

**USING NUCLEAR WEAPONS OF THE LAW-
ANTON PILLER ORDERS & MAREVA INJUNCTIONS**

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A seminar presented by Counsel of Gordon & Jackson's List

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EXECUTION OF ANTON PILLER ORDERS

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This paper deals with some problems which may arise in the execution of Anton Piller orders by reference to decided cases. It is intended to provide a background to some of the numerous pitfalls associated with this special order and the important consequences of failing to observe them. To the extent that the Anton Piller order has been described as one of the 'nuclear weapons' of the law¹, this paper could well have been entitled 'How to avoid fall out when using tactical nuclear weapons'.

1. BACKGROUND

An order of the type now known as an 'Anton Piller' order appears to have been first given in 1974.² However, the order gained prominence in 1976, when the case from which it now draws its colloquial name was decided by the English Court of Appeal.³

Briefly, the requirements for the granting of an Anton Piller order are simply stated by Ormrod L.J., in the *Anton Piller* case⁴, as follows:

1. An extremely strong prima facie case must exist;
2. The damage, potential or actual must be very serious for the plaintiff;
3. There must be clear evidence that the defendant has in its possession incriminating documents or things and that there is a real possibility that

¹ *Bank Mellat v. Nikpour* [1985] FSR 87 at 92

² *A and M Records Inc. v. Aram Darakdjian* unreported 21 May 1974, Foster J. but referred to in *EMI Ltd. v. Pandit* [1975] 1 All E.R. 418 at 423

³ *Anton Piller K.G. v. Manufacturing Processes Limited* [1976] Ch 55

⁴ At page 62

it may destroy such material before any application inter partes can be made.

The order will only be made on the basis of specific undertakings to the Court which usually include:

1. An undertaking as to damages;
2. The articles or documents obtained as a result be retained by the plaintiff's solicitors in safe custody;
3. Not to use any documents or information obtained as a result of the execution of the order except for the purposes of civil proceedings in connection with the subject matter of the dispute, without leave;
4. The order will be served by a solicitor who shall offer to the person served to explain the order in simple language;
5. The person served will be given the opportunity to obtain legal advice.

The strict conditions imposed upon the execution of an Anton Piller order and the often stringent criticism by courts of inadequacies in execution are due to the draconian nature of the order and the extreme disquiet often felt by a court in granting such an order (more so than other ex parte or injunctive remedies).

These concerns were fully enunciated by Scott J. in *Columbia Pictures Industries Inc. v. Robinson*⁵ where his Honour observed that the mandatory order is made in the absence of the respondent and in secret. It is served on and executed against the respondent without his having any chance to challenge the correctness of its grant or to challenge the evidence on which it was granted. His Honour also pointed out that the order may also involve a wholesale removal of all business material, whether stock-in-trade, bank statements, cheque books or correspondence. The continuance of the business by the respondent to the order is thereby made impossible. It has to be accepted, said Scott J., that a common,

perhaps the usual effect of the service and execution of an Anton Piller order is to close down the business which, on the applicants' evidence, is being carried on in violation of their rights.

Scott J. was also mindful of the personal hardship which resulted from the execution of an Anton Piller order⁶:

"The service and execution of an Anton Piller order is likely to have on a respondent a personal as well as a commercial effect. Anton Piller orders are often granted not simply in respect of business premises but in respect of the respondent's home. He is required, on pain of committal, to open the doors of his house to the plaintiff's representatives and to permit a search of the contents thereof. The plaintiffs and their representatives are at liberty to search and rummage through the personal belongings of any occupant of the house and to remove the material they consider to be covered by the terms of the order. The traumatic effect and the sense of outrage likely to be produced by an invasion of home territory in the execution of an Anton Piller order is obvious."

His Honour went on to express the view that notwithstanding the extreme nature of the order, which he referred to as 'draconian and essentially unfair', on balance and subject to strict control, it was a necessary remedy to which a plaintiff was entitled. However, not before he commented upon the extreme nature of the remedy⁷:

"It is a fundamental principle of civil jurisprudence in this country that citizens are not to be deprived of their property by judicial or quasi-judicial order without a fair hearing. Audi alterem partem is one of the principles of natural justice and contemplates a hearing at which the defendant can, if so advised, be represented and heard."

Refusal to obey an Anton Piller order has the same consequences as that of refusing to obey any other court order namely, proceedings for contempt. Lord Denning M.R., in the *Anton Piller* case described these consequences of the order in the following terms⁸:

"It serves to tell the defendants that, on the evidence put before it, the court is of opinion that they ought to permit inspection – nay, it orders them to permit – and that they refuse at their peril. It puts them in peril not only of proceedings for

⁵ [1986] 3 All E.R. 338 at 368

⁶ At 368

⁷ At 369

⁸ At 61

contempt, but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply."

In the same case, Ormrod L.J.⁹ similarly warned of the consequences of failing to obey the order:

"It is therefore open to [the defendant] to refuse to comply with such an order, but at his peril either of further proceedings for contempt of court – in which case, of course, the court will have the widest discretion as to how to deal with it, and if it turns out that the order was made improperly in the first place, the contempt will be dealt with accordingly – but more important, of course, the refusal to comply may be the most damning evidence against the defendant at the subsequent trial."

In addition, the defendant will also face the risk of adverse inferences being made against him in the substantive proceedings should he refuse entry to proper persons pursuant to an Anton Piller order.¹⁰

Whilst it is clear that disobeying an order amounts to a contempt of court it is also important to note that even if an application to set aside the order subsequently succeeds then the defendant will, having refused to comply with the order, nonetheless be in contempt of court. In *Wardel Fabrics Limited v. G. Myristis Limited*¹¹ a defendant refused access to a plaintiff pursuant to an Anton Piller order and thereafter successfully made an application to discharge the order. However, an application brought by the plaintiff for contempt on the basis of the refusal to grant entry was also successful. Goulding J. was of the view that a contempt of the Anton Piller order had been made even though the order had been subsequently discharged.¹²

It is a consequence of both the severe hardship placed upon the defendant by the order and also the liability for contempt for refusal that it is important to carry out all aspects of execution properly.

There are many aspects of the onus of proper execution and I shall discuss some of them, as have been considered by various courts.

