

EQUITABLE AND INEQUITABLE REMEDIES

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INTRODUCTION

Over the past fifteen years or so we have witnessed developments in the field of equitable remedies, injunctions in particular, which have been extraordinary in several respects. First, the period during which the new remedies have been ‘invented’, adopted and transformed from the rare to the common-place is in legal terms extremely short. Secondly, the speed with which and the extent to which the original limitations and restrictions have been discarded is remarkable. Thirdly, the new remedies are extraordinary in terms of sheer innovation, and illustrate equity’s capacity to adapt to new situations in the commercial world.

The subject matter of my paper falls into three parts: the current use of the Anton Piller order,¹ which is designed to prevent the removal or destruction of evidence; the ever-widening horizons of the Mareva injunction,² which is designed to prevent the removal or dissipation of assets; and the new interlocutory injunction to prevent a defendant from leaving the jurisdiction. By way of background to the latter development, it will be useful also to consider the recent revival of the ancient writ *ne exeat regno*, which has a similar aim.

My purpose is not to examine the details of these new injunctions nor to admire equity’s innovations, but rather to express concern that they could become, or are already becoming, instruments of oppression. Do they really deserve to be called equitable remedies, or might the label “inequitable” be more appropriate?

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1. Named after the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55 (“*Anton Piller*”).
2. Named after the case of *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd’s Rep 509 (“*Mareva*”).

ANTON PILLER ORDERS

These, along with Mareva injunctions, have been described by Lord Justice Donaldson as "the Law's two 'nuclear' weapons".³ Lord Denning in his book *The Due Process of Law* describes the injunction as having been "invented by an ingenious member of the Chancery Bar, Mr. Hugh Laddie".⁴ Mr Laddie was counsel for the plaintiffs in the *Anton Piller* case, and appeared in many of the later cases. I would like to examine the progress of his invention by looking at how judicial attitudes towards it have changed since 1975. The early days saw some words of warning and predictions of trouble. These were followed by enthusiastic adoption of the new remedy. Now it seems that the early doubts are reappearing.

The purpose of the Anton Piller order is to ensure that pending trial the defendant does not dispose of any articles in the defendant's possession which could be prejudicial at the trial. This is achieved by granting an injunction to enable the plaintiff to search the defendant's premises and remove evidence. It is not a search warrant, although Lord Denning in the *Anton Piller* case after describing the new injunction, said "This may seem to be a search warrant in disguise".⁵ The difference, he explained, was that a search warrant authorises the holder to enter premises against the owner's will. The Anton Piller order does not do so. It only authorises entry and inspection with the defendant's permission. But of course it puts pressure on the defendant to give permission and in fact orders the defendant to do so, with the result that the defendant is guilty of contempt of court if the order is not complied with, and adverse inferences will be drawn against the defendant at the trial. In the nature of things, the injunction must be available ex parte, without hearing the defendant, because its purpose might be frustrated if the defendant were forewarned. As Lord Justice Templeman said in *Rank Film Distributors Ltd and Others v Video Information Centre (A Firm) and Others* ("*Rank Film*"),

If the stable door cannot be bolted, the horse must be secured ... If the horse is liable to be spirited away, notice of an intention to secure the horse will defeat the intention.⁶

3. *Bank Mellat v Nikpour* [1985] FSR 87, 91-92.

4. A T Denning *The Due Process of Law* (London: Butterworths, 1980) 123.

5. *Supra* n 1, 60.

6. [1982] AC 380, 418.

While it must be agreed that the injunction would be ineffective if it could not be granted *ex parte*, it is precisely because of its *ex parte* nature that difficulties have arisen.

Interestingly, Justice Brightman issued an early warning in the *Anton Piller* case itself, where he refused the order but was reversed on appeal. He said:

[I]t seems to me that an order on the lines sought might become an instrument of oppression, particularly in a case where a plaintiff of big standing and deep pocket is ranged against a small man who is alleged on the evidence of one side only to have infringed the plaintiff's rights.⁷

Similar views were expressed by Lord Justice Donaldson in his dissenting judgment in *Yousif v Salama and Another* where he said:

What [Counsel for the plaintiffs] asks us to do in this case is to make an order that the plaintiff, on an *ex parte* application, should be entitled, armed with a warrant from this court, to enter the premises of the defendants and *take* discovery. I regard that as a very serious invasion of the rights of the defendants ... I think this is a draconian power which should be used in only exceptional cases ... The people of this country are entitled not to have their privacy and their property invaded by a court order except in very exceptional circumstances.⁸

His Lordship considered that an *Anton Piller* order could only be made in a limited class of case where there was, on the face of it, a very clear case that the defendant would conceal or destroy essential evidence *and* that the plaintiff would be left without any evidence to support their claim.

As mentioned above, one cause for concern is the transformation of the remedy from the rare to the common-place. In the *Anton Piller* case itself Lord Justice Ormrod said:

The proposed order is *at the extremity of this court's powers*. Such orders therefore, *will rarely be made*, and only when there is no alternative way of ensuring that justice is done to the applicant.⁹

Lord Denning himself said:

We are prepared, therefore, to sanction its continuance, but only in an *extreme case* where there is grave danger of property being smuggled away or of vital evidence being destroyed.¹⁰

7. Supra n 1, 60.

8. [1980] 1 WLR 1540, 1543.

9. Supra n 1, 61 (emphasis added).

10. Ibid (emphasis added).

Contrast this with his Lordship's statement just over two years later in *Ex parte Island Records Ltd and Others* ("*Ex parte Island Records*") concerning the sale of pirate recordings:

The effect of these *ex parte* orders has been dramatic. When served with them, the shopkeepers have acknowledged their wrongdoing and thrown their hand in. So useful are these orders that they are in *daily use*....¹¹

He added optimistically that "the order contains safeguards to see that no injustice is done."¹² Two years after that, in *Rank Film*, Lord Denning described the order as "commonplace" and "an innovation which has proved its worth time and time again."¹³ In *Columbia Picture Industries Inc and Others v Robinson and Others*¹⁴ ("*Columbia Picture*") it transpired that one firm of solicitors alone had executed about three hundred such orders, of which the present was the first to have come to a full trial after the execution. Furthermore, they had no record of any application failing. Far from being rarities, such orders were regularly granted. Similarly Justice Hoffmann has recently commented in *Lock International plc v Beswick and Others*¹⁵ ("*Lock International*") that his common experience was that counsel were surprised when he refused their applications.

