MAREVA INJUNCTIONS AND ANTON PILLER ORDERS

by the HONOURABLE MR. JUSTICE C.F. TALLIS

SASKATCHEWAN COURT OF APPEAL

AUGUST 1984

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I. History of the Mareva Injunction

The Mareva Injunction is a species of interlocutory injunction.[1] This remedy was developed by the Court of Chancery and finds its roots in Section 25(8) of the Supreme Court of Judicature Act 1873 which provides:

> 25(8) A mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made.[2]

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1. Gertner, Prejudgment Remedies for Rationalization, (1981) 190 H.L.J. 503.
2. see s. 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. amended (now s.37(1) of the Supreme Court Act of 1981) It should be noted that the common law jurisdictions in Canada all give their courts the same powers. See: B.C.: Law and Equity Act, R.S.B.C. 1979, c. 24, s. 36; Alta.: Judicature Act, R.S.A. 1980, ch. J-1; Sask: Queen's Bench Act, R.S.S. 1978 ch. Q-1, s.45.8; Man: Queen's Bench Act, R.S.M. 1970, c. C-280, s. 59(1); Ont: Judicature Act, R.S.O. 1980, c. 223, s. 19(1); N.S.: Judicature Act, S.N.S. 1972, ch. 2, s. 39(9); N.B.: Judicature Act R.S.N.B., 1973, c. J-2, s. 33; P.E.I.: Judicature Act, R.S.P.E.I. 1974, cap. J-3, s. 15(4); Nfld.: Judicature Act, R.S. Nfld. 1970, ch. 187, s. 21(m); N.W.T.: Judicature Ordinance, R.O.N.W.T. 1974, c. J-1, s. 19(h); Yukon: Judicature Ordinance, R.O.Y.T. 1978, c. J.-1, s. 10(1)(h).
   McAllister, Mareva Injunctions (1982-83) 28 C.P.C. 1, at p. 71 notes that the Mareva injunction has been given statutory force in England by the enactment of s.37(3) of the Supreme Court Act, 1981.

The jurisdiction to grant this form of relief is equitable and discretionary in nature and is not exercised simply as a matter of course upon certain facts being shown. A Mareva injunction is really a specialized form of the injunctive remedy. Its history is described in somewhat colourful language by Lord Denning at p. 133 of his book The Due Process of Law, as follows:

> In most countries of the world a creditor can impound the property of his debtor--at the outset--long before he has got judgment against the debtor: and then have the property-- or its equivalent--retained as security for payment of the debt in case he afterwards gets judgment... But English law had nothing. In England a creditor could seize nothing unless he got judgment against the debtor. This was very serious for the creditor. Some time always elapses between the issue of a writ and the obtaining of a judgment. All sorts of delaying tactics can be put up by a debtor. Meanwhile he can get rid of his assets in all kinds of ways. A familiar device is to put them into the name of his wife: and say that they always belonged to her. To overcome such devices, there is machinery--after judgment--to make him bankrupt and to set aside the device as a being a fraud on the creditor. Such machinery is not very effective--even against an English debtor. But it is quite useless if the debtor absconds and goes off to a foreign country taking his assets with him: or if he lives in a foreign country and removes his assets outside

England.[3]

Prior to the emergence of the Mareva injunction Canadian Courts were basically disciples of the Rule "that there shall be no execution before judgment." Except for the odd exception, it is a fundamental principle of law that no injunction would be granted prior to trial to restrain a defendant from disposing of or dealing with his or her assets.[4] The major exceptions to this rule are cases of fraud, and for preservation of the subject matter of litigation.[5]

According to one commentator "[t]hey are not broad exceptions and courts have in the past not readily found situations which allow for their application. He concludes

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3. (1980) Lord Denning provides a concise historical review of the development of the Mareva injunction in Part IV of this book. He also updates his overview in The Closing Chapter (1983) at pp. 225-235. In Due Process of Law, at pp. 123-131, and in The Closing Chapter, at pp.235-240 he also gives a brief account of the development of "Anton Piller" orders, which are discussed in part IV below.
4. This principle is derived from the Rule in Lister & Co. v. Stubbs (1890) 45 Ch. D. 1; [1886-90] All E.R. 797 (C.A.) See also Gertner, Mareva Injunctions: Here to Stay, But..., (1984) 36 C.P.C. 1. at pp. 1-2; Montgomery J. in Liberty National Bank and Trust Co. v. Atkin et al, (1981) 20 C.P.C. 55, 31 O.R. (2d) 715, 121 D.L.R. (3d) 160 (H.C.) (further references are to 20 C.P.C.) at pp. 59-60; and McAllister, supra fn. 2, at pp. 18-31.
5. Jessiman, The Mareva Injunction in B.C., (1984) 18:1 U.B.C.L.R. 143, at p. 146.