⁹ At 62

¹⁰ See *WEA Records Ltd v. Visions Channel 4 Ltd* [1983] 2 All E.R. 589 at 592

¹¹ [1984] FSR 263

2. GENERAL BEHAVIOUR OF SOLICITORS EXECUTING ANTON PILLER ORDERS

As a preliminary matter, those persons involved in the execution of the order should at all times maintain scrupulous behaviour including that of professionalism and good manners. This was commented upon by Dillon L.J. in *Booker McConnell plc v. Plascow*¹³:

"Service of an Anton Piller order, involving as it does the arrival of a number of strangers to search the defendant's premises, is a delicate matter requiring tactful handling by the solicitor concerned, whether the defendant is innocent or guilty of what is alleged against him."

The care with which an Anton Piller order must be executed by the solicitor and the responsibility for any faults in execution are not more clearly stated than by Ormrod L.J. in the *Anton Piller* case where he said¹⁴:

"Great responsibility clearly rests on the solicitors for the applicant to ensure that the carrying out of such an order is meticulously carefully done with the fullest respect for the defendant's rights, as Lord Denning M.R. has said, of applying to the Court, should he feel it necessary to do so, before permitting the inspection."

Those comments were echoed by Shaw L.J. in the same case when his Honour said¹⁵:

"When such an order is made, the party who has procured the court to make it must act with prudence and caution in pursuance of it."

3. SPECIFIC OBLIGATIONS

In addition to those general comments there are a great many authorities dealing with specific obligations or duties of solicitors executing Anton Piller orders:

(a) Entry cannot be forced

¹² See also *Bhimji v. Chatwani* [1991] 1 All E.R. 705

¹³ [1985] RPC 425 at 442

¹⁴ At 62

¹⁵ At 62

The order operates in personam against the defendant. It is not a search warrant of the defendant's premises and does not give the plaintiff authority to effect forceable entry. Rather, the order is a mandatory injunction against the defendant to allow the plaintiff to enter. Refusal to allow entry is a breach of the order and a contempt of court. The Anton Piller order is often referred to as a civil search warrant, which, perhaps true in fact, is clearly not so as a matter of law. The distinction is unequivocally made by Denning M.R. in the *Anton Piller* case when he said¹⁶:

"Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind.

No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get Out"...

But the order sought in this case is not a search warrant. It does not authorise the plaintiff's solicitors or anyone else to enter the defendant's premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, not getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendant's permission. But it does this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission with, I suppose, the result that if they do not give permission, they are guilty of contempt of court."

His Lordship went on to reiterate that the refusal to allow entry was a matter for the court to deal with subsequently¹⁷:

"If the defendants refuse permission to enter or to inspect, the plaintiffs must not force their way in. They must accept the refusal, and bring it to the notice of the court afterwards, if need be on an application to commit."

Some early forms of the order also contain an undertaking by the solicitor that in the execution or professed execution of the liberty granted by the

¹⁶ At 60

¹⁷ At 61

Anton Piller order there would be no forceable entry into the premises¹⁸.

(b) Informing the Defendant of the evidence upon which the Anton Piller is based

Some authorities indicate that the evidence upon which the Anton Piller order was granted ought be put to the defendant at the time of executing the order. Dillon L.J. in *Booker McConnell* commented as follows¹⁹:

"In the present case, although the ex parte order did not so require, the order was served by a solicitor at each place visited; but the evidence on which it was obtained was not produced nor did the ex parte order contain any requirement that it should be produced. It is unjust to the defendant if the evidence on which the order has been obtained is not produced to him when the order is served, because if he is not told what the case against him is he is gravely hampered in endeavouring to have the order set aside or varied by the court ... Justice requires that he must be shown the case against him at the earliest moment. To avoid lax practice developing, these safeguards ought to be embodied in undertakings to the Court in the ex parte order."

Similar comments were made by Hooson L.J. in *AB. v. CDE*²⁰ when his Honour, in discharging an Anton Piller order, indicated that not only should the respondent be informed of his rights but also the evidence upon which the ex parte order was made. The latter requirement, said his Honour, was so that the respondent could consider whether he should consent or immediately apply to the court for a discharge, variation or limitation of the order.²¹

(c) Service of the order

Clearly, the order must be served upon the defendant before it can be enforced. It is desirable and indeed usually a requirement of the court

¹⁸ For an example of such an order see *Pall Europe Limited v. Microfiltrex Limited* [1976] RPC 326

¹⁹ At 442

²⁰ [1982] RPC 509 at 510

²¹ See also Federal Court Practice Note No.10

that the person in charge of executing the order and who effects service should be a qualified solicitor who is, as such, an officer of the court.²²

(d) Service of judgment

If a judgment is delivered when the Anton Piller order is made a copy of it should be served on the defendant with the order.²³

(e) The identity and number of persons executing the Anton Piller order

In almost all cases the Anton Piller order will specify the number of persons who may be in attendance at the defendant's premises pursuant to the order and often indeed specify the identity of those persons.

In *Vapormatic*, Graham J.²⁴, commented that the persons attending on the execution of the order should, if possible be named in the order and that the order should provide for them to be identified to the defendants by the solicitor effecting service. By such means, said his Honour, the court is doing the best it can to ensure that service is proper and effective, that objections as to the identity of those concerned cannot properly be taken by the defendant and that the proceedings following service are also conducted in an effective but at the same time orderly and correct manner.²⁵

Considerable care should also be taken that no more than the specified number of persons are taken upon the premises pursuant to the Anton Piller order. Where an excessive number of persons than those stipulated in the order are present upon the defendant's premises there may be, in addition to damages pursuant to undertakings, an action for trespass.²⁶

²² *Vapormatic Co. Ltd v. Sparex Limited* [1976] 1 WLR 939, *Universal City Studio's Inc. v. Mukhtar* [1976] 2 All E.R. 330 at 333, Federal Court Practice Note No. 10

²³ *Snugcoat Limited v. Chaudhry* [1980] FSR 286 at 288, Federal Court Practice Note No. 10

²⁴ At 940

²⁵ See also Templeman J. in *EMI Ltd v. Pandit* at 424

²⁶ *Digital Equipment Corp. v. Dark Crest Limited* [1984] 3 All E.R. 381) or even to exemplary damages (*Colombia Picture Industries* at 379

The defendant is, of course, entitled to verify the identity of persons seeking access pursuant to an Anton Piller order.²⁷

(f) **Assistance of police in execution in the Anton Piller order**

Little is said in the reported authorities as to the prudence or otherwise of solicitors executing Anton Piller orders with the assistance of or in the presence of local police. In the *AB* case Hooson L.J. made a passing reference to the practice as follows²⁸:

"Immediately on issuing the Order the solicitors for the plaintiffs, stopping only to pick up a passing policeman, of which I make no criticism, attended at the offices of the third defendants..."