The Anton Piller order suffered a temporary setback when the House of Lords in the *Rank Film* case¹⁶ held that the defendant could invoke the privilege against self-incrimination. The privilege was swiftly withdrawn by section 72 of the United Kingdom Supreme Court Act 1981 ("Supreme Court Act") in intellectual property cases, which enabled Lord Denning (who had dissented in the *Rank Film* case in the Court of Appeal) to say in his book *The Closing Chapter* "So the law is now as I thought it should be."¹⁷

Why, then, in spite of this enthusiasm for the new injunction, have the early doubts resurfaced? The case against Anton Piller orders has

11. [1978] Ch 122, 133 (emphasis added).

12. *Ibid.*

13. *Supra* n 6, 406.

14. [1987] Ch 38.

15. [1989] 3 All ER 373.

16. *Supra* n 6. The privilege has recently been held available in cases of discovery in aid of Mareva injunctions: "Privilege to resist discovery in civil fraud allegation" *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* The Times 15 February 1990, 36. See also "Curb on scope of search and seize orders" *Tate Access Floors Inc v Boswell* The Times 14 June 1990, 32.

17. A T Denning *The Closing Chapter* (London: Butterworths, 1983) 239.

been very clearly presented by Justice Scott in *Columbia Picture*¹⁸ the facts of which provide a good illustration of the dangers. The defendant was alleged to be a video pirate. The plaintiff obtained an Anton Piller order which was executed in an excessive and oppressive manner. The plaintiff's solicitors planned a raid "with military precision". Eight members of the firm, with the senior partner in charge and accompanied by police officers, set out to execute the order at various premises of the defendant. They took some things which were not covered by the order, kept some of them for nearly three years, lost some and did not give adequate receipts. Similar fact evidence was allowed of executions of Anton Piller orders elsewhere by the solicitors in question. The result was that the defendant's business was closed down, which was the plaintiff's motive, at least in part. The business could not continue because of the wholesale removal of all business material and as a result of a Mareva injunction, also obtained by the plaintiff, the defendant could not get credit. Nor could he recover his property without going to court. The closure of the business was said to be a common effect of these injunctions, but whether the business was illegal could not be established until final judgment. But the cases did not normally proceed to trial, so that in effect businesses were being closed down on ex parte applications.

Justice Scott expressed "very grave disquiet".¹⁹ He described the characteristics of the injunction as follows: there was no notice to the defendant; they were obtained in secret, in chambers or in camera; they were mandatory and designed for immediate execution; they were almost always accompanied by a Mareva injunction, to freeze the defendant's assets. The defendant's liberty to apply for a discharge was a reasonable safeguard for a Mareva injunction, but was of little if any value with an Anton Piller order which had already been executed. The defendant would be in contempt if he did not comply even if the order was later held to have been wrongly granted, because of non-disclosure.²⁰ His Lordship continued:

[A] mandatory order is made in the absence of the respondent and in secret; it is served upon 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.²¹

18. Supra n 14.

19. Ibid, 73.

20. Ibid, 71.

21. Ibid, 72.

Orders were often granted with respect to the defendant's home, giving the plaintiff the right to "search and rummage"²² through his belongings.

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.²³

Can it be right that all this is being done in the name of equity? Surely not, for, as Justice Scott explained:

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 ... What is to be said of the *Anton Piller* procedure which, on a regular and institutionalised basis, is depriving citizens of their property and closing down their businesses by orders made ex parte, on applications of which they know nothing and at which they cannot be heard, by orders which they are forced, on pain of committal, to obey, even if wrongly made?²⁴

The plaintiff's undertaking in damages was a safeguard, but did not meet the objection. It might be said that the defendant was guilty, and thus deserved what he got, but "even villains ought not to be deprived of their property by proceedings at which they cannot be heard".²⁵

Justice Scott did not doubt the court's jurisdiction to grant *Anton Piller* orders, but considered that the plaintiff's need for the remedy must be balanced against the requirement of justice that the defendant should not be deprived of his property without being heard. He was disposed to think that

the practice of the court has allowed the balance to swing much too far in favour of plaintiffs and that *Anton Piller* orders have been too readily granted and with insufficient safeguards for respondents.²⁶

His Lordship went on to describe the injunction as "Draconian and essentially unfair"²⁷ and suggested that where it was proper to make the order, the plaintiff should return the property after a short period and should keep detailed records. Furthermore, it was bad practice for solicitors to make defendants sign forms saying that the property was handed over "willingly and without duress",²⁸ as the consent obtained in this way might not be seen to be real.

22. Ibid, 73.

23. Ibid, 73.

24. Ibid, 73-74.

25. Ibid, 74.

26. Ibid, 76.

27. Ibid.

28. Ibid, 60, 77.

The result of the case was that the defendants were awarded aggravated damages of £10,000 and costs arising out of the Anton Piller order, even though the plaintiffs succeeded in their action for breach of copyright, passing-off and trade mark infringement. The Anton Piller order was not set aside because to do so would have been an empty gesture - it had been executed three and a half years before.

This view of the Anton Piller jurisdiction has subsequently been found persuasive on at least two other occasions in the English High Court. In *O'Regan v Iambic Productions Ltd*, Sir Peter Pain said:

An Anton Piller order plainly carries the suggestion that a person is not to be trusted and is likely to destroy evidence. This is a very serious thing. People who owe a defendant money, or may enter in further obligations with him, are reluctant to carry on business with him in the ordinary way while this is hanging over him.²⁹

In that case the order was discharged for non-disclosure. Justice Hoffmann took the same view in *Lock International*.³⁰ There the plaintiff company manufactured metal detectors. When the company was taken over, the defendants, who held key posts, joined a rival company. The plaintiff brought an action to protect trade secrets and confidential information. An Anton Piller order was obtained. In executing it, the plaintiff searched the rival company's premises and the homes of three of the defendants. At the business premises the plaintiff's solicitors took away twelve boxes of documents, five filing cabinet drawers and five prototype machines. They removed not only documents containing confidential information, but virtually all of the rival company's drawings, commercial documents and computer records.³¹ At the defendant's home they removed a private diary and papers relating to industrial tribunal proceedings against the plaintiff, none of which were subsequently relied on.³²

Justice Hoffmann discharged the Anton Piller order as having been wrongly granted. There was insufficient evidence to support it, and the plaintiff was guilty of non-disclosure on the question of its finances to support the cross-undertaking in damages. His Lordship agreed with Justice Scott that the balance had swung too far in favour of plaintiffs.

29. (1989) 139 NLJ 1378.

30. *Supra* n 15.

31. *Ibid*, 373.

32. *Ibid*, 386.

He considered that they "potentially involve serious inroads on principles which bulk large in the rhetoric of English liberty"³³ such as the presumption of innocence, the right not to be condemned unheard, protection against arbitrary searches and seizures, and sanctity of the home.