that:

> The restrictions inherent in most pre-trial attachment procedures, whether by way of garnishment, imprisonment, writ of attachment, absconding debtor's legislation or as exceptions to the Rule in Lister & Co. v. Stubbs, have not provided satisfactory recourse for many creditors and our law has been deficient in this regard for some time. At least one author is inclined to view the Mareva cases as a judicial cure to correct a major weakness in English debtor-creditor law.[6]

Commercial shipping interests in London found the rule in Lister to be an especially difficult one to be bound by. Consequently, the Mareva injunction started life as a remedy in the City of London, relating to shipping litigation.[7] In The Siskina, Lord Diplock noted that its basic rationale and purpose was "to prevent a judgment against a foreign defendant for a sum of money being a 'brutum fulmen'.[8] Thus the remedy

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6. Ibid, at p. 146. This comment is elaborated at pp. 146-147.
7. See, for example: Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, [1975] 2 LLoyd's Rep. 137 (C.A.); Mareva v. International Bulkcarriers S.A.; The Mareva [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.). Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) [1978] Q.B. 644, [1977] 3 All E.R. 324, [1977] 2 Lloyd's Rep. 397 (C.A.); The Siskina [1979] A.C. 210, [1977] 3 All E.R. 803, [1978] 1 Lloyd's Rep. 1 (H.L.); and Third Chandris Corporation v. Unimarine [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 3 W.L.R. 122 (C.A.) (all subsequent references to any of the above are to the All E.R. series). See also Powles, The Mareva Injunction, [1978] J.B.L. 504.
8. Ibid, at p. 822.

started out as a limited exception to the general proposition that before judgment, a defendant could freely deal with his assets.

The Mareva injunction however, was not destined to remain a limited remedy. An English commentator has written:

> The Mareva injunction, as created and subsequently administered, has developed into a potent and widely used weapon in a plaintiff's armoury. From its early appearance in shipping cases, it has been applied in many cases involving shipping and commercial transactions and has been developed to apply in other fields, for example to aircraft. From its development in the Commercial Court it has been adopted by other Courts and applied in a variety of cases. In particular, the injunction has recently been applied to a personal injury case and to a case concerning the proceeds of the sale of real property... [R]ecent decisions have classified and expanded earlier established principles.[9]

The outcome of this classification and expansion by the English Courts is outlined briefly below.[10]

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9. Powles, The Mareva Injunction Expanded, [1981] J.B.L. 415, at p. 415. In Canada, the Mareva principle has been applied primarily in the area of debtor-creditor relations, and has been similarly refined, although there are still areas which require clarification from both the jurisprudential and practical perspectives.
10. In addition to the Powles articles, supra, fn. s. 7 and 9, there are a number of other works which outline this development in a comprehensive fashion. See Denning, supra, fn. 3; Jessiman, supra, fn. 5; Gertner, supra, fns. 1 and 4; McAllister, supra, fn. 2; and, Hetherington (ed), Mareva Injunctions, (1983), ch. 1.

At the outset, it should be observed that the Mareva injunction started out as a useful device for dealing with foreign defendants who had assets located in England. However, that notion was soon challenged in the English Courts with some of the judges leaning in favour of extending the remedy, and accordingly taking the position that matters of nationality, domicile and residence were matters to be taken into account only in assessing the balance of convenience in granting an injunction. Gertner notes that:

> What started out as a remedy to be used only against foreign or non-resident debtors soon developed into a general prejudgment remedy, available against commercial and non-commercial debtors alike, whether the action sounded in debt or damages, and irrespective of the resident or non-resident status of the debtor.[11]

In his reasons for judgment in Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha. [12] Lord Denning approached the problem in this way:

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11. Supra, fn. 4, at p. 2. See for example, Barclay v. Johnson v. Yuill [1980] 3 All E.R. 190, [1980] 1 W.L.R. 1259 (Ch. D.) (subsequent references are to [1980] 3 all E.R.), at p. 195.

12. [1980] 3 All E.R. 409, [1980] 1 W.L.R. 1259, [1980] 2 Lloyd's Rep. 565 (C.A.) (subsequent references are to [1980] 3 All E.R.).