In *Columbia Picture Industries* Scott J. also commented upon the practice without criticism in the following terms²⁹:

"In addition [the plaintiff's solicitors] had arranged for a number of police officers to be in attendance. This is, I am told, normal practice where execution of an Anton Piller order is to be effected. It is to prevent any breach of the peace."

However, should the executing solicitor decide to be accompanied by police, care must be taken first that he has not thereby attended the defendant's premises with more persons than those stipulated in the order or that the conduct is not subsequently criticised as being oppressive. The purpose of the attendance should also carefully be explained to the police to prevent any misunderstanding, on their part, of their role - namely to prevent any breach of the peace.

Police may, of course, obtain search warrants properly so called upon completely different grounds than those specified for the granting of an Anton Piller order. Often, however, the subject matter of an Anton Piller order may also properly be the subject of a civil search warrant obtained by police. Care must be taken that execution of the Anton Piller order and

²⁷ *Universal City Studios Inc. v. Mukhtar & Sons Ltd.* at 333

²⁸ At 510

the police search warrant not be made simultaneously. In an unreported English decision five solicitors attended the defendant's premises to execute an Anton Piller order together with eleven police officers also at the premises pursuant to a civil search warrant. Subsequently, the Court of Appeal criticised the plaintiffs for not fully disclosing the role of the police and also on the basis that the order had been executed in an oppressive manner, in particular, because the Anton Piller order and search warrant had been executed simultaneously by some seventeen persons. Warner J. said it was most undesirable that solicitors executing an Anton Piller order should be seen to 'the hangers on' of a squad of police carrying out a warrant. However his Honour did not consider it constituted a misuse of the procedure with which the Court should interfere.³⁰

(g) Right to consult a solicitor

The execution of an Anton Piller order will usually take the defendant by surprise. Due to the consequences of failing to immediately obey the order, often it will contain a provision enabling the defendant to consult a solicitor before complying with the terms. Indeed, the order may place a positive obligation upon the solicitor executing the order to specifically inform the defendant of that right.

In *Anton Piller*, Denning M.R. said³¹:

"They should give the defendant an opportunity of considering it and of consulting their own solicitor. If the defendants wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so."

Moreover, the order may contain an undertaking by the executing solicitor to explain fairly and in every-day language the scope and extent of the order.³²

²⁹ At 353

³⁰ *ITC Film Distributors Ltd v. Video Exchange Ltd* (No. 2) 1982 126 Sol. J 672

³¹ At 61

³² See *Wardel Fabrics* at 268

In *Bhimji's* case, the order contained an undertaking by the solicitor to offer to explain to persons served with the order "... its meaning and effect fairly in everyday language and advise the person ... of his right to obtain legal advice...". Scott J. was critical of the conduct of the executing solicitors who explained the order in terms of an entitlement to search rather than an obligation upon the defendant to permit a search.³³

(h) **Removal of goods or documents**

(i) Making a Record.

A detailed record of material taken away pursuant to the Anton Piller order should be made by the solicitors who execute the order before the material is removed from the respondent's premises. So far as possible, said Scott J. in *Columbia Picture Industries v. Robinson*³⁴, disputes as to what material was taken, the resolution of which depends upon the oral testimony and credibility of solicitors on the one hand and the respondent on the other hand ought to be avoided. In the absence of any corroboration of a respondent's allegation that particular material was taken, a solicitor's sworn and apparently credible denial is likely always to be preferred.

This state of affairs is unfair to the respondents, said Scott J., and ought to be avoided so far as it can be.

One might add that it is a prudent practice, to ensure that the list of materials removed is read and signed by the defendant prior to leaving the premises.

(ii) Taking additional material not covered by the order

³³ See also Federal Court Practice Note No.10

³⁴ At 371

Extreme care must be taken to only remove those goods which are specifically referred to in the Anton Piller order. Removal of additional material is potentially a contempt of court as well as a trespass and may result in an application for damages.³⁵

It is, of course, possible to obtain the consent of the defendant to remove other materials. However, in the *Columbia Picture Industries* case Scott J.³⁶ disapproved strongly of that practice. His Honour there said that he found it 'highly unacceptable' that a practice should have grown up whereby the respondent to the order is procured by the executing solicitors to give consent to additional material being removed. His Honour went on to say³⁷:

"In view of the circumstances in which Anton Piller orders are customarily executed (the execution is often aptly called a 'raid') I would not, for my part, be prepared to accept that an apparent consent by a respondent had been freely and effectively given unless the respondent's solicitors has been present to confirm and ensure that the consent was a free and informed one."

The use of material found during the course of executing an Anton Piller order and not the subject of that order, was considered in *L.T. Piver S.A.R.L. v. S. & J. Perfume Co. Limited*.³⁸ During the course of executing an Anton Piller order on behalf of one client also removed was an article not subject to the order. The article was an empty perfume box which the person considered to be a counterfeit of goods manufactured by another person. That perfume box was subsequently used to obtain a second Anton Piller order against the same defendant but on behalf of a new plaintiff. Walton J. considered that it was irrelevant how evidence is obtained if it is not of a confidential nature. His Honour was of the view that if the circumstances of obtaining the evidence was disclosed to the court he had a discretion whether to grant the order. It is also to be noted that there was no application for

³⁵ See *Columbia Picture Industries*

³⁶ At 371

³⁷ At 371

³⁸ [1987] FSR 159

contempt made by the defendant rather the defendant sought injunctions restraining the plaintiff from using the box removed.³⁹

More recently in *JC Techforce Pty Ltd v. Pearce*⁴⁰ Branson J.⁴¹ has criticised the conduct of solicitors in seeking, with the consent of the respondent, to remove material not covered by the order. In that case her Honour adopted what was said by Scott J in *Columbia Picture Industries*. Branson J went on to say:

