [1978] 3 All E.R. 164, 170d.
[69] Cf. equivalent American procedure—the contingent lien:- *Ross* v. *Peek Iron and Metal Co. Inc.* 264 Fed 262, U.S. Court of Appeals.
[70] *Rasu Maritima* v. *Perusahaan* [1978] Q.B. 644, 662.
[71] *Cretanor Maritime* v. *Irish Marine Management* [1978] 3 All E.R. 164, 171.
[72] *Allen* v. *Jambo Holdings Ltd.* [1980] 2 All E.R. 502, 505; *The Rena K* [1979] 1 All E.R. 397, 420.

the following terms:

> The nearest parallel is a ship in an English port where there is an accident causing personal injuries or death. It has been settled for centuries that the claimant can bring an action *in rem* and arrest the ship. She is not allowed to leave the port until security is provided. . . .[73]

In response to the argument that ships are different because of their protection and idemnity clubs he states that:

> The situation is so parallel, the one with the other, that even though this is a new case, it seems to me that it would be right to continue the *Mareva* injunction in the expectation that the aircraft will be released at any moment as soon as security is provided.[74]

Once again a commendable result was reached although again it may be protested that the reasoning was a little strained.

The development of the procedure in the form of an interlocutory injunction has facilitated the merging of the new procedure into the existing system in a manner consistent with existing principle. That the injunction was eventually found to act *in personam* enabled the *Mareva* jurisdiction to exist side by side with the pre-existing system of priorities, and without undue disruption. That this would be the eventual result was by no means clear from the early decisions, particularly in the light of Lord Denning's very persuasive view of the procedure as a modern equivalent of the foreign attachment doctrine. In due course the point arose for decision by the Courts and was most satisfactorily resolved in the *Cretanor* case. The successful resolution of the question as to the nature of the order and its effect on priorities demonstrates clearly the judicial refinement of procedure in a manner consistent not only with the pre-existing system of priorities but also with the historical origins of the procedure translated into the modern context.

Similarly the extension of the scope of the injunction to encompass an action brought to encourage the giving of security also reveals a degree of judicial extrapolation consistent with pre-existing law. The equitable basis for the remedy certainly justified Buckley L.J.'s caution that the propriety of such a use of the Courts jurisdiction was open to debate. Meisel though did not support this objection since the Court will frequently give leave to defend in summary judgment proceedings on condition that the defendant brings into Court the sum claimed or a substantial part of it.[75] In his view then the expansion of the objects of a *Mareva* injunction to cover pressuring a defendant into offering security is at least consistent with existing practice.

In the *Jambo Holdings* case Lord Denning sought to show that such an expansion was consistent with the established procedures

[73] *Allen* v. *Jambo Holdings Ltd.* [1980] 2 All E.R. 502, 504.
[74] *Ibid.*, 505; *Hunt* v. *B.P. Exploration (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, 120.
[75] Meisel, "The Mareva Injunction—Recent developments" [1980] L.M.C.L.Q. 38, 44.

applicable to shipping. He then decided that not only was such an interpretation of the scope of the jurisdiction desirable, but it was also consistent with a broader view of the law in that field.

Both the nature and the objects of the order then offer examples of step-by-step judicial law reform of a less startling but no less important kind than that shown in the development of the jurisdiction to make the order.

The degree of flexibility achieved and the speed at which the jurisdiction has developed while still largely consistent with the principles of the law generally must surely provide an admirable example of the merits of judicial law reform within the common law system. The cynic may point to the civil law systems and say that the equivalent jurisdiction there developed much earlier. While that is as may be, the development of the *Mareva* jurisdiction is of far wider significance—providing a modern precedent for practical and useful judicial reform in an apparently well-settled area.

The remarks of Barker J. In the *Hunt* case pertaining to the work of Lord Denning in this area can be applied equally well to the other English and New Zealand judges who have so capably developed this new procedure. As Barker J. said:[76]

> I, for one, do not always agree with the alleged judicial 'law-making' of Lord Denning; on this occasion I think that he has legitimately spelt out the jurisdiction of the Court and has updated old but useful procedures, aimed at enabling the law to deal with the commercial realities of modern business.

It is to be hoped that these developments will act as a catalyst for desirable reforms in other areas of the law too.

[76] *Hunt* v. *B.P. Exploration (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, 118.