PRE-JUDGMENT PROPERTY ORDERS

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Introduction

The financial world is becoming more international by the day. More and more corporations and persons have a multi-national presence or connection, and the ability to move their operation from one jurisdiction to another. Money and assets can be transferred from person to person and jurisdiction to jurisdiction by a telephone call or the touch of a few computer keys, and debtors appear to be showing less and less hesitation in taking all available steps to avoid the rigours of a judgment by reshaping their asset positions. Creditors are often thwarted by unscrupulous debtors dissipating assets before judgment.

This international problem has not yet turned inter-galactic, but if it has a Jedi it must be Lord Denning who, in what he has described with customary modesty as the most important judicial innovation of his time, created or re-created the pre-judgment non-disposition of property order, now known as the *Mareva* injunction. And other procedures exist to assist the hapless plaintiff.

The available remedies

The three most commonly used remedies are the pre-judgment charging order, the preservation order under r 331 and the *Mareva* injunction. There are others, of course, such as the appointment of a receiver by the Court, but this paper will be limited to those three.

There are real conceptual differences between the three, although they are often lumped together in a scatter-gun approach.

The pre-judgment charging order is directed against a particular asset. There is an actual charge over that asset, and the charge may be registered against land. This has the great advantage of being, in respect of land, a procedural bar to disposition. It has the demanding threshold requirement of proof of intention to defeat creditors.

In contrast, the *Mareva* injunction does not create any charge over specific assets, although it may be directed to restraining the disposition of a specific asset. The threshold requirement was uncertain at first and may have come close to proving an intention to defeat the interests of creditors, but that threshold test has now been lowered, and the decisions of the 1980s make it

clear that in addition to the other threshold requirements, there only needs to be proven a risk that the defendant's assets will be dissipated thus frustrating the plaintiff from executing the judgment. In general terms the *Mareva* injunction is not focused on an intention to defraud by disposing of a particular asset as is the pre-judgment charging order. Rather, it is focused on the Courts' wish not to see its jurisdiction and procedure defeated by the dissipation of assets between the issue of proceedings and the execution of a judgment. It is an in personam remedy, rather than an in rem remedy.

While the interim charging order and the *Mareva* injunction have clear conceptual links, focusing as they do on defeating the interests of creditors, the preservation order is a remedy of a different type. It is not linked to the frustration of the right of execution of a judgment, but rather to preventing property that is the subject matter of the proceedings from dissipation before the actual court hearing. One of the traditional and major aspects of r 331(3) is the preservation of evidence prior to the hearing. However, the aspect of the rule which is relevant to this paper is that aspect that preserves the specific property or fund that the parties are arguing about.

It is important to emphasise that none of these remedies can be used for the improper purpose of tying up a defendant's funds against the day of the judgment. More than a general wish to obtain pre-judgment security must be proven. This has been emphasised in respect of all three of these remedies – for interim charging orders see *Jones v Poffenroth* (HC Auckland, CP 188/86, 10 March 1986, Smellie J); for preservation orders see *Rapid Metal Developments (NZ) Ltd v Rusher* [1987] 2 PRNZ 1985; and for *Mareva* injunctions see *Whitmarsh v A'mon Corporation Ltd* (HC Christchurch, CP 282/88, 9 June 1988, Hardie Boys J).

The pre-judgment charging order

The present r 567 is derived from the former r 314. It existed long before the *Mareva* injunction was a gleam in Lord Denning's eye.

The criteria are as follows:

(a) A reasonable cause of action. The test here may come close to the *Mareva* injunction test of a "good arguable case". In *Jones v Poffenroth* relief was refused because the cause of action was perceived to be hopeless.

(b) Proof that the debtor is making away with his property or is absent from or about to quit New Zealand. Some reasonable proof of this must be put to the Court. The quaint phrase "making away with the property" means dissipation – some sort of sale or disposal of the assets.

(c) Proof of an intention to defeat creditors. Surmise and opinion, even a positive opinion, are not enough. What is required is "positive proof": *Pond v Glover* [1933] GLR 358; *Nelson & Robertson Pty Ltd v Niue Products Ltd* (HC Auckland, A 853/83, 31 August 1983, Chilwell J). This is proof on the balance of probabilities, accepting that seldom will there be direct evidence of intention, and that it must be inferred from proven facts. There is no doubt that a suspicious circumstance, even strongly suspicious, are insufficient.