*"Having regard to the exceptional nature of an Anton Piller order, the case will be rare, in my view, in which any consent to a course of conduct potentially adverse to it, given by a respondent which has not first obtained legal advice of its own, will be regarded by a court as having been freely given."*⁴²

Branson J considered that appropriate courses of action available to those executing an Anton Piller order in such circumstances included the following:

- (a) the making of an immediate application to the court for an order allowing the removal from the premises of those items;
- (b) contacting the defendant's solicitor for the purpose of either:
 - (i) negotiating through the solicitor the consent of the defendants to removal from the premises of such items;
or
 - (ii) inviting the solicitor to seek instructions to take such items into his [the solicitor's] custody or to place them in neutral custody, until any disputes as to respective rights of the parties concerning such items could be resolved; or

³⁹ See also *Crest Homes PLC v. Marks* [1987] AC 289

⁴⁰ (1996) 138 ALR 522

⁴¹ At 203

- (c) the preparation of a list of such items to allow appropriate steps for the recovery of such items to be initiated at a later time.⁴³

(iii) Ownership of seized material and use to which it may be put

It must always be remembered that the purpose of an Anton Piller order is to prevent the destruction of evidence which would give the plaintiff a cause of action at trial and on that basis there are two consequences of such an order. First, that the order relates only to physical custody of the goods and not ownership. The goods even after seizure remain the property of the defendant and cannot be dealt with by the plaintiff or its solicitors.⁴⁴

Secondly, the express/implied undertakings given to keep the goods safely precludes the giving of access to anyone other than the court or the defendants' legal representative. Importantly, the court will take the view that the goods may not be used for any other collateral or ulterior purpose whether that purpose is that of the plaintiff, its solicitors or any other party. In the *Customs and Excise* case the Commissioner for Customs and Excise sought access to documents which were held by the plaintiffs' solicitors pursuant to an Anton Piller order. The Commissioner argued that he had a statutory right to see the documents in question and therefore need not, notwithstanding the Anton Piller order, apply to the court for access. The court was of the view that the access could only be given by the court or by the consent of the defendant, being the owner of the goods. This is said to follow on the basis that the Anton Piller order is in the nature of discovery and therefore carries with it an obligation not to use the documents

⁴² At 526-527

⁴³ At 526-257. These comments were referred to and agreed with Heerey J in *Flowcast v Purcell* (No. 3) 176 ALR 354 at 365

⁴⁴ *Customs and Excise Commission v. A.E. Hamlin & Co.* [1983] All E.R. 654, per Falcolner J. at 660

for other purposes.⁴⁵

(iv) Retention of seized goods by a plaintiff's solicitors

In *Columbia Picture Industries*, Scott J. was of the view that, as the Anton Piller order was to preserve evidence which otherwise may be destroyed or concealed, orders should not allow the plaintiffs' solicitor to retain the goods. Once obtained they should be copied and returned to their owner. In particular his Honour considered it inappropriate that the goods be retained by the plaintiffs' solicitor pending trial. Scott J. said that whilst officers of the court the solicitors were nonetheless the solicitors for the plaintiff. His Honour considered the material should either be lodged with the court or be delivered to the defendants' solicitors of record upon an undertaking as to safe custody.⁴⁶

(v) Identification of documents removed

If documents or goods are removed from the premises they must be identified precisely. In *Columbia Pictures Industries*, Scott J. was extremely critical, when subsequently dealing with an allegation that excessive documents were removed, with a lack of detail on the list of documents prepared by the solicitors.⁴⁷

(vi) Safekeeping of goods or documents

The material seized pursuant to the order is important evidence and must be kept safely. In *Columbia Picture Industries* the executing solicitors lost a good deal of material, the extent of which was unascertainable due to incomplete cataloguing of material removed. Scott J. found that to be a serious breach of the solicitors undertakings.⁴⁸

⁴⁵ See also *Harman v. Secretary of State for the Home Department* [1983] AC 280

⁴⁶ At 371-372

⁴⁷ At 354 h, and 356 b-c

⁴⁸ At 360 and 376

(i) **Taking notes of attendance of the execution**

Execution of the Anton Piller order is a part of the overall litigation and it must be remembered that subsequent evidence of the attendance will often be vital. In *Columbia Picture Industries* Scott J. had, in evidence, the attendance notes made by solicitors as well as the affidavit subsequently sworn by them of the attendance. One particular point, the sighting of a master copy video tape in a video tape duplicating machine, was sworn to by a solicitor. No mention of that sighting was made in his attendance note nor in those of other solicitors present. His Honour did not accept the solicitors evidence and said:

"His explanation given in cross examination was that the circumstance was not relevant to be included in his affidavit. The explanation is nonsense. I am unable to accept the testimony of Mr Cumberland regarding the 'Star Wars' tape in the jaws of the machine. I do not believe he found any such thing. This is, perhaps, only a small point in the scale of the evidence in this case, but it has importance in persuading me of the care with which I must examine the oral testimony of those who took part in the raid where that testimony is damaging to the defendants and is unsupported by any of the many contemporaneous records."⁴⁹ (emphasis added)

4. WHAT NOT TO DO

If the above has not filled you with sufficient trepidation a graphic example of the problems which may befall solicitors executing an Anton Piller order is to be found in the *Columbia Picture Industries* case. The facts of the case are worthy of reciting in some detail:

1. The plaintiff, of which there were 35, were engaged in the business of making or distributing motion picture films. They alleged that the defendant was a video 'pirate' and had infringed copyright in respect of 104 motion picture films as well as passing off and trade mark infringement.

⁴⁹ At 355

2. The plaintiff's solicitors obtained an Anton Piller order in respect of three premises comprising respectively production facilities, a retail outlet and the defendant's residence.
3. The Anton Piller order was executed and a total of 300 tapes removed from the two commercial premises.
4. The defendant applied for the Anton Piller order to be discharged and also that damages be paid pursuant to the undertakings given by the plaintiff. The grounds given by the defendants in applying to discharge the Anton Piller order were misleading evidence or non-disclosure of material facts but also that the order had been oppressively and excessively executed.