> So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.[13]

The English Courts also developed a set of conditions that must be satisfied before a Court will grant an applicant a Mareva injunction, described by Gertner as a "code of procedure applicable to Mareva injunction cases.[14] Underlying this "code of procedure" is the fundamental fact that this type of injunction is made ex parte. Its purpose is to strike quickly and to tie up assets so that they cannot be electronically transferred out of the jurisdiction. It is this characteristic of a Mareva injunction which has lead most courts to regard it as a drastic procedure and extra-ordinary remedy, and to be careful to ensure "a proper balancing of the interests of plaintiffs, defendants and third parties, and . . . [to warn] . . . against overreaching by creditors resorting to this new judicially fashioned prejudgment remedy."[15]

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13. Ibid, p. 412.
14. Gertner, supra, fn. 4, at p. 3.
15. Ibid, at p. 3.

While the specific procedural mechanics will vary from jurisdiction to jurisdiction, the conditions set out by the English Court of Appeal in Third Chandris Shipping Corporation v. Unimarine S.A.; The Pythis have generally been adopted by Canadian Courts.[16] In his judgment Lord Denning stated:

> These are the points which those who apply for it should bear in mind. (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know: see The Assios. (ii) The plaintiff should give particulars of his claim against the defendant, stating the

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16. Supra, fn. 7. See for example: B.P. Exploration Co. (Libya) Ltd. v. Hunt [1981] 1 W.W.R. 209, 23 A.R. 271, 16 C.P.C. 168, 114 D.L.R. (3d) 35 (N.W.T.S.C.); Liberty National Bank, supra, fn. 4; Chitel v. Rothbart, (1982) 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (C.A.); Feigelman et al v. Aetra Financial Services Ltd. et al [1983] 2 W.W.R. 97, 36 C.P.C. 20, 19 Man. R. (2d) 295, 143 D.L.R. (3d) 715 (C.A.) leave to appeal to S.C.C. granted (1983) 19 Man. R. (2d) 179, 46 N.R. 266 (S.C.C.); Humphreys v. Buraglia (1983) 36 C.P.C. 44, (1982) 39 N.B.R. (2d) 674, 103 A.P.R. 674, 135 D.L.R. (3d) 535 (C.A.); and Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima and Nagashima (1983) 42 B.C.L.R. 1, 33 C.P.C. 42 (C.A.) (all subsequent references to the above cases are to the C.P.C. series). The Canadian decisions will be discussed in more detail in Part II below. At this stage it is appropriate to note that Canadian courts have not resolved the question "as to what degree the plaintiff must establish the strength of his or her claim on the merits." (See McAllister, supra fn. 2, at p. 69). The English Courts have tended to adopt the test enunciated by the House of Lords in American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396, [1975] 1 All E.R., and have interpreted it to mean that a "good arguable case" suffices to satisfy the threshold requirement for a Mareva application.

> ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give some grounds for believing that the defendants have assets here... In most cases the plaintiff will not know the extent of the assets. He will only have indications of them. The existence of a bank account in England is enough, whether it is in overdraft or not. (iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient... other grounds may be shown for believing there is a risk. But some such should be shown. (v) The plaintiffs must, of course, give an undertaking in damages, in case they fail in their claim or their injunction turns out to be unjustified.[17]

In Barclay v. Johnson v. Yuill,[18] Megarry V.C. discussed the two lines of authority represented by Lister & Co. v. Stubbs.[19] and The Mareva[20]. In summarizing The Mareva line of authority, the learned Vice Chancellor further refined requirement (iv), as outlined by Lord Denning in Third Chandris, above, emphasizing the risk of the defendant removing his assets from the jurisdiction. He stated:

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17. Supra, fn. 7, at pp. 984-985.
18. Supra, fn. 11. at pp. 193-194
19. Supra, fn. 4.
20. Supra, fn. 7.

> It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, may run the risk, common to all, that the defendant must dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilised for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due: see Iraqi Ministry of Defence v. Arcepey Shipping Co. SA [1980] 1 All ER 480 at 486, [1980] 1 WLR 488 at 494 per Robert Goff J.[21]

Megarry, V.C. added that "it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default."[22]

21. Ibid, fn. at p. 194.
22. Ibid, p. 195.

The learned Vice Chancellor also stressed the importance of carefully weighing the balance of convenience when deciding whether or not a Mareva injunction should be granted. He emphasized this consideration in these terms:

> The Mareva prohibition against making any disposition of the assets within the country is a normal ancillary of the prohibition against removing the assets from the country, and if this is likely to affect the defendant seriously I think that he is entitled to have this put into the scales against the grant of the injunction. Much may depend on the assets in question. If, as in many of the reported cases, there is merely an isolated assets here, the harm to the defendant may be small. On the other hand, if he is trading here and the injunction would 'freeze' his bank account, the injury may be grave. I think that he should be able to rely on the Lister principle except so far as it cannot be fairly reconciled with the needs of the Mareva doctrine. I would regard the Lister principle as remaining the rule, and the Mareva doctrine as constituting a limited exception to it.[23]

These principles, especially with respect to the exceptional character of the Mareva injunction, and the need for caution in granting the remedy, have been adopted by the Manitoba Court of Appeal.[24]

These guidelines were further extended in later English cases to account for the position of third parties, most

23. Ibid p. 195.
24. Feigelman, supra, fn. 16, at pp. 30-31.

often banks who, having notice of a Mareva injunction, might be affected by it.[25] An English writer notes that:

> ... Mareva injunctions have an immediate effect on third parties, and may, out of necessity from the terms of the injunction itself, or by further order of the court, involve such third parties in expenditure. Relief to third parties thus involved in the form of making the injunction subject to an undertaking by the plaintiff to pay all costs reasonably incurred by them was recently granted in Searose Ltd. v. Seatrain U.K. Ltd.[26]

In Searose Ltd. v. Setrain Ltd,[27] a case in which the third party was a bank, Robert Goff J. noted that the orders applied for would prejudice the bank, since the Bank would be required to incur costs in order to ascertain the existence and value of the defendant's account. Further, he pointed out that a bank, like every citizen who received notice of an injunction would risk proceedings for

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25. See, for example: Prince Abdul Rahman, supra, fn. 12; Z Ltd. v. A. [1982] Q.B. 558, [1982] 1 All E.R. 556, [1982] 1 Lloyd's Rep. 240 (C.A.); Clipper Maritime Co. v. Mineral import export; The Marie Leonhardt, [1981] 3 All E.R. 664, [1981] 1 W.L.R. 1262, [1981] 2 Lloyd's Rep. 458 (Q.B.); and, Searose Ltd. v. Seatrain U.K. Ltd. [1981] 1 W.L.R. 894, [1981] 1 All E.R. 806, [1981] 1 Lloyd's Rep. 556 (Q.B.) (subsequent references to Searose are to [1981] 1 W.L.R.). See also the discussion in McAllister, supra, fn. 2, at pp. 75-78.
26. Supra, fn. 9, at p. 429.
27. Supra fn. 25.

contempt if it did not comply with the orders. However, the learned judge did not think that the bank, where an account was unidentified, should incur the expense of ascertaining whether the alleged account existed without being reimbursed by the plaintiff for reasonable costs so incurred. He continued:

> Banks are not debt-collecting agencies; they are simply, in this context, citizens who are anxious not to contravene an order made by the court, an order which has been obtained on the application of, and for the benefit of, the plaintiff. Even where the particular branch of the bank is identified, some expense is likely to be incurred in ascertaining whether the defendant has an account at the branch. But where the branch is not identified, the bank will be put in a very difficult position. It is, I think, well known that Barclays Bank has over 3,000 branches in this country, and Lloyds Bank has over 2,000 branches. Are they to circulate all their branches? If they did so, it would involve them in great expense; moreover such an exercise cannot, in ordinary circumstances, reasonably be expected of them.[28]

He concluded that the problem could be solved by requiring the plaintiffs to give an undertaking, the effect of which would be:

> that a bank to whom notice of an injunction is given can, before taking steps to ascertain whether the

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28. Ibid. at p. 896. In Z. Ltd., supra, fn. 25, the Court of Appeal developed a more detailed set of guidelines applicable in cases where the third party is a bank. For a concise summary of this case, see McAllister, supra fn. 2 at pp. 77-78. McAllister notes, at p. 78 that the Canadian courts have not yet had to deal with cases "so factually complex as to raise serious questions of third party rights. However, once the doctrine is more firmly established in Canada, such issue will inevitably arise. When they do, our Courts may well look to the cases received above for guidance."