In *National Mutual Finance (1988) Ltd v Shaw* [1989] BCL 882 a husband and wife were transferring a house into the wife's name, the husband lending her half the purchase price and receiving an acknowledgment of debt. The defendant implicitly undertook in his affidavit not to weaken his wife's debt until the current action was completed, and this persuaded Tipping J that the condition of showing an intention to defeat the interests of creditors was not proved.

Pre-judgment charging orders do not create interests in the land. However, registration of the charging order against the land will prevent the disposition of a particular property, and give the plaintiff an opportunity to obtain judgment prior to sale. The charging order is subject to all liens and charges created over the land prior to the charging order. It is only the interest of the judgment debtor at the time of registration that can be charged: Hinde McMoreland & Sim, *Land Law* (2nd ed, 1986) 8.163. Whereas the only sanction for breach of a *Mareva* injunction is contempt proceedings, or possibly the defendant being debarred from defending, the registered pre-judgment charging order actually precludes registration of any other instrument of disposition and therefore prevents actions in breach.

Preservation orders

Rule 331 is derived from the former rr 476 and 478. The old rules related to property the subject matter of the action, or property in respect of which any material question might arise. This limitation was not maintained in the wording of the new rule.

The new rule is stated in the widest possible terms. No criteria are stated. On a broad interpretation every plaintiff can seek immediate security over all the defendant's assets. However, it has not been interpreted in this way.

A leading case is *Rapid Metal Developments (NZ) Ltd v Rusher* [1987] 2 PRNZ 85. This 1987 analysis of the new rule has been specifically followed in most cases on r 331. In the case McGechan J stated that the new rule was not intended to provide a means of attachment of the unrelated worth of the defendants concerned. Despite the broad words, there must be a specific

property or a fund involved in the litigation itself so that claims are not rendered nugatory by the time of the hearing. The property must be tangible and capable of being preserved. In other words, the new rule is not so different from the old.

An ongoing business is not such property: *Moffatt v Chambers* (HC Auckland, CL 19/89, 20 October 1989, Henry J).

Not just any such property will be made the subject of an order. It is necessary generally to show some risk of dissipation or damage: *Lewis v Poultry Processors (Holdings) Ltd* [1987] 2 PRNZ 64,508, 64,513.

Moreover, in so far as a fund is concerned, there must be an identifiable and existing aggregation of money. *Lewis v Poultry Processors (Holdings) Ltd* stands for the proposition that the plaintiff must have a right to the particular fund (at 64,512). Its mere existence is not enough. There is no power to apportion a fund – the order must relate to the whole fund.

The order is discretionary. In *Lewis v Poultry Processors (Holdings) Ltd* Tipping J stated that while it was not always mandatory for an applicant under r 331 to demonstrate a risk of destruction or dissipation of the asset, this will be an important matter to consider in the exercise of the discretion. In *Sharplin v Walding* (HC Wellington, CP 586/89, 17 November 1989) Master Williams QC concluded that there must be some risk to the property, while not stating that this was a mandatory requirement. Furthermore, there must be some challenge or issue that specifically relates to the property: *Marketing Management Holdings v NZI Securities Ltd* (HC Auckland, M 1068/89, 17 August 1984, Henry J).

In an appropriate case a preservation order may be made against a person not a party to the proceedings: *Ireland v AGC (Wholesale) Pty* [1983] 1 VR 222; *Hibbs v Towle* (HC Auckland, A 341/83, 19 May 1988, Gault J). However, the order cannot apply to property not owned by the defendant: *Moffat v Chambers*.

The order can only secure – it cannot provide for payment out: *Allison v Bolton Enterprises Ltd* (HC Christchurch, A 10/84, 15 October 1986, Williamson J).

The *Mareva* injunction

There is probably no single legal development which has led to such a fusillade of legal writing. The reason for this probably derives from the fact that a *Mareva* injunction is entirely judge-made. It is effectively a piece of modern judicial legislation, which has had to be thought out by the judges as they have gone along. Its future for a while was in doubt, but it has proven very popular, and is now in everyday use.