Scott J., in a lengthy judgment, commented upon the various issues as follows:

1. The Anton Piller order entitled the person serving the order to be accompanied by not more than 4 duly authorised persons. The order therefore entitled a total five persons to be present as representatives of the plaintiffs at each of the premises named and not, as had been argued by the defendant, that the same 5 persons sequentially attend each of the named premises.
2. At all three of the premises the solicitors took material not covered by the order including personal diaries of the defendant, cheque books, bank statements and allegedly papers relating to divorce proceedings. His Honour commented that none of the material could have had any relevance to the proceedings and indeed was not covered by the order even on its widest construction.
3. Requests by the defendant's solicitors subsequently for the return of documents not covered by the Anton Piller order were refused by the plaintiff's solicitors. This was disapproved of by his Honour.

4. Blank video tapes were removed from the retail outlet and subsequently justified on the basis that they could have been used to produce 'pirate copies'. His Honour found that explanation entirely unconvincing as the blank tapes were the normal stock in trade of a video retail outlet.
5. His Honour commented that, in respect of much of the material, no attempt ever was made by the solicitors so far as he could tell from the evidence to confine their seizures to material strictly covered by the order. Rather, said Scott J., they took everything to which there was a question that they wished to investigate.
6. The solicitors prepared lists of documents or material removed by them from the premises which were signed by the defendant or his representative. His Honour did not consider the lists of documents removed to be sufficiently comprehensive, for example, a 'bundle of documents or receipts' was not considered by his Honour to be sufficient. This was later to have important consequences when documents were lost by the plaintiffs' solicitors after seizure, the precise number or nature of which could not be ascertained due to the inadequate nature of the lists prepared by the solicitor. His Honour noted that the order did not place on the solicitors an obligation to prepare a detailed or any receipts and their failure in this respect demonstrated neither oppressive execution of the order nor flagrant disregard of the defendant's rights. However, his Honour was nonetheless critical of that failure and commented that he hoped it would not be repeated in subsequent cases.
7. The losing of some material seized pursuant to the order was, in his Honour's view, a breach of the plaintiffs' solicitors' undertakings for safe custody of the seized material.
8. The list of documents prepared by the solicitors was signed by the defendant together with a statement indicating consent. The list included documents clearly not subject to the order. His Honour was stringently critical of the practice of obtaining consent to removal of extra material and considered it ought not be allowed.

9. The plaintiffs' solicitors failed to expeditiously return the material which had been taken. In Scott J.'s view that was oppressive and in flagrant disregard of the defendant's rights. He considered that Anton Piller orders ought make provision for return of relevant material either to a neutral officer of the court or the defendant's own solicitors at the earliest possible moment.

As a result, Scott J. found the complaint of oppressive execution of the order and flagrant disregard of the defendant's rights made out in respect of the seizure of the material not covered by the order, the reliance on the so-called consents embodied in the receipts and the retention by the plaintiffs' solicitors' of material not covered by the order. His Honour also dealt with allegations that it had been the intention of the plaintiff to summarily close down the business of the defendant and that there had been material non-disclosure by the plaintiffs' solicitors in obtaining the Anton Piller order at first instance (those comments are extremely detailed and although not relevant to the theme of this paper do reward careful reading). Scott J. assessed damages at 10,000 pounds and whilst noting there was no claim for exemplary damages before the Court he was clearly of the view that such an application was sustainable:

"One of the categories of cases identified by the judgment of Lord Devlin in Rookes v. Barnard [1964] 1 All E.R. 367 ... in which exemplary damages may be claimed is that of cases which involve oppressive, arbitrary or unconstitutional action by servants of the government. Solicitors who execute an Anton Piller order do so, in important part, as officers of the court. It is the court which places them in a position to do that which would, without the court authority, be a flagrant and inexcusable trespass. They are placed in a position in which their actions are likely to cause shock, distress and often outrage to those against whom the orders are executed. If, in execution of these orders, they act outside the terms of the order oppressively or excessively, I am disposed to think that Lord Devlin would have included the case in the category to which I have referred."⁵⁰ (emphasis added)

If anything is to be learned from the *Columbia Picture Industries* decision it is that not only are the consequences of careless execution of an Anton Piller order serious but that they can happen to anybody. The senior partner of the firm of solicitors referred to in the *Columbia Picture Industries* case was directly

responsible for the conduct of the Anton Piller order. He gave evidence that he was an experienced intellectual property lawyer and commercial litigation partner and that, since 1974, his firm had executed some 300 Anton Piller orders. Apparently the firm had almost never failed in an application for an Anton Piller order.

Similar concerns were raised in *Universal Thermosensors Ltd v Hibben*⁵¹, although the facts which alarmed the judge are not fully set out due to a compromise reached between the solicitors who executed the order and the defendants.

In *Universal Thermosensors Ltd* it appears that:

- (a) the order was executed, inter alia, at a residence at 7.15 a.m. upon a woman;
- (b) the woman was told she could not speak to anyone else other than her solicitor, but that she must do so forthwith;
- (c) further, she was prevented by the terms of the order from speaking to any other defendant for a period of one week;
- (d) the order was also executed at commercial premises in the absence of a representative of the defendant and by a representative of the plaintiff who was a trade competitor;
- (e) the order was executed by a young solicitor with little or no experience in Anton Piller Orders.

The defendant subsequently applied to discharge the order and, inter alia, for damages and exemplary damages against the solicitors who executed the order. Further, for declarations that the plaintiff had trespassed both as to land and to goods.

⁵⁰ At 379

⁵¹ [1992] 1 WLR 840

The judge was constrained in his comments upon the facts due to a compromise which had been reached between the defendants and the plaintiff's solicitors as to the execution of the order and the defendant's claims for damages. Nonetheless⁵², the judge set out what he considered ought be the requirements of executing such an order:

- (a) it should only be executed during office hours and on working days;
- (b) if it is to be executed at a private house and it is likely that a woman may be in the house alone, then the solicitor serving the order must be or be accompanied by a woman;
- (c) a detailed list of all items being removed should be prepared and the defendants given an opportunity to inspect the list;
- (d) if the order prevents the defendants from speaking to each other it should not do so for long certainly for less than one week;
- (e) the order should not be executed at business premises save in the presence of a responsible officer or representative of the defendants;
- (f) the order should be served and the execution supervised by a solicitor other than a member of the firm of solicitors acting for the plaintiff and that person should be familiar with the execution of Anton Piller Orders;
- (g) a written report should be prepared of the events which occurred at the execution and which should be presented to the judge making the order shortly afterwards at an inter partes hearing;
- (h) the applicant for the order should identify the solicitor who will supervise the order and of his relevant experience.