Where Anton Piller orders were sought against former employees who had started up in competition - in contrast with "fly-by-night video pirates" - the applications should be approached with scepticism.³⁴ In trade secrets cases, there was a tendency to blind the judge with science: "It may look like magic but turn out merely to embody a principle discovered by Faraday or Ampere."³⁵ There was an incentive for employers to

launch a pre-emptive strike to crush the unhatched competition in the egg by causing severe strains on the financial and management resources of the defendants or even a withdrawal of their financial support. Whether the plaintiff has a good case or not, the execution of the Anton Piller order may leave the defendants without the will or the money to pursue the action to trial in order to enforce the cross-undertakings in damages.³⁶

The fact that an employee had behaved wrongfully did not necessarily justify an Anton Piller order. It would often suffice to order the preservation or delivery up of documents or that the plaintiff take copies. Employees who take lists of customers would not necessarily disobey such an order. Not everyone who is misusing confidential information will destroy documents in the face of a court order to preserve them. As far as the more intrusive Anton Piller orders were concerned, Justice Hoffmann held that the plaintiff's rights must be balanced against the defendant's privacy where the defendant has not been heard.

It is not merely that the defendant may be innocent. The making of an intrusive order *ex parte* even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff.³⁷

It should be added that the plaintiff failed to obtain the interlocutory injunction to restrain the use of confidential information.

33. Ibid, 382.

34. Ibid, 383.

35. Ibid, 384.

36. Ibid, 383.

37. Ibid, 384.

These decisions, it is suggested, make an unanswerable case that Anton Piller orders have gone too far and have become inequitable remedies. We must revert to the original conditions which have since been lost sight of if Anton Piller orders are to be retained as equitable remedies. They should be granted rarely, and only in extreme cases where there is a grave danger of destruction of evidence, as laid down in the *Anton Piller* case itself.

MAREVA INJUNCTIONS

This injunction emerged in 1975³⁸ and was described by Lord Denning in *The Due Process of Law* as “the greatest piece of judicial law reform in my time”.³⁹ It is an interlocutory injunction designed to prevent the dissipation or removal of the defendant’s assets before trial, so that if the plaintiff succeeds at the trial there will be property against which he can enforce judgment. It is also available after judgment if there are grounds to suspect that the defendant will dispose of his assets to avoid execution. This is illustrated by some of the “world-wide” cases, discussed below. The injunction is usually granted *ex parte* for the same reason as the Anton Piller order, with which it is often combined. It may also be combined with the new injunction against leaving the country, discussed in the final part of this article. It is this combination of remedies which may give cause for concern, bearing in mind that (except in the post-judgment cases) the plaintiff’s case has yet to be proved.

What is remarkable here is the rapid development of the remedy and the speed with which almost all the original limitations have been discarded.

One initial difficulty was the well known decision of the Court of Appeal in *Lister & Co v Stubbs*⁴⁰ (“*Lister*”), where it was held in no uncertain terms that an interlocutory injunction to restrain dealings with the defendant’s assets could not be granted pending trial. Subsequent criticisms of *Lister* have focused on the decision that an agent who takes a bribe is only personally liable to account for the sum in

38. Supra n 2; *Nippon Yusen Kaisha v Karageorgis and Another* [1975] 1 WLR 1093.

39. Supra n 4, 134.

40. (1890) 45 Ch D 1.

question and is not subject to any liability, personal or proprietary, for any profit the agent may have made by investing it. The criticisms have not been directed at the proposition that the defendant's assets cannot be frozen by injunction pending trial. The *Mareva* cases had to explain this away by saying that the new remedy was an exception to the principle in *Lister*. Thus Vice Chancellor Megarry in *Barclay-Johnson v Yuill*⁴¹ said that some weight must still be given to the *Lister* principle, which remained the rule, while the *Mareva* doctrine was a limited exception to it. The justification for *Lister* was that:

Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.⁴²

In the *Mareva* case itself, Master of the Rolls Lord Denning was able to avoid *Lister* by relying on section 45 of the United Kingdom Supreme Court of Judicature (Consolidation) Act 1925, which provides that an interlocutory injunction may be granted whenever it is "just or convenient,"⁴³ and this should be widely interpreted. Of course, these words also appeared in the United Kingdom Judicature Act 1873, which was prior to *Lister*, but was not there referred to.

But, in spite of these doubtful beginnings, it cannot now be said that there is no such jurisdiction. The House of Lords confirmed it in *Siskina and Others v Distos Compania Naviera SA*⁴⁴ ("*Siskina*"). Lord Hailsham referred to *Lister* and similar decisions but was content to say that: "this well-established list of authorities, to the effect that an unsecured creditor cannot convert himself into a partially secured creditor merely by bringing an action against the alleged debtor and then seeking to freeze his assets by an injunction is, apparently, no longer reliable",⁴⁵ adding that the House was not casting doubt on the validity of the new practice, but "some at least of the arguments by which it is supported are, I would have thought, a little specious".⁴⁶ This may seem less than whole-hearted, but Parliament has subsequently sanctioned the practice. Even though the old Judicature Acts were hardly a sufficient basis, section 37(3) of the Supreme Court Act

41. [1980] 1 WLR 1259, 1266.

42. *Ibid*, 1263.

43. *Supra* n 2, 510.

44. [1979] AC 210.

45. *Ibid*, 260-261.

46. *Ibid*, 261.

specifically refers to the court's power to grant an interlocutory injunction to restrain a party to any proceedings from dealing with its assets.

The legitimacy of the Mareva jurisdiction having been established, it remains to consider the manner in which the early restrictions upon it have been overturned both by the courts and the legislature. One limitation laid down by the House of Lords in *Siskina*⁴⁷ was that the injunction could not be granted unless it was ancillary to substantive relief which the English High Court had jurisdiction to grant. In other words, there was no power to grant it save in protection or assertion of some legal or equitable right which the English High Court had jurisdiction to enforce by final judgment. The English Court of Appeal in *Siskina* had granted the injunction but was reversed on appeal by reason of the principle referred to above.⁴⁸ Lord Denning in *The Due Process of Law* said "I have suffered many reversals but never so disappointing as this one".⁴⁹ He describes the case (which concerned events arising out of the sinking of the *Siskina*) under three headings: The *Siskina* sinks without trace; We are sunk too like the *Siskina* (referring to the reversal); But not without trace (referring to the affirmation of the Mareva principle by the House of Lords). His Lordship's disappointment did not last for too long, for the decision of the House of Lords was reversed by section 25 of the United Kingdom Civil Jurisdiction and Judgments Act 1982.