The jurisdiction for the *Mareva* injunction is derived from s 16 of the Judicature Act 1908, which declares that the Court shall have all judicial jurisdiction which may be necessary to administer the laws of New Zealand. Its existence in New Zealand was affirmed (and perhaps created) by Barker J in *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104, in the course of a detailed analysis of its origins which has generally been accepted here.

There is now a detailed rule dealing with *Mareva* injunctions in the United Kingdom. There is no such rule in New Zealand. However, r 236B of the High Court Rules, introduced in 1988, states that it is "declared" that the Court may grant an interlocutory injunction restraining a party from removing assets from New Zealand, or otherwise dealing with assets in New Zealand, whether or not the party is domiciled, resident or present in New Zealand.

The new rule makes certain things clear. *Mareva* injunctions can be obtained by a party to prevent another from removing assets from New Zealand, and also from dealing with assets within New Zealand. The party may be domiciled either in or out of New Zealand.

However, as the rule is carefully expressed as being "declaratory", the body of English and New Zealand decisions on this subject continue to determine the ambit of the injunction. The words of the rule cannot be regarded as words of limitation.

There are many issues that have arisen in relation to *Mareva* injunctions, some of which have given rise to a great deal of academic writing. Various staged tests have been propounded by judges. One that has been referred to on a number of occasions in New Zealand is that propounded by Hillyer J in *Wilsons Cement v Gatz-Fuller* [1985] 2 NZLR 11, 21. This is:

(a) A need for a good arguable case.

(b) The defendant has appropriate assets within the jurisdiction.

(c) A need to show risk of dissipation.

The need for a "good arguable case" is a more stringent test than that which normally applies to interim injunctions. However, it was made clear in *Wilsons Cement v Gatz-Fuller* that the case need not be strong enough to entitle the plaintiff to summary judgment. Thus it is more than a "serious question to be tried" and less than "no arguable defence". At the end of the day a Court is only likely to act if it has some real confidence that the plaintiff's claim will succeed. Perhaps the best analogy is back to the traditional interim injunction concept of "strong prima facie case".

This test in the rule does not contain two limitations that were previously thought to exist. The first was that there had to be a need to show a risk of removal of the assets out of the jurisdiction. It is clear now from the New Zealand case-law and r 236B that this is no longer a requirement.

It is also clear that there is no need to show an intention to defraud creditors. All that is required is a risk of dissipation. The Court will consider such risks as a prudent or sensible commercial person would: *Third Chandris Shipping Corporation v Unimarine SA* [1979] 2 All ER 872, 972, 985 per Lawton LJ.

A detailed analysis of all the controversial issues is not attempted in this paper, but the following points of significance can be noted:

(a) There is debate as to whether there is any need for an undertaking as to damages. Quilliam J in *Frances v Supreme Services Ltd* (HC New Plymouth, CP 26/87, 25 May 1987) concluded that as the *Mareva* injunction relied on the inherent jurisdiction of the Court, an undertaking as to damages was unnecessary. In *McGechan on Procedure* para 236B.04(5), however, the view is expressed that based on English practice an undertaking as to damages should be filed. It is to be noted that no such undertaking is required in relation to r 331 orders or pre-judgment charging orders. This is, therefore, a disadvantage of the *Mareva* procedure.

(b) In an important decision, *Ashtiani v Kashi* [1986] 2 All ER 920, it was held that discovery can be ordered in a *Mareva* context, ie discovery of all relevant information relating to assets. It has been held in New Zealand, following this decision, that discovery is available as to assets within the jurisdiction, but not as to assets outside of the jurisdiction: see *Countrywide Finance Ltd v Kirk* (HC Auckland, CP 351/91, 8 April 1991, Wylie J).

(c) There must be an accrued cause of action before a *Mareva* injunction will be granted. In *Euronational Corporation Ltd v NZI Bank Ltd* (HC Auckland, CL 76/90, 28 March 1991, Barker J), the debt accrued at a date later than the hearing date of the *Mareva* injunction, and an order was declined on that basis.

(d) As to risk, non-disclosure of asset position by a defendant may lead to the Court drawing an inference of assets within the jurisdiction, and an inference of risk of dissipation: *BNZ v Hawkins* [1989] 1 PRNZ 451, 453, 455.