Universal Thermosensors Ltd was referred to by Burchett J in *Tony Blain Ltd v.*

⁵² At 859-861.

*Jamison*⁵³ in which he noted undertakings proffered in support of the order along those lines of the comments in *Universal Thermosensors Ltd* as to an independent solicitor supervising the execution of the order.⁵⁴

5. FEDERAL AND SUPREME COURT PROCEDURE

(i) Federal Court of Australia

Order 25B of the Federal Court Rules sets out the requirements as to the terms of such an order and the requirement for an independent solicitor to supervise the execution.⁵⁵

Practice Note No. 24⁵⁶ is intended to supplement Order 25B and addresses the Court's usual practice relating to the making of a search order and the usual terms of such an order. It describes various aspects including:

- (a) the need for and the responsibilities of an independent solicitor;
- (b) the content of the affidavits in support including namely, whether it is believed that the occupant of the premises is likely to be female, a child under 18, or any other vulnerable person;
- (c) the hours between which a search should usually take place;
- (d) a search order must not be executed at the same time as the execution of a search warrant by the police or a regulatory authority;
- (e) whether the independent solicitor should be either a woman or a person capable of addressing any relevant vulnerability.

(ii) Supreme Court of Victoria

Order 37B of the Supreme Court Rules is in similar terms to Order 25B of the

⁵³ (1993) 41 FCR 414

⁵⁴ See also 'Piller Problems' – Dockray & Laddie 106 LQR 601

⁵⁵ See Order 28B Rule 5 and Rule 6

⁵⁶ Dated 5 May 2006

Federal Court Rules and includes many of the matters set out in Federal Court Practice Note No. 24.

Supreme Court Practice Note No. 2 of 2006⁵⁷ supplements Order 37B and is an endeavour to harmonise the practices of such applications between State and Federal jurisdictions. It is in very similar terms to that of Federal Court Practice Note No. 24.

6. CHECKLIST: EXECUTION OF ANTON PILLER ORDERS

1. Read the court order carefully. It is likely to be construed strictly in the event of a dispute as to execution.
2. Brief those attending on:
 - (a) the terms of the order;
 - (b) their obligation when executing it;
 - (c) the nature of the premises.
3. Consider informing the local police, in advance, of the execution and the location of the premises. You may even provide them with a copy of the order.
4. Take a copy of the order, affidavits in support and exhibits to serve upon the respondent.
5. Take sufficient personnel to execute the order in a reasonable time. (This will vary depending upon the size of the premises and the nature of the infringing articles).
6. Consider whether you need technical assistance in order to execute the order (eg. a computer operator).
7. Take mobile phones to call your office and other members of your 'team'.

8. Take labels and plastic bags so that you may take away items pursuant to the search.
9. Consider whether you need a truck or some other vehicle to remove any items pursuant to the search.
10. Do you need cameras, dictaphones, other devices to record what transpires during the execution of the order?
11. Do you need a stenographer to record conversations between yourself and the respondent?

PETER J BOOTH
Aickin Chambers

EXECUTION OF ANTON PILLER ORDERS – READING GUIDE

1. *Anton Piller KG v Manufacturing Processes Ltd* 1976 Ch.55
2. *Booker McConnell plc v Plascow* [1985] RPC 425 at 442.
3. *Columbia Picture Industries v Robinson* [1986] 3 All. E.R. 388.
4. *Wardel Fabrics Ltd v G Myristis Ltd* [1984] FSR 263.
5. *Bhimji v Chatwani*[1991] 1 All.E.R. 705.
6. *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 2 All.E.R. 589.
7. *Digital Equipment Corp v Dark Crest Ltd* [1984] 3 All.E.R. 381.
8. *AB v CDE* [1982] RPC 509.
9. *ITC Film Distributors Ltd v Video Exchange Ltd (No 2)* (1982) 126 Sol J 672.
10. *Bank Mellat v Nikpour* [1985] FSR 87.
11. *LT Piver SARL v S & J Perfume Co Ltd* [1987] FSR 159.
12. *Customs & Excise Commission v A E Hamlin* [1983] All.E.R. 654.
13. *Harman v Sec State for Home Dept* [1983] AC 280.
14. *Universal Thermosensors Ltd v. Hibben* (1992) 1 WLR 840.
15. *Flocast Australia Pty Ltd v Purcell* [1999] FCA 309 (31 March 1999).
16. *Long v Specifier Publications Pty Ltd and Others* (1998) 44 NSWLR 545.
17. *J.C. Techforce Pty Ltd v Pearce* 138 ALR 522.
18. *Flocast Australia Pty Ltd v Purcell (No. 3)* (2000) 176 ALR 354.
19. Federal Court of Australia, Practice Note No. 24 (5 May 2006).
20. Supreme Court of Victoria, Practice Note No. 2 of 2006; 21 August 2006.

MAREVA INJUNCTIONS

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1. INTRODUCTION

This paper deals with the law relating to Mareva injunctions. In particular it is sought to provide a general background to the area and then identify common issues and difficulties for practitioners.

2. BACKGROUND

The Mareva injunction allows a court to make orders to prevent a judgement of the court being unsatisfied. It is a powerful weapon in the litigation process. It is used to prevent abuse of the process of the courts. Accordingly, as the order interferes, perhaps sometimes temporarily, with the right to dispose of property as the owner of such property wishes the courts are cautious in granting such orders.

The New South Wales Court of Appeal stated in *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 that:

"The basis of the jurisdiction is founded on the risk that the defendant will so deal with his assets that he will stultify and render ineffective any judgement given by the court in the plaintiff's action and thus impair the jurisdiction of the court and render it impotent properly and effectively to administer justice ... the jurisdiction to grant the injunction is not to be exercised simply to preclude a debtor from dealing with his assets, and in particular to prevent him from using them to pay his debts in the ordinary course of business. It is directed to dispositions which do not fall within this category and which are intended to frustrate or have the necessary effect of frustrating the plaintiff in his attempt to seek through the court a remedy for the obligation to which he claims the defendant is subject"

The seriousness with which the courts regard Mareva type orders is exemplified in *Supreme Court of Victoria Practice Note No. 3 of 2006* where it is stated as follows:

“A freezing order should be viewed as an extraordinary interim remedy because it can restrict the right to deal with assets, even before judgement, and is commonly granted without notice.”