> defendants have an account at any particular branch, obtain an undertaking from the plaintiffs' solicitors to pay their reasonable costs incurred in so doing. The bank will then be protected; moreover the plaintiffs' solicitors will no doubt encouraged to limit their inquiry to a particular branch, or to certain particular branches.[29]

It should be noted that Robert Goff J., also commented that while he had "in this judgment dwelt upon the position of banks, because they are most likely to be affected, the undertaking so given could, if appropriate, be equally effective to protect other third parties similarly affected."[30]

English courts have also adapted certain of their powers to deal with the problem of "evasive defendants;" i.e.:

> defendants who have refused to supply details of their assets so that such assets cannot be specified in the order of the injunction, or who have refused to enter an appearance so that judgment in default cannot, technically, be entered until the injunction is removed, thus facilitating the removal of the assets before execution.[31]

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29. Ibid, at p. 896.

30. Ibid., at p. 896. For example, in Clipper Maritime, supra, fn. 25, the third party was not a bank, but a port authority. The Court granted a Mareva, subject to the plaintiff's undertaking to meet the reasonable costs of the authority. In addition, the authority was permitted to move the vessel within the port area for operational reasons.

31. Powles, supra, fn. 9, at p. 423. For details, see pp. 423-428. See also McAllister, supra, fn. 2, at pp. 71-75; Gertner, supra, fn. 1, at pp. 533-534, and fn. 4, at p. 14; Jessiman, supra, fn. 5, at p. 157; and, Denning, The Closing Chapter, supra, fn. 3 at p. 228.

These include the power to order discovery of documents[32] to order interrogatories,[33] and to enter judgment in default.[34]

The use of these powers in Canada remains largely an open question.[35] One commentator suggests with respect to discoveries, "Canadian courts might move in this direction since the relevant statutory provisions are identical to that which existed in England at the time of the ....[Bekhor]... decision and the inherent jurisdiction of our courts is presumably

32. A. v. C. (No. 2) [1981] 2 W.L.R. 634, [1981] 2 All E.R. 126 (Q.B.),[1980] 2 Lloyd's Rep. 200; and, A.J. Bekhor & Co. Ltd. v. Bilton [1981] 2 W.L.R 601, [1981] 2 All E.R. 565, [1981] 1 Lloyd's Rep. 491 (C.A.)

33. Bekhor v. Bilton, Ibid

34. Stewart Chartering Ltd. v. C. & O Managements S.A. [1980] 1 W.L.R. 460, [1980] 1 All E.R. 718, [1980] 2 Lloyd's Rep. 116 (Q.B.).

35. See Jessiman, supra, fn. 5, at p. 157, who notes that only one Canadian appellate court has dealt with this question. See Sekisui House, supra fn. 16 discussed infra, at p. 36.

the same as that of the English courts."36

II Canadian Mareva Injunctions

The Canadian response to the English developments has been described as cautious.[37] Gertner points out that it took nearly five years for the Mareva injunction developments in England to be accepted in Canada.[38] There are a number of detailed accounts of the history of the Mareva injunction in Canada.[39] This paper will concentrate on the cases which highlight this development in order to provide a basis for making generalizations about the law concerning the Mareva injunction in Canada today, and questions which remain to be addressed.

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36. McAllister, supra fn. 2 at p. 75.
37. Gertner, supra, fn. 4, p. 3.
38. Ibid p. 3.
39. See McAllister, supra, fn. 2 at pp. 52-71. (focuses specifically on Canadian cases); Jessiman supra fn. 5 (written from a British Columbia perspective); Gertner, supra, for 1, pp. 537-543; and, supra fn. 4, pp. 3-14 (focuses primarily on appellate court decisions to date).

Much of what follows must be read in light of the fact that the Supreme Court of Canada has not yet made any ruling on the availability of Mareva injunctions in Canada, or the guidelines which should be applied to applications for this remedy. It should be noted that leave to the Supreme Court of Canada from the decision of the Manitoba Court of Appeal in Feigelman v. Aetra Financial Services Ltd. [40] has been granted. [41] The decision of the Supreme Court of Canada in Feigelman will undoubtedly clarify some of the areas of uncertainty which will be noted below.

In B.P. Exploration Company (Libya) Ltd. v. Hunt [42] I concluded that the Supreme Court of the Northwest Territories had jurisdiciton to grant a Mareva type injunction to prevent a defendant from removing assets from the jurisdiction. Ontario courts[43] had reached

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40. Supra fn. 16.
41. Ibid
42. Supra fn. 16.
43. See for example: OSF Indust Ltd. v. Marc-Jay Invt. Inc. (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446,

a different conclusion, preferring the rule in Lister v. Stubbs[44], as reflected in the following passage from Bedell v. Gafaell:

> There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere quia timet and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.[45]

The B.P. case involved an application by the defendant to set aside ex parte orders granting a Mareva injunction and leave to serve ex juris granted on April 1, 1980.[46] The applicant defendant made 3 submissions, the first of which challenged the jurisdiction of the Court to grant a Mareva type injunction on the following ground:

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44. Supra fn. 4.
45. [1938] O.R. 726, [1938] 4 D.L.R. 443 (C.A.) (reference is to 4 D.L.R.)at p. 466.
46. Supra, fn. 16 at p. 170. The Mareva injunction issued is reproduced at pp. 171-172. The original order was varied on April 28, 1980, and again on May 22, 1980 as indicated at pp.172-173.