(e) The jurisdiction is in personam not in rem. On this basis it can be applied to specific assets out of the jurisdiction: *Derby & Co Ltd v Weldon* [1989] 1 All ER 1002; *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433. This particular concept of "world-wide" injunctions has attracted wide interest. The concept is used in Australia in respect of assets located outside the Courts' territorial jurisdiction (*Ballabil Holding Pty Ltd v Hospital Products Ltd* [1985] 1 NSWLR 155). It seems that these injunctions are likely to be granted in special circumstances only, where there are insufficient local assets, substantial foreign assets, and a high degree of risk that the defendant will dispose of them (Capper, 'Worldwide *Mareva* Injunctions' (1991) 54 MLR 330, 344). The jurisdiction cannot affect the rights of third parties, or seek to control their activities.

(f) An order will not be made where it is not established that the defendant owns the assets: *Westpac Banking Corporation v Gill* [1987] 2 PRNZ 52; *Rocket Cargo (NZ) Ltd v Chipperfield Enterprises Ltd* (HC Auckland, CP 666/88, 13 April 1988, Henry J).

(g) The rights of third parties will be taken into account in deciding whether to make an order: *Gilfoyle Shipping Services Ltd v Binosi* [1984] 2 NZLR 742. Moreover, a plaintiff who resorts to the *Mareva* jurisdiction must expect to pay and should in justice pay all reasonable expenses and reasonable costs to which innocent third parties may be put by the *Mareva* action: *Project Development Co Ltd SA v KMK Securities Ltd* [1983] 1 All ER 465; *Galaxia Maritime SA v Mineralimportexport* [1982] 1 All ER 796.

(h) Where there is clear evidence that a defendant is likely, unless restrained by order, to dispose or otherwise deal with assets to deprive the plaintiff of the fruits of any judgment, the assets may be required to be delivered up: *CBS United Kingdom Ltd v Lamberg* [1982] 3 All ER 237.

(i) The Court will not intervene simply to give pre-judgment security, even if there is evidence that a defendant is about to pay a genuine pre-existing debt, thus leaving insufficient assets to satisfy the plaintiff's claim: *Whitmarsh v A'mon Corporation Ltd* (HC Christchurch, CP 282/88, 9 June 1988, Hardie Boys J).

(j) The fact that the defendant is in a jurisdiction where the Reciprocal Enforcement of Judgments Act 1934 applies is a relevant factor. It will be taken into account against exercising the discretion to order a *Mareva* injunction: *Rocket Cargo (NZ) Ltd v Chipperfield Enterprises Ltd*.

(k) In general terms there is a discretion as to whether an order will be made. The Court will consider whether the order is just and convenient: *Property Marine Australia Pty Ltd v Condor Yachts (Bermuda) Ltd* [1987] 1 PRNZ 251. There the assets included seven tigers and nine lions which would suffer if they could not be immediately removed from the jurisdiction by their owners, an order was refused: *Rocket Cargo (NZ) Ltd v Chipperfield Enterprises Ltd*. As mentioned above, there can be no doubt that the level of disclosure by a defendant may be influential if the issues are balanced.

(l) It is clear that the law is still subject to development on a case by case basis: *Euronational Corporation Ltd v NZI Bank; Riley McKay Pty Limited v McKay* [1982] NSWR 264, 276. So there is still some real opportunity here for creative counsel.

Procedure

The usual procedure for a pre-judgment charging order is by way of ex parte application or risk of dissipation of property. This is because by its very definition an intention to defeat creditors exists. A plaintiff is unlikely to wish to give the defendant notice of an application for fear that the property will be put beyond its reach. If possible, however, notice should be given to the defendant, to avoid the pitfalls of non-disclosure.

If it is a true pre-judgment charging order situation, with a creditor acting in a way that shows an intention to defeat the interests of the plaintiff, it will generally be appropriate to seek a *Mareva* injunction as well. This is because the three criteria for a *Mareva* injunction are likely to exist if the pre-judgment charging order is available, namely a good cause of action, assets within the jurisdiction and a risk of dissipation.