The concept of a Mareva order is relatively recent. Prior to 1975 an order in the nature of an asset preservation order could not be granted before judgement had been obtained. In *Nippon Yusen Kaisha v Karageorgis [1975] 1 WLR 1093* Lord Denning M.R. made the first order in the nature of a Mareva order before judgement had been entered.

A Mareva order may now be made at any time whether proceedings have been issued or not and irrespective of whether judgement has been obtained. Of course a Mareva order may be granted after judgement as an aid in the execution process.

3. NOT AN INJUNCTION

Although generally referred to as a Mareva injunction it is not in fact regarded by the courts as an injunction but as a type of interlocutory relief. In *Cardile & Ors v LED Builders Pty Ltd (1999) 198 CLR 380* at 393 the majority of the High Court stated as follows:

“... the courts developed doctrines and remedies outside the injunction as understood in courts of equity to protect the integrity of its processes once set in motion. The Mareva order for the preservation of assets should be seen as a further development. There is no harm in the use of the term Mareva to identify that development, provided the source of the remedy is kept in view when considering the form of the remedy in each particular case. ”

Kirby J stated as follows:

“... the word ‘injunction’ may involve an imprecise use of technical language. It is one thing for the parliament to use the words in a statute providing specific orders which do not bear all of the characteristics of an injunction as understood in equity. But courts should be careful not to gloss over the differences. Not every mandatory or imperative order is an injunction. The ‘anti-suit injunction’ when not in aid of a contractual stipulation may be granted to protect the court’s processes. The so-called ‘Mareva injunction’ shares similar characteristics which may not exist in an ‘injunction’ in the strictest sense.”

Accordingly, in *Cardile* the majority of the court used the term Mareva order and Kirby J referred to asset preservation orders.

In Victoria the term Mareva order has effectively been replaced by the term freezing order.

With effect from 1 September 2006 Order 37 A was introduced into the *Supreme Court (General Civil Procedure) Rules 2005*.

4. POWER OF THE COURT

The power to grant a freezing order is both statutory and part of the inherent jurisdiction of the court.

Section 37(3) of the *Supreme Court Act 1986 (Vic.)* provides as follows:

“The Court may grant an interlocutory injunction under sub-section (1) restraining a party to a proceeding from removing from Victoria or otherwise dealing with assets located within Victoria, whether or not that party is domiciled, resident or present within Victoria.”

The power of the Federal Court to grant a Mareva order is contained in section 23 of the *Federal Court of Australia Act 1976 (Cth)*. That section provides that the Federal Court has the power:

“...to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate”.

5. ASSETS AFFECTED

A Mareva order is a personal order. It operates against the defendant personally. It is not an order that attaches to a particular asset so as to give any priority over such asset to the person to whom the order is granted. While a Mareva order is given to preserve the assets of the defendant it does not give any priority to the applicant over such assets if, for instance, the defendant becomes insolvent.

There is no limitation on the type of asset that may be the subject of an order. An order may be made in respect of a known or identified asset of the defendant or it may be made against all of the assets generally of the defendant.

However, the order will usually be restricted so that the value of assets which are the subject of the order does not exceed the likely damages that may be obtained by the applicant or the judgement that has been awarded.

For instance in *Supreme Court of Victoria Practice Note No. 3 of 2006* it is provided as follows:

“The value of assets covered by a freezing order should not exceed the likely maximum amount of the applicant’s claim, including interest and costs. ...”

The assets which are subject to a freezing order may be located within or outside Australia. For instance Rule 37A.02(2) of the *Supreme Court (General Civil Procedure) Rules 2005* provides as follows:

“A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.”

6. UNDERTAKING AS TO DAMAGES

While a freezing order is not regarded as an injunction, as stated above, the court will almost invariably require an undertaking as to damages from the applicant.

If there is evidence that the applicant may have insufficient assets to satisfy any undertaking as to damages the court may order that the applicant provide security for the undertaking as to damages.

For instance in *Supreme Court of Victoria Practice Note No. 3 of 2006* it is provided as follows:

“If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages the applicant may be required to support the undertaking by providing security.”

Damages that may be granted if it is later found that a freezing order should not have been granted may of course be substantial if a defendant has been prevented from dealing with his or her assets.

Often if a freezing order is obtained while the defendant is in the process of selling assets, an order may be made allowing such assets to be sold on condition that the proceeds of sale are paid into court or a suitable trust arrangement. Whether this is possible will depend on the nature of the asset. For instance if real estate is being sold there is often little difficulty with such an order as either an estate agent or solicitor will have control of the proceeds of sale.

7. PROCEDURE

Given that the purpose of a freezing order is to prevent the dissipation of assets it is usually made *ex parte*, that is, without notice to the proposed defendant. If notice is given there is the obvious risk that the defendant may dispose of the assets before the application is able to be heard.

The making of an ex parte order imposes certain obligations on the applicant. The applicant must make full and frank disclosure of all facts which are relevant to the application including any defence that may be raised by the defendant or proposed defendant. If a freezing order is made ex parte without full disclosure the court may set aside the order.

Evidence for an application for a freezing order is given by affidavit. The courts have laid down the minimum requirements for such affidavits. Regard must also be made to the relevant rules of court.

Rule 37A.02 of the *Supreme Court (General Civil Procedure) Rules 2005* provides that the affidavits relied on must as far as possible address the following:

- (a) Information about the judgement that has been obtained or if no judgement has been obtained the following information about the cause of action:
 - (i) The basis of the claim for substantive relief;
 - (ii) The amount of the claim;
 - (iii) If the application is made without notice to the respondent, the applicant's knowledge of any possible defence;
- (b) The nature and value of the respondent's assets, so far as they are known to the applicant within and outside Australia;
- (c) The matters referred to in Rule 37A.05; and
- (d) The identity of any person other than the respondent who the applicant believes may be affected by the freezing order and how that person may be affected by it.