(1) The Mareva type injunction order should not have been granted because it is not an order that is consistent with the existing law of the Northwest Territories of Canada and accordingly the Supreme Court of the Northwest Territories had no jurisdiction to issue the same.[47]

In support of this contention, the applicant argued that "if the English courts did have jurisdiction to grant a Mareva type of injunction, then it was based upon a custom of local or limited character and accordingly is not part of our law"[48] I rejected this argument, and relied upon section 19(h) of the Judicature Ordinance R.O. N.W.T. 1974,[49] which is substantially the same as the provision underlying the Mareva line of cases in England and concluded that it was open to the Northwest Territories Supreme Court to adopt the English interpretation of this statutory provision.[50]

I also rejected the applicant's second[51]

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47. Ibid at p. 173.
48. Ibid at p. 173.
49. Ibid at p. 178.
50. Ibid at p. 178. For a review of the foundation Mareva cases in England, see pp. 178-181.
51. Ibid at pp. 182-186

and third submissions[52]. Only the third is relevant to the present discussion, and can be summarized as follows:

> (3) In any event, even if this court had jurisdiction to grant a Mareva type injunction, and even if the order was properly made for service ex juris, an injunction should not have been granted on the basis of the facts and circumstances of this case.[53]

I applied the guidelines discussed by Lord Denning M.R. in the Third Chandris case, concluding that the "material filed in support of this application" complied with those requirements.[54]

Following B.P. v. Hunt, Montgomery J., of the Ontario High Court of Justice delivered what was been described as "the landmark decision in Ontario"[55] in Liberty National

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52. Ibid at pp. 186-188.
53. Ibid at p. 173.
54. Ibid, at pp. 186-187. These guidelines were discussed supra, at p. 8.
55. McAllister, supra, fn. 2 at p. 55. See pp. 55-56 for a summary of the Liberty decision.

Bank & Trust Co. v. Atkin.[56] He first noted that the relevant statutory provision, Section 19 of The Jurisdiction Act. R.S.O. 1970, c. 228 was, "for all intents and purposes" the same as the legislation referred to in the Mareva line of cases decided by the English Court.[57] Montgomery J., then considered the traditional approach in Ontario as affirmed in OSF Indust. Ltd. v. Marc-Jay Invt. Inc and the leading Mareva cases from England, (i.e. Nippon Yusen Kaisha v. Karageorgis, The Mareva, Third Chandris Shipping, Barclay-Johnson v. Yuill, Al Sudairy v. Abu Taha)[58]. He referred to B.P. v. Hunt and Elesguro Inc. v. Ssangyong Shipping Co.[59], which both affirm the jurisdiction of Canadian Courts to issue Mareva injunctions, and concluded:

> In my view, the winds of change cry out for the new equitable remedy that Mareva provides. I adopt the

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56. Supra, fn. 4.
57. Ibid, at p. 59.
58. Ibid at pp. 60-65. See also the discussion of the development of the Mareva principle outlined in Part I, supra.
59. (1980) 19 C.P.C. 1 (Fed. Ct.).

> test laid down by the Master of Rolls in Third Chandris Shipping. I also adopt the proposition in Prince Abdul Rahman that, if there is a danger of the defendant absconding or of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that if the plaintiff obtains judgment he may not be able to have it satisfied, an injunction should issue if the safeguards in the test in Third Chandris Shipping are met.
>
> I cannot believe that the equitable jurisdiction of this Court should be any less than that of the English Court. The statute affording jurisdiction is practically the same. The size of Ontario and the complexity of its geography invite the remedy. In my view, the doctrine should not be restricted to the threat of removal of assets from Ontario.[60]

Since Liberty National Bank, four provincial appellate courts have recognized the Mareva injunction jurisdiction.[61] In Humphreys v. Buraglia, [62] the New Brunswick