As indicated earlier, the preservation order stands aside from the other two applications. This is because there is not necessarily any misconduct on the part of the defendant or immediate and urgent risk to the plaintiff. It may be necessary to seek a preservation order against a perfectly scrupulous defendant, to preserve a particular asset or fund. Thus with notice applications will tend to be more appropriate in the r 331 situation, although it will still often be the case that an ex parte application is necessary.

Clearly on occasions it will be necessary to seek all three orders, because there is an intention being shown to defeat the interests of creditors, and a relevant asset is the subject matter of the litigation. A typical situation is an application under s 60 of the Property Law Act 1952 to set aside a fraudulent preference, where there is danger of further dissipation.

The plaintiff should submit detailed affidavit evidence in respect of all three of the applications. As has been suggested, the pre-judgment charging order contains the most formidable threshold. Documentary evidence supporting the claim should be attached if possible. Everything possible should be done to show the strength of the claim and any misconduct on the part of the defendant. All credible evidence, including (if a proper basis can be shown) hearsay, should be put forward, providing the full background to the claim. The affidavit in support, preferably under headings, should "prove" the substantive claim. If time allows, it is desirable to follow a format similar to an affidavit in support of a summary judgment action, stating on oath, all the facts relied on in the claim. The facts relied on in respect of assets and risk should be dealt with fully, and preferably under headings.

Counsel's memorandum should summarise the cause of action, the existence of assets, and the evidence of risk. It should specifically address the urgency issue, and the reasons for the ex parte nature of the application. It should be a neat summary, able to guide the judge quickly through all important issues.

As has been mentioned above, where a *Mareva* injunction is sought it is desirable to file an undertaking as to damages.

A defendant should appreciate that, except in the case of a very weak claim, it is necessary for a defendant, if it wishes to discharge an ex parte order or defeat an application on notice, to establish bona fides. It is dangerous to adopt a "you prove it" stance. This is likely to backfire, as happened in *BNZ v Hawkins*. A defendant should, where possible, give details of assets and intentions, preferably with some corroborative evidence to establish bona fides. If this is done it may be sufficient to defeat any of the three applications. At the end of the day the Court intervenes because some action by the defendant which will defeat the interests of the plaintiff is believed to be a possibility. If the Court is satisfied that it is not unlikely, it will not

intervene. Unfair as it may be on occasions, there is a sort of reverse onus upon a defendant in these situations which it would be unwise to ignore.

Future directions

There are two competing interests in the area of pre-judgment property orders. On the one hand there is the obvious need to protect property that is the subject of litigation, and the assets of the debtor, so as not to make a farce of the Court process by allowing defendants to avoid the execution of a judgment or defeat the Court process. On the other hand there is the necessity to protect defendants from plaintiffs who will seek pre-judgment security simply as a comfort, and also as a source of embarrassment to the defendant, forcing a settlement.

It would be generally accepted that prior to the *Mareva* injunction there was a deficiency in this area of the law from the plaintiff's point of view. It is likely that the protection that exists now for a plaintiff has developed as far as it should. There will continue to be a battle-ground in the Courts as the legitimate interests of plaintiffs meet the legitimate interests of defendants. But now that the *Mareva* injunction applies in and out of the jurisdiction to all cases of serious risk of dissipation, the substantive reform has gone as far as it should go.

Of course there is room for further refinement, and this is likely to be seen particularly in the area of third party interests and discovery and interrogatories. The interesting question arises as to whether it is fair to require a defendant to disclose his or her asset position in full. Will it extend to the disclosure of recent dispositions? It would be quite unfair for defendants as a matter of course to have to make such disclosure. But it is appropriate in a case where a plaintiff has shown an intention to defeat creditors on the part of the defendant.

There does not seem to be any reason in logic why an undertaking as to damages is not required in respect of all of the orders. They can do a great deal of damage if obtained improperly. The undertaking requirement should be extended to all pre-judgment property orders.

Although there is great overlap between the three remedies, each has its own particular place and it is not suggested that they should be amalgamated. The higher burden relating to the pre-judgment charging order is appropriate, given the more draconian nature of the order. The preservation order, limited as it has been by the Courts has its special place. The present range of remedies appears to be adequate, and any major tampering from above with the situation that has evolved through the Courts in response to "market demand" is unlikely to improve things.