Originally the Mareva injunction was confined to foreign based defendants. This was assumed even by the House of Lords in *Siskina*, although the logic of distinguishing between English based and foreign based defendants was questioned, especially since the abolition of exchange control. Attempts were soon made to extend the jurisdiction to an English-based defendant. So in *Chartered Bank v Daklouch*⁵⁰ a Mareva injunction was granted against a Lebanese defendant who was resident in England. Lord Denning had to distinguish his own prior statement⁵¹ that the injunction could not be granted against a defendant within the jurisdiction. In *Barclay-Johnson v Yuill*⁵² Vice Chancellor

47. Supra n 44.

48. Ibid Diplock LJ, 256-257.

49. Supra n 4, 141.

50. [1980] 1 WLR 107.

51. In *Rasu Maritima SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Government of the Republic of Indonesia Intervening)* [1978] QB 644, 659.

52. Supra n 41.

Megarry granted the injunction against an English defendant, saying that the statements in *Siskina* were "descriptive of the past rather than restrictive of the future".⁵³ He added that:

[I]n the short five years of its life the Mareva doctrine has shed all the possible limitations of its origin. It is now a quite general doctrine, free from any possible requirements of foreignness, commerce or anything else....⁵⁴

As will be seen, there were some remaining limitations, which have subsequently been shed. These two cases were subsequently approved by the English Court of Appeal on an inter partes hearing, where Lord Denning said that "things are moving rapidly" and that "the time has come for us to grasp the nettle".⁵⁵ So the injunction became available against English based defendants and this was confirmed by section 37(3) of the Supreme Court Act, which provides that the power to grant such an injunction is exercisable whether or not the defendant is domiciled, resident or present within the jurisdiction.

I am not seeking to argue that the Mareva injunction should be confined to foreign defendants but have referred to its extension to English defendants merely to illustrate how quickly a quite fundamental limitation was discarded.

The next limitation to be shed was a relatively minor one. The original Mareva injunction was to restrain the *removal* of assets from the jurisdiction. It was subsequently extended to cover the dissipation of assets within the jurisdiction. The extension was confirmed by section 37(3) of the Supreme Court Act.

Before turning to the last of the discarded limitations, it is worth mentioning that during the process of rapid development outlined above, the Mareva injunction was transferred from the rare to the common-place, just as in the case of Anton Piller orders. As long ago as 1979 Justice Mustill said:

Far from being exceptional it has now become commonplace. At present applications are being made at the rate of about 20 per month. Almost all are granted.⁵⁶

53. Ibid, 1264.

54. Ibid, 1267.

55. *Prince Abdul Rahman Bin Turki Al Sudairy v Abu-Taha and Another* [1980] 3 All ER 409, 411. This case has been applied in Australia: *Jackson v Sterling Industries Ltd* (1987) 62 CLR 612.

56. *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645, 650 (at first instance).

By way of introduction to the final abandoned restriction let us return to section 37(3) of the Supreme Court Act, which refers to the injunction as being to restrain the removal of assets *from the jurisdiction of the English High Court* or to restrain dealings with assets *located within the jurisdiction*. This does not seem to contemplate a jurisdiction to restrain dealings with assets abroad, but it has not prevented the recent evolution of the “world-wide” Mareva injunction. Such a jurisdiction was plainly rejected by the English Court of Appeal in *Ashtiani and Another v Kashi*⁵⁷ (“*Ashtiani*”). Lord Justice Dillon, quoting from *Lister*, said that to grant the injunction “would be introducing an entirely new and wrong principle”,⁵⁸ and held that the Mareva injunction was clearly limited to assets within the Court’s jurisdiction. He also repeated Lord Denning’s words of warning in *Third Chandris Shipping Corporation v Unimarine SA* to the effect that the Mareva injunction “must not be stretched too far, lest it be endangered.”⁵⁹ There were four reasons for confining the injunction to United Kingdom assets: it could otherwise be oppressive to the defendant; it would be difficult for the English court to enforce; the disclosure order would invade the defendant’s right to privacy; and, the disclosure of foreign assets could enable the plaintiff to get security in the foreign jurisdiction, which was not the object of the Mareva injunction. Lords Justices Neill and Nicholls agreed, although, as we will see, they changed their minds in later cases referred to below.⁶⁰

The established view that the injunction was confined to United Kingdom assets was exploded by four decisions of the English Court of Appeal in 1988, starting with *Babanaft International Co SA v Bassatne and Another*⁶¹ (“*Babanaft*”). This was a “post-judgment” case, where it might be thought less objectionable to extend the

57. [1987] QB 888. The views expressed in *Ashtiani* were held to be wrong in “Power to order transfer of assets” *Derby & Co Ltd and Another v Weldon and Others* (No 6) *The Times*, 14 May 1990, 26. *Ashtiani* was applied by Murphy J in *Brereton and Others v Milstein and Others* [1988] VR 508; but neither *Ashtiani* nor *Brereton* were followed by Brooking J in *National Australia Bank Ltd v Dessau and Others* [1988] VR 521, decided just 3 weeks after *Brereton*. *Dessau* was followed in *Planet International Ltd (in liquidation) v Garcia* [1989] 2 Qd R 427.

58. *Supra* n 40, 14.

59. *Supra* n 56, 668.

60. *Infra* 156-168.

61. [1989] 1 All ER 433.

jurisdiction because the plaintiff had actually proved his case. *Ashtiani* was avoided by saying that the practice was in a state of development and had moved on since then. Lord Justice Neill, who had sat in *Ashtiani*, said that it was correct then but may now require reconsideration. He added that the Australian courts had granted such injunctions.⁶² Lord Justice Nicholls, who also sat in *Ashtiani*, distinguished the latter as a pre-judgment disclosure case. The "world-wide" Mareva injunction, however, was a jurisdiction to be exercised with caution lest it should operate oppressively. Lord Justice Kerr in *Babanaft* reflected this view, saying that such injunctions may well be rare. The court was concerned to protect third parties from having their rights affected by the "world-wide" Mareva injunction, save where the order was enforced by the courts where the assets were located. Hence a proviso was added to the order, which came to be known as the "Babanaft proviso".