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60. Supra, fn. 16, at pp. 66-67.
61. For a concise analysis of these decisions, see Gertner, supra, fn. 4 at pp. 4-14, and his general conclusions with respect to Marevas in Canada at pp. 14-15. There are other recent reported decisions from courts of first instance in some Canadian jurisdictions which support the Mareva injunction. See, for example: La Caise Populaire D'Ottawa Ltee v. Guertin et al (1983) 36 C.P.C. 63 (Ont. H.C.); Irving Oil Ltd. v. Biornstad, Biorn & Co. (1981) 35 N.B.R. (2d) 265, 88 A.P.R. 265 (Q.B.), Parkes v. Clarke et al (1983) 42 B.C.L.R. 268, (B.C.S.C.); Oilwood Supply Co. et al v. Audas et al (1983) 44 B.C.L.R. 268 (B.C.S.C. in Ch.); Deane v. LDS Cpn. (1970) Ltd. (1983) 44 B.C.L.R. 373 (B.C.S.C.); Bache Halsey Stuard Shields Inc. v. Chas Stanfied and Dobell (3rd Pty), (1983) 49 B.C.L.R. 396 (B.C.S.C.); MacIsaac, Clark & Co. & Koopmans, (1983) 50 B.C.L.R. 8 (B.C. Cty. Ct. in Ch.); Sask Workwear Inc. v. Ollinik, (1982) 23 Sask R. 177 (S.Q.B.); and Standard Life Assurance Co. v. Schutte, Sundance Invts. Inc. and Balek, (1983) 29 Sask. R. 161.
62. Supra, fn. 16.

Court of Appeal considerd an appeal by the defendant in an action for money due under an agreement with the plaintiff (respondent). The plaintiff had obtained an ex parte interlocutory Mareva type injunction restraining the appellant defendant from sale or disposition of his property until final disposition of the action or until further order. Upon receiving notice of the injunction, the defendant unsuccessfully applied to the Court of Queen's Bench to have it set aside. In a judgment delivered by Stratton J.A. on April 13, 1982, the appeal was dismissed.

On appeal, counsel for the the appellant argued that:

> ... that the order issued by the Judge included an order for a "Mareva injunction", a novel form of proceeding in this jurisdiction, the requirements for which were not established by the affidavits of Mr. Buraglia and his solicitor and, accordingly, the injunction ought to have been discharged.[63]

Stratton J.A, traced the development of the Mareva principle in England from Nippon Yusen and The Mareva to Third Chandris and Prince Abdul Rahman and concluded that:

> It is clear that the power to grant injunctive relief in the Mareva line of cases was founded upon s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which has a counterpart in s. 33 of the Judicature Act, R.S.N.B. 1973, c. J-2. Moreover, the right to such relief was not wholly novel in England

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63. Ibid, at p. 54.

> and is to be found already entrenched in the law of civilian jurisdictions and in the United States. Despite the reservations expressed by Lord Diplock and Lord Hailsham in The Siskina as to restrictions or modifications to be made to the Mareva injunction, the remedy is now widely used in England.[64].

He then noted that there were several reported decisions in Canada in which Mareva injunctions had been granted, and that the New Brunswick Civil Procedure Rules Revision Committee had recommended the enactment of a Rule of Court specifically providing for Mareva injunctions.[65] Even in the absence of a specific Rule for Marevas however, Mr. Justice Statton was still prepared to find that the Court had jurisdiction to grant a Mareva injunction:

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64. Ibid, at pp. 54-60
65. Ibid, at pp. 60-61. The Rule referred to by Mr. Justice Stratton is now in force. According to Gertner, supra, fn. 4, at p. 4, "Rule 40.03(1) prescribes the scope of the Mareva injunction jurisdiction adopted by the New Brunswick Legislative Assembly:

    > "40.03(1) Where a person claims monetary relief, the court may grant an interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick assets within New Brunswick of the person against whom the claim is made."

    Rule 40.03 then goes on to describe the matters that a Court should consider in determinng whether to grant a Mareva injunction and the length of time for which the injunction will remain in force. The New Brunswick Rules of Court also empower a Court to impose terms and conditions on the granting of a Mareva injunction, as in the case of any injunction or mandatory order.

    Gertner then comments on this approach to Marevas, at pp. 4-5.