Supreme Court of Victoria Practice Note No. 3 of 2006 also provides that the applicant's affidavit evidence should include:

"... disclosure of ... any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia."

If an ex parte order is made the court will expect the matter to be returned to the court within a short time. *Supreme Court of Victoria Practice Note No. 3 of 2006* also provides that the applicant's affidavit evidence should include:

"The duration of a freezing order made without notice will ordinarily be limited to a period terminating on the return date of the summons, which should be as early as practicable (usually not more than a day or two) after the order is made, when the respondent will have the opportunity to be heard. The applicant will bear the onus of satisfying the Court that the order should be continued or renewed."

If a freezing order is made the court will make allowance for the ordinary living expenses, legal expenses and other bona fide expenses of the defendant. It is to be noted that the object of the freezing order is not to prevent the defendant from carrying on its usual or ordinary business but is to prevent attempts to put assets out of the reach of a successful plaintiff.

By way of example, *Supreme Court of Victoria Practice Note No. 3 of 2006* provides that:

"The order should exclude dealings by the respondent with assets for legitimate purposes, in particular:

(a) Payment of ordinary living expenses;

(b) Payment of reasonable legal expenses;

(c) Dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and

(d) Dealings and dispositions in the discharge of obligations bona fide and properly incurred under a contract entered into before the order was made."

If a freezing order is made the court may also make ancillary orders. For instance, if the applicant is unaware of the full extent, nature or location of the defendant's assets the defendant may be ordered to make an affidavit disclosing his or her assets.

Following the making of an ex parte order the applicant is required to promptly serve the defendant with the order. The order should be endorsed with a notice in accordance with Rule 66.10 if made in a state court.

8. ORDERS AGAINST THIRD PARTIES

A freezing order is usually made against the defendant or proposed defendant in a proceeding. However, in certain circumstances a freezing order may be made against a non-party who is in possession of assets of the defendant.

The issue of what matters should be taken into account when considering a freezing order against assets in the possession of a non-party was dealt with by the High Court in Cardile's case. The court stated:

"What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the object sought to be restrained. In our opinion such an order may, and we emphasise the word 'may' be appropriate assuming the existence of other relevant criteria and discretionary factors in circumstances in which:

- (a) the third party holds, is issuing, or has exercised or is exercising a power of disposition over, or is otherwise in possession of assets, including 'claims and expectancies' of the judgement debtor or potential judgement debtor; or*
- (b) some process, ultimately enforceable by the courts, is or may be available to the judgement creditor as a consequence of a judgement against that actual or potential judgement debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds of*

property of the judgement debtor to help satisfy the judgement against the judgement debtor.”

In the Supreme Court the power to make a freezing order against a person other than the defendant is set out in Rule 37A.05(5) where it is stated as follows:

“the Court may make a freezing order or an ancillary order or both against a person other than a judgement debtor or a prospective judgement debtor (a third party) if the Court is satisfied, having regard to all the circumstances, that:

(a) There is a danger that a judgement or prospective judgement of the Court will be wholly or partly unsatisfied because:

(i) The third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgement debtor or prospective judgement debtor; or

(ii) The third party is in possession of, or in a position of control or influence concerning assets (including claims and expectancies) of the judgement debtor or prospective judgement debtor; or

(b) A process in the Court is or may ultimately be available to the applicant as a result of a judgement or prospective judgement of the Court, under which process the third party may be obliged to disgorge assets or contribute toward satisfying the judgement or prospective judgement”.

9. CONDITIONS FOR GRANT OF ORDER

In order for a freezing order or Mareva order to be made it must be established that:

- (a) there is a judgement or if judgement has not been granted that the plaintiff’s case is of sufficient strength to the requisite degree to merit the granting of a freezing order;
- (b) there is a real risk that the judgement will be unsatisfied;
- (c) whether the balance of convenience supports the granting of the order.

In addition to the above matters the court retains an overriding discretion as to whether such an order will be made.

In *Glenwood Management Group Pty Ltd & Anor. V Mayo & Anor.* [1991] 2 VR 49 Young C.J. stated as follows:

“Although I have necessarily dealt separately with the three elements, a good arguable case, a risk of frustration of judgement and the balance of convenience, the authorities make it plain that the three elements overlap and that the granting of a Mareva type injunction is always in the end a matter of discretion. In this case the most significant overlapping is of the good arguable case and the balance of convenience. As the strength of the arguable case diminishes so the balance of convenience moves in favour of the defendants and vice versa.”

The strength of the case required for the granting of a Mareva type order has been variously described. As stated above in *Glenwood Management* the court held that a good arguable case is required. In *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 the standard was referred to as “a serious question to be tried.”

Rule 37A.05 of the Supreme Court Rules refers to an applicant having:

“... a good arguable case on an accrued or prospective cause of action ...”

10. RISK OF DISSIPATION

In order to obtain a Mareva type order the applicant must show that there is a risk of dissipation of assets by the defendant.

This was described in *Nimenia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen)* [1983] 1 WLR 1412 as follows:

“The test is whether, on the assumption that the plaintiffs have shown at least a good arguable case, the court concludes, on the whole of the

evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgement or award in favour of the plaintiffs would remain unsatisfied.”

The evidence of real risk or danger that a judgement will be unsatisfied may be established by direct evidence or by inference.

In the *Nimenia* case it was stated as follows:

“It (the evidence) may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied upon. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to rise an inference that the company is not to be relied upon. ...”

11. DISCRETIONARY CONSIDERATIONS

In addition to the matters referred to above the court has a general discretion in the circumstances of each application whether or not to make a freezing order.

In *Cardile* the court considered that such discretionary considerations included:

- (a) whether the applicant had proceeded diligently and expeditiously;
- (b) whether the applicant had recovered a money judgement in the proceeding;
- (c) are proceedings (for example civil conspiracy proceedings) available against the third party;
- (d) if some proceedings are available, why have they not been taken;
- (e) why if proceedings are available against the third party and have not been taken and the court is minded to make a Mareva order should not the grant of relief be conditioned upon an undertaking by the applicant to commence and ensure the expedition of such proceedings.

DATED: 25 March 2009.

NICHOLAS JONES.

OWEN DIXON CHAMBERS.