This was followed by *Republic of Haiti and Others v Duvalier and Others*⁶³ ("Duvalier"), where a "world-wide" Mareva injunction was granted in a pre-judgment case, that is where the plaintiff's case was not yet proved. *Ashtiani* was said to be based on practice, not jurisdiction. The court would be more willing in a post-judgment case or in a case where the plaintiff had a proprietary claim, but could make the order where appropriate in a pre-judgment case. Lord Justice Staughton said that:

[C]ases where it will be appropriate to grant such an injunction will be rare, if not very rare indeed.⁶⁴

The Babanaft proviso was held inadequate, and was modified, although this would involve "formidable problems in drafting".⁶⁵ The case was regarded as appropriate for a "world-wide" Mareva injunction because the circumstances alleged embezzlement of \$120 million from the Republic during the presidency of Jean-Claude Duvalier, and demanded international co-operation. But the only connection with England was

62. *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155; *Coombs and Barei Constructions Pty Ltd v Dynasty Ltd and Coombs* (1986) 42 SASR 413; *Re Clunies-Ross; Ex parte Totterdell and Another* (1987) 72 ALR 241. See also cases cited supra n 55 and 57.

63. [1989] 1 All ER 456.

64. *Ibid*, 466.

65. *Ibid*, 468.

the defendants' English solicitors, holding foreign assets on their behalf. The editor of *Dicey and Morris on The Conflict of Laws*,⁶⁶ writing in the Law Quarterly Review, has warned that the *Duvalier* decision "goes to the very edge of what is permissible".⁶⁷ He doubts whether such an order was capable of recognition abroad, and considers that it is only likely to be effective if the defendant is an individual in the United Kingdom, or if the defendant has a real interest in defending or appealing the English judgment.⁶⁸

The emphasis on the rarity of the grant in *Duvalier* sounds reassuring, but were not the same things said in the early days of Anton Piller orders? Only a few days after *Duvalier*, another pre-judgment "world-wide" Mareva injunction was granted in *Derby & Co Ltd and Another v Weldon and Others (No 1)*.⁶⁹ It was again said that such an injunction should be granted only in an exceptional case, in view of its drastic and oppressive nature. Third parties must be protected, and so must the defendant be protected from oppression by exposure to multiple proceedings and from misuse of information obtained under a disclosure order.⁷⁰ Lord Justice May said that "unless precautions are taken, the jurisdiction may prove more oppressive to the defendant than beneficial to the plaintiff".⁷¹ Lord Justice Nicholls referred to the injunction as "Draconian"⁷² and doubted whether such an order will or should become the norm.⁷³

A few months later, in *Derby & Co Ltd and Another v Weldon and Others (No 2)*,⁷⁴ a similar pre-judgment order was made against other defendants, companies in Luxembourg and Panama with no assets in the jurisdiction. Difficulties of enforcement against the Luxembourg company would be alleviated by reason of its residence in a Brussels Convention country. The judge below had refused the order against the Panamanian company because of difficulties of enforcement, but this

66. 11th edn (London: Stevens, 1987).

67. L Collins "The Territorial Reach of Mareva Injunctions" (1989) 105 LQR 262, 281.

68. *Ibid*, 296.

69. [1989] 1 All ER 469.

70. *Ibid*, 470.

71. *Ibid*, 473.

72. *Supra* n 27.

73. *Ibid*, 478.

74. [1989] 1 All ER 1002. See also *Derby & Co Ltd v Weldon (No 6)* *supra* n 57 (court can order transfer of assets from one foreign jurisdiction to another).

was overturned on appeal. The sanction of being debarred from defending in the event of disobedience was regarded as sufficient. The Mareva injunction was a developing branch of the law, and Lord Justice Neill said that:

Having regard to the changes in the practice which have already taken place since 1975, I see no good reason for saying that a practice which has so recently come into existence has already become ossified.⁷⁵

His Lordship then referred to the abolition of exchange control and the ease with which funds could be transferred to another jurisdiction. *Ashtiani* was again regarded as based merely on practice. Lord Justice Butler-Sloss seemed more cautious, emphasising that remedies must not be oppressive, and that the plaintiff's needs must be balanced against protecting the defendant from unjustified results in other jurisdictions, misuse of information obtained, invasion of privacy and interference with his business activities.⁷⁶

To sum up, in a few short years the Mareva injunction has sidestepped *Lister*, shaken off the *Siskina* limitation, extended to English defendants, encompassed dissipation of assets within as well as removal from the jurisdiction and, most remarkably of all, extended to freezing assets in foreign jurisdictions, whether or not subject to the Brussels Convention and irrespective of whether the order is pre-judgment or post-judgment. Indeed, it seems that there is nowhere left for it to go, unless the "world-wide" orders are to be transformed from the rare to the commonplace.

Interestingly, however, the latest development in Mareva injunctions is one which is restrictive of the remedy. It has recently been held by the English Court of Appeal that the privilege against self-incrimination is available in cases of discovery in aid of Mareva injunctions.⁷⁷ The Vice-Chancellor expressed concern at the implications of this and the hope that Parliament would remedy the situation, as has been done in the case of Anton Piller orders.⁷⁸

As far as the "world-wide" Mareva is concerned, it does not seem that the court has yet resolved the problem of third parties such as

75. Ibid, 1019.

76. Ibid, 1022-1023.

77. Supra n 16.

78. Ibid.

banks with branches in the relevant jurisdictions: hence the attempts to improve upon the Babanaft proviso. Problems of enforcement remain acute.

Reference has already been made to the difficulties facing defendants who are subjected to two or more of these *ex parte* orders simultaneously. So in *Columbia Picture*, discussed above in the context of the Anton Piller order,⁷⁹ the simultaneous Mareva order caused the bank to withdraw overdraft facilities, which contributed to the defendant going out of business. Such damage is difficult to compensate.

One of the most worrying aspects of both Anton Piller orders and Mareva injunctions is the question whether plaintiffs are fulfilling their duties of full and frank disclosure in *ex parte* applications. There have been many recent cases where defendants have succeeded in applications for discharge for non-disclosure. Could these merely be the tip of the iceberg? There may be other defendants who simply throw their hand in, to use Lord Denning's phrase from *Ex parte Island Records Ltd*.⁸⁰ Even where the non-disclosure is established, the position is somewhat confused. It was held in *Dormeuil Freres SA and Another v Nicolian International (Textiles) Ltd*⁸¹ that the correct time for hearing an application for discharge for non-disclosure is the trial, as normally the order has been executed and the issue is one of damages. No distinction was drawn here between Anton Piller orders and Mareva injunctions. Maybe normally no harm is done by waiting until the trial in the case of an executed Anton Piller order, but this is hardly the case with a Mareva injunction whereby assets are still frozen although the original *ex parte* order was improperly obtained. This has been pointed out in subsequent cases,⁸² but further guidance is needed. In *Lock International*⁸³ an Anton Piller order was discharged without waiting until the trial because the non-disclosure involved the plaintiff's financial standing. If there was any risk that the plaintiff might become unable to satisfy its cross-undertakings in damages, it would be wrong to make the defendant wait any longer to enforce them.

79. *Supra* n 14.

80. *Supra* n 11, 133.

81. [1988] 1 WLR 1362.

82. *Ali and Fahd Shobokshi Group Ltd v Moneim and Others* [1989] 1 WLR 710. See now *Tate Access Floors Inc v Boswell* *supra* n 16.

83. *Supra* n 15.

This danger is well illustrated by the recent case of *Manor Electronics Ltd v Dickson*⁸⁴ where an Anton Piller order in a case where the plaintiff alleged misuse of confidential information by an employee was discharged for non-disclosure of the plaintiff's finances after it was executed. In fact the plaintiff had been unable to substantiate its case and had been ordered to pay the costs on discontinuing the action. The plaintiff then went into liquidation leaving the defendant's costs of £1,000 and damages arising under the undertakings unpaid.

Sometimes it transpires that the plaintiff has failed to disclose the most material of matters, for example, that part of the action has been settled and that the defendant has a large counterclaim.⁸⁵

It would be hard to disagree with one commentator who has said that "[t]he present practice amounts to one of shooting first and compensating later."⁸⁶ He remarks that the Anton Piller order and Mareva injunction met with universal approval, but "[n]ow, however, we have good reasons for wondering whether our forebears were not the wiser for refraining from such invention."⁸⁷

THE WRIT NE EXEAT REGNO AND THE INJUNCTION AGAINST LEAVING THE JURISDICTION

Some may be surprised to hear that the courts are invoking equity's assistance to restrict a defendant's freedom by preventing the defendant from leaving the jurisdiction, and that this may be done even though the case against the defendant (which is civil, not criminal) has not yet been proved. This section will examine recent developments in the use of the newly-revived writ ne exeat regno⁸⁸ and the newly discovered jurisdiction to grant an interlocutory injunction prohibiting the defendant from leaving the country and ordering delivery up of the defendant's passport.

84. "All procedural undertakings for orders must be scrupulously honoured" *The Times*, 8 February 1990, 38. The action, which failed, was against the plaintiff's solicitors.

85. *Behbehani and Others v Salem and Others* [1989] 2 All ER 143 (decided 1987).

86. A Zuckerman "Practice and Procedure" (1986) All ER Rev 225, 227.

87. *Ibid*, 225.

88. Meaning "that he should not depart from the Kingdom". In Australia the writ is called "ne exeat colonia".

The ancient prerogative writ *ne exeat regno* emerged in the thirteenth century and was later adapted by equity as a means of coercing the defendant to give security on pain of arrest in cases where the debt was equitable and the defendant was not, therefore, liable to arrest at law. Until recently it was thought to be obsolescent if not obsolete. Thus it is stated in *Snell's Principles of Equity* that the remedy "must be regarded as obsolete or almost so".⁸⁹ Recently, however, it has enjoyed a revival. Before examining the recent cases, it should be said that the possibility of arrest for debt at law is extremely limited, and is governed by section 6 of the United Kingdom Debtors Act 1869 ("Debtors Act"), as amended by section 11 of the United Kingdom Administration of Justice Act 1970. By the maxim that equity follows the law, the writ *ne exeat regno* is limited to cases of equitable⁹⁰ debts where the conditions of section 6 of the Debtors Act are satisfied. The point of the writ, of course, is to prevent the defendant from leaving the jurisdiction without giving security for the debt.

The conditions for its grant were considered by Justice Megarry in the leading modern case *Felton and Another v Callis*⁹¹ where the writ was held to be still extant. It was there held that four conditions must be satisfied, that the standard of proof is high, and that the remedy is discretionary even where the conditions are satisfied. His Lordship added that the conditions are not to be relaxed because a creditor who lends without security must abide by the consequences. The conditions are as follows:

- (1) The action is the equitable equivalent of one in which the defendant would have been liable to arrest at law before the passing of the Debtors Act.
- (2) A good cause of action for at least £50 is established.
- (3) There is "probable cause" for believing that the defendant is "about to quit England" unless arrested.
- (4) The absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action.⁹²

89. P Baker and P Langan *Snell's Principles of Equity* 28th edn (London: Sweet & Maxwell, 1982) 567.

90. LJ Anderson "Antiquity in Action - Ne Exeat Regno Revived" (1987) 103 LQR 246 questioning whether the writ should be confined to equitable claims, as other equitable remedies are available for legal claims.

91. [1969] 1 QB 200. The history of the writ is outlined in *Allied Arab Bank Ltd v Hajjar* *infra* n 98.

92. *Felton* *supra* n 91, 211.

The writ was refused in this case because there was no equitable debt but only a legal contractual obligation, and in any event conditions (1) and (4) were not satisfied. The case illustrates how narrow is the scope of the writ. Even assuming an equitable obligation, condition (1) is extremely difficult to satisfy, and likewise condition (4) when properly understood. It must be emphasised that it is not enough that the defendant's absence might prejudice the plaintiff in the *execution* of any judgment the plaintiff may get, that is by preventing recovery of the fruits of the action by removing assets from the jurisdiction. It must be shown that the defendant's absence will materially prejudice the prosecution of the action, which is a very different thing. Examples might be where the defendant is a trustee and alone has all the information and documents relating to the trust property,⁹³ or where the trustee is required as a witness.

Some recent cases have shown a tendency to relax the conditions in an unjustifiable way, contrary to the exhortations of Justice Megarry. In *Lipkin Gorman v Cass*⁹⁴ a solicitor stole £200,000 of clients' money and spent it on gambling. He was now in prison. The plaintiff firm needed an inquiry into the defendant's accounts and deposits. An injunction restraining dealings had been granted, also a disclosure order (which had not been complied with) and the writ *ne exeat regno*. Some difficulty arose over the fourth condition (prejudice in prosecution of the action) but this was overcome on the basis that the plaintiff needed the defendant's presence to frame an order for delivery up (of moneys and properties representing the £200,000) in a form which could be properly executed. Until this was done, the plaintiff was still prosecuting the action rather than proceeding to execution. More worrying was the finding that the third condition (probable cause for believing that defendant about to quit England) was satisfied. The defendant had been in Israel before he was imprisoned and planned to return there when released which might be in October, some five months hence. Justice Walton held that the facts were "within the

93. *Hands v Hands* (1881) 43 LT 750.

94. "Writ assists in judgment not execution" *The Times*, 29 May 1985, 16; cf *Le Clea v Trot* (1704) Prec Ch 230. It was said in *Al Nahkel*, *infra* n 97, 238 that the writ in *Lipkin Gorman v Cass* was never executed and was discharged before the defendant was released from prison. The plaintiffs subsequently failed to recover the money from the gambling club and the bank where the client account was held: *Lipkin Gorman v Karpnale Ltd and Another* [1989] 1 WLR 1340.

spirit”⁹⁵ of the third condition because he might abscond when on parole and so it was not possible to assume he would remain in prison until the end of his term: “Prisoners absconding on weekend parole were not unknown.”⁹⁶ One can only comment that if the third condition was satisfied here, there would hardly be a case where it would not be. Nevertheless Justice Walton upheld the grant of the writ, to remain in force until the defendant complied with the disclosure orders.

Also open to criticism is *Al Nahkel for Contracting and Trading Ltd v Lowe*⁹⁷ (“*Al Nahkel*”). The defendant had allegedly stolen £14,000 from the plaintiff in Saudi Arabia. He flew to London carrying large sums in cash, intending to fly to Manila the next day. The plaintiff sought a Mareva injunction (which prevents a defendant from disposing of or otherwise dealing with his assets) and a writ *ne exeat regno* unless the defendant gave security for £14,000. The writ was granted in support of the Mareva injunction to prevent the defendant from leaving with the money in order to frustrate the plaintiff’s claim. The judge commented that the writ was rarely granted today because of the availability of the Mareva injunction. In the extreme circumstances of the present case, however, it was unlikely that the Mareva injunction could be served on him before he left. The writ *ne exeat regno* enabled his arrest at Gatwick Airport and in this way allowed the Mareva injunction to be effective. It will be appreciated, of course, that the claim against the defendant had yet to be proved. He appeared to be a rogue, but it need hardly be said that this is irrelevant to the question whether there was jurisdiction to detain him. The difficulty about this case is that the fourth condition was not satisfied. The defendant’s presence was not necessary to the *prosecution* of the action, but rather for the *execution* of any judgment. In other words, to keep him in England in order to serve him with the Mareva injunction would assist the plaintiff to recover the fruits of his action, but was not essential to its prosecution. A Mareva injunction is to aid execution, not prosecution, and any order made in support of it must be for the same purpose.

95. *Lipkin Gorman v Cass* supra n 94.

96. *Ibid.*

97. [1986] QB 235. See also *Thaha v Thaha* (1987) 17 Fam Law 234.

The case may be contrasted with *Allied Arab Bank Ltd v Hajjar and Others*⁹⁸ (“*Hajjar*”), which illustrates the draconian nature of the remedy. The writ had been granted requiring a security of £36 million (a sum which the defendant, a Jordanian, had guaranteed). A Mareva injunction and a disclosure order were also granted. The defendant could not raise the security and spent “one of the most distressing and humiliating nights of his life”⁹⁹ in jail. He was released from custody on entering into a bond for £250,000 and surrendering his passport. On appeal the writ was set aside. The action (being for damages for fraudulent conspiracy rather than an action on the guarantee) gave rise to no claim in equity, nor was there a debt for a sum certain. The plaintiff’s purpose was to preserve the assets by the Mareva injunction so that they would be available for execution. The defendant’s presence was not necessary to the prosecution of the action. He was therefore released from his bond and an inquiry as to damages was ordered. The plaintiff had taken a chance by lending unsecured, knowing that the money would be used abroad. *Al Nahkel* was unobjectionable if it merely suggested that the writ could issue alongside a Mareva injunction if the conditions of both were satisfied (so that the arrest might incidentally prevent a breach of the Mareva injunction), but was doubtful in so far as it suggested that the writ could issue in support of a Mareva injunction, to require the defendant to identify the assets. That overlooked the distinction between prosecution and execution.¹⁰⁰

This statement of the law is to be preferred, but it may be of concern to note that *Hajjar* suggested that if the plaintiff is merely seeking to enforce a Mareva injunction, so that *ne exeat regno* is inappropriate, the proper remedy is an interlocutory injunction against leaving the country. Does this not allow the plaintiff to bypass the safeguards and restrictions discussed above? As has been well said, this novel remedy is:

[A]n altogether more fashionable procedure, designed to do all the work of the writ *ne exeat regno* but without the shackles of compliance with section 6 of the Debtors Act.¹⁰¹

98. [1988] QB 787.

99. *Ibid*, 789.

100. It has been suggested that the writ could properly be granted in aid of an Anton Piller injunction, whose object is to preserve evidence and to enable the plaintiff to obtain judgment. It is, therefore, concerned with the prosecution of the action. See N Andrews “The Writ *ne exeat regno* and related relief” (1988) 47 Cambridge LJ 364.

101. *Supra* n 87, 260. See also C Harpum “The said defendant will not go into parts beyond the seas...” (1986) 45 Cambridge LJ 189. The injunction “has even less

This new injunction will now be examined. An interlocutory injunction (that is, one granted before final judgment) may be granted under section 37 of the Supreme Court Act if it appears to the court to be "just and convenient to do so". The jurisdiction is not as wide as it seems, as the plaintiff must have some legal or equitable right.¹⁰² The first example of an injunction against leaving the country is *Bayer AG v Winter and Others*¹⁰³ ("Bayer"), which concerned counterfeit insecticide purporting to be a product of the plaintiff. The English Court of Appeal held that the court should not shrink from relief of a novel character if necessary to protect the plaintiff. The injunction was granted to prevent the defendant (who was British but resident in Austria) from leaving England before Mareva injunctions and Anton Piller¹⁰⁴ orders could be executed. In fact there seemed to be no evidence that he was about to leave the country, in contrast with the *Al Nahkel* case. The interference with the defendant's liberty was considered outweighed by the hardship to the plaintiff if he lost the benefit of his other injunctions. It was conceded that the writ *ne exeat regno* was inapplicable (because the action was for an unliquidated sum). The court approached the matter on the strange basis that the order would do the defendant no harm. Thus Lord Justice Fox said:

[S]o far as the first defendant is concerned, one asks what harm will this order do him? If he says it will cause him some embarrassment or hardship, he can apply to the High Court forthwith, on evidence, to ask that it be varied or, if necessary, discharged.¹⁰⁵

Similarly Lord Justice Ralph Gibson said that if the defendant complied with the order "it will cause him very little trouble."¹⁰⁶ He added that the defendant was protected by the plaintiff's undertaking in damages.

jurisdictional legitimacy" than the writ *ne exeat regno*; and "the practical consequences are frightening": R P Meagher W M C Gummow and J R F Leane *Equity Doctrines and Remedies* 2nd edn (Sydney: Butterworths, 1984) 576.

102. H G Hanbury R H Maudsley and J E Martin *Modern Equity* 13th edn (London: Stevens, 1989) 704. See now *P v Liverpool Daily Post and Echo Newspaper Plc* [1990] 2 WLR 494.

103. [1986] 1 All ER 733. See also "Injunction keeps mother within jurisdiction" *Re I (a minor)* The Times, 22 May 1987, 13; *Arab Monetary Fund v Hashim* [1989] 1 WLR 565.

104. To prevent the removal or destruction of evidence.

105. *Bayer* supra n 103, 737.

106. *Ibid*, 738.

This novel remedy was also granted *In re Oriental Credit Ltd*,¹⁰⁷ where a company director left the jurisdiction shortly before the company went into liquidation and did not reply to communications. It was known that he would return for a short time on 29 June. On 26 June the liquidator got an order under section 561 of the United Kingdom Companies Act 1985 for the private examination of the director on 21 July and an ex parte injunction (granted in camera) restraining him from leaving the country until after this date, over three weeks hence. On 1 July the director applied for the discharge of the injunction but failed. Justice Harman held that the court had jurisdiction to grant it under the Supreme Court Act on the basis that it was necessary to ensure compliance with the Companies Act order. But where was the liquidator's legal or equitable right, which is necessary to the grant of an injunction? It was agreed that the liquidator had no cause of action but this was overcome by referring to a decision of the House of Lords¹⁰⁸ where Lord Goff had held that the power to grant injunctions was unfettered and that it was impossible to foresee every circumstance in which it would be right to make the remedy available. Justice Harman construed Lord Goff's words liberally:

In saying that, he was (although without, I think, express knowledge and certainly sub silentio) alluding to what Fox LJ had said in *Bayer AG v Winter*.¹⁰⁹

Lord Goff was, therefore, confirming the court's power to grant novel relief where necessary. Justice Harman added that

[I]t would be astonishing ... if the court ... [were] to have to hold up its hands and say "Oh dear, oh dear, how very awkward, there is nothing we can do."¹¹⁰

Thus the order was granted even though the defendant

[U]ndoubtedly has real and urgent need to depart for the purpose of very proper matters of his family in Pakistan.¹¹¹

107. [1988] Ch 204.

108. *South Carolina Insurance Co v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1989] AC 24, concerning an injunction to restrain foreign proceedings.

109. *Supra* n 107, 207.

110. *Ibid*, 208. There is some authority for the grant of an injunction to ensure the effectiveness of a court order. See *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1988] 3 WLR 1191; "No ban on architects indemnity" *Normid Housing Association v Ralphs* *The Times*, 18 July 1988, 26.

111. *Supra* n 107, 208.

Nothing less than a bond for £250,000 would procure the discharge of the injunction. The defendant's proffered undertakings were inadequate, coming from:

[a] gentleman who is a foreigner, with no allegiance to this country, whose company in this country is insolvent....¹¹²

His Lordship even found it necessary to add that the defendant's brother and co-director was "detained in foreign parts for want of proper payment of debts there."¹¹³

These cases may be contrasted with the approach of Justice Scott in *Bayer AG v Winter (No 2)*,¹¹⁴ where the plaintiff sought a further order that the defendant attend court for cross-examination¹¹⁵ as to his assets and that he be restrained from leaving England for a period necessary to enable this to take place. This period would be at least a week or two, as the hearing was on Christmas Eve. Justice Scott emphatically rejected both applications, as being unprecedented:

I am doubtful whether orders of this sort are justifiable in this case or any other ... there has been a recent tendency on the part of the courts to make more and more draconian, more and more interrogatory types of interlocutory orders in order to try and combat the rising level of international fraud.... That tendency seems to have resulted in ex parte orders of an increasingly extensive sort being made. In my view, the basis on which ex parte orders can properly be made requires to be very carefully examined. Defendants are entitled, prima facie, not to have assumptions made against them and orders made against them without a hearing at which they can be represented and can put forward their case.... So far, however, there has been no proper opportunity for [the defendant] to answer the case made against him. The plaintiffs have obtained an order on an ex parte application made in camera ... Star Chamber interrogatory procedure has formed no part of the judicial process in this country for several centuries.¹¹⁶

Not even the police had such powers as the plaintiff was invoking to subject a citizen to cross-examination before a judge to discover the truth about his misdeeds. It could not be right to subject him to such a

112. Ibid, 208.

113. Ibid, 209.

114. [1986] 1 WLR 540.

115. Because the plaintiff considered that the defendant's answers, given during a six hour period of questioning by the plaintiff's solicitors on the day the Anton Piller order was served, did not comply with the disclosure order.

116. Supra n 114, 543-544.

process in a civil case.¹¹⁷ If the defendant had breached the previous order, the remedy would be to seek committal at an inter partes hearing.

It is suggested that the approach of Justice Scott is to be preferred. Orders interfering with the defendant's liberty in a civil case which has yet to be proved, and which are obtained ex parte and in camera, should not be permissible without clear statutory authority.

CONCLUSION

We are all familiar with Lord Denning's statement that "Equity is not past the age of childbearing",¹¹⁸ but we should also have regard to the warning of Justice Bagnall in *Cowcher v Cowcher* that "its progeny must be legitimate - by precedent out of principle".¹¹⁹ Lord Denning was referring to the so-called "new model" constructive trust, but this was subsequently described in Australia as having suspect legitimacy: "at best it is a mutant from which further breeding should be discouraged".¹²⁰ Should the same be said of the recent innovations in the field of equitable remedies? Many will share the reservations of Justice Scott, discussed above, concerning the Anton Piller order and the injunction against leaving the country.¹²¹ Others may doubt the wisdom and efficacy of the new "world-wide" Mareva injunction.

I would like to finish by quoting the famous words of Lord Selborne in *Barnes v Addy*, repeated by Lord Upjohn in his powerful dissent in *Boardman v Phipps*:

There would be no better mode of undermining the sound doctrines of equity than to make *unreasonable and inequitable* applications of them.¹²²

117. Such an order for cross-examination was made by consent in *House of Spring Gardens Ltd and Others v Waite and Others* (1985) 11 FSR 173. This was relied on in *In re Oriental Credit Ltd* supra n 107, but Scott J in *Bayer (No 2)* supra n 114 doubted whether the order could have been made without consent. *Bayer (No 2)* was not cited in *In re Oriental Credit Ltd*.

118. *Eves v Eves* [1975] 1 WLR 1338, 1341.

119. [1972] 1 WLR 425, 430.

120. *Allen v Snyder* [1977] 2 NSWLR 685, 701.

121. Supra 147-149, 167-168.

122. [1967] 2 AC 46, 133 citing *Barnes v Addy* (1874) 9 Ch App 244, 251 (emphasis added).