> ... if there exists a substantive cause of action on which the plaintiff is suing or about to sue in this province and it appears that there is danger that the defendant may abscond or remove or dispose of his assets so as to prevent satisfaction of any judgment the plaintiff may obtain, I am of the opinion, for the reasons expressed in the Third Chandris Shipping case and in the Prince Abdul Rahman case, that the Courts of this province have jurisdiction in a proper case to grant an interlocutory judgment so as to prevent the defendant disposing of assets which otherwise might be available to satisfy a judgment obtained by the plaintiff. I would, however, repeat the admonition of Lord Denning that the Mareva injunction must not be stretched too far lest it be endangered and I would respectfully adopt as applicable to all applications for such injunctive relief the guidelines enumerated in the Third Chandris Shipping case.[66]

He concluded tht the plaintiff respondent in the case at bar had satisfactorily met the requirements outlined above, and accordingly that the discretion which the Judge of first instance had exercised should not be overruled.

The second appellate decision, Chitel v. Rothbart[67] was delivered by the Ontario Court of Appeal

66. Ibid, at p. 61.
67. Supra, fn. 16.

on December 2, 1982. The applicant plaintiff had originally sought to continue a Mareva type ex parte interlocutory injunction until trial before Mr. Justice Anderson, who referred it to the Court of Appeal pursuant to s. 34 of the Judicature Act in order to clarify the jurisprudence as to the availability of the Mareva injunction in Ontario.[68] Associate Chief Justice MacKinnon, who delivered the Court's decision held:

> Because of the failure to make full disclosure with the resulting incomplete and misleading picture of the relationship between the parties, I would not exercise my discretion to order continuance of the injunction until the trial of the action. I hold this opinion whatever view may be taken of the Mareva form of interlocutory injunction.[69]

The learned Associate Chief Justice then went on to discuss the question of the availability of Mareva injunctions in Ontario. He canvassed the leading English cases which developed and refined the Mareva principle, and concluded that:

> .... [u]nder certain limited and special conditions, it is a legitimate exercise of the discretion given a Court under s. 19(1) of the Judicature Act, R.S.O. 1980, c. 223. [the Ontario counterpart to s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925] to grant a Mareva injunction. This jurisdiction

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68. Ibid, p. 207.
69. Ibid, p. 213.

> is not limited by the nature of the proceedings. However, like Sir Robert Megarry, I regard the Lister principle as remaining the rule "with the Mareva doctrine as constituting a limited exception".[70]

Associate Chief Justice MacKinnon then considered the decisions of the Ontario High Court in OSF Indust. Ltd. v. Marc-Jay Invt. Inc., and concluded that "the learned Judge was in error in ...[concluding that there was no basis in law for the remedy of Mareva injunction in Ontario]... and the case cannot be used to stand in the way of the granting of a Mareva injunction in a proper case".[71] He continued with a discussion of the guidelines set out by Lord Denning in Third Chandris[72] in which he noted that items (i), (ii) and (v) of the guidelines are "standard considerations for the Courts of this province when considering the usual application for an interlocutory injunction.[73] MacKinnon, A.C.J.O. then referred to his earlier discussion of the decision of the House of Lords in American Cyanamid and reiterated his conclusion that "whatever the test may be regarding the granting of interlocutory injunctions

70. Ibid p. 228
71. Ibid, p. 228.
72. See text, supra at p. 8.
73. Supra, fn. 16 at pp. 228-229.

generally, in my view, the granting of a Mareva injunction, under special and limited circumstances, requires that the applicant establish a strong prima facie case".74

Turning to guidelines (iii) and (iv), he observed that they covered areas unique to the Mareva injunction. With respect to the material under item (iii) dealing with the assets of the defendant within the jurisdiction, MacKinnon, A.C.J.O., stressed that it

> ... should establish those assets with as much precision as possible so that, if a Mareva injunction is warranted, it is directed towards specific assets or bank accounts. It would be unusual and in a sense punitive to tie all the assets and income of a defendant who is a citizen and resident within the jurisdiction. Damages, covered by an undertaking as to damages, might be far from compensating for the ramifications and destructive effect of such an order.75

Finally with respect to guideline (iv), concerning the risk of removal of assets from the jurisdiction, he stated:

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74. Ibid, pp. 215-216, restated at p. 229. On the face of it, this is a higher standard than that set out in Humphreys and Feigelman, supra, fn. 16; the former requiring a "substantive cause of action", the latter, a "prima facie" case. See the discussion of this point in Gertner, supra fn. 4 at p. 14.

75. Ibid, p. 229.

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.[76].

While MacKinnon A.C.J.O. concluded by endorsing the Mareva principle for Ontario, he did so with the following proviso:

> The Courts must be careful to ensure that the "new" Mareva injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial. I would respectfully adopt what Grange J. said in C.P. Airlines Ltd. v. Hind (1981), 32 O.R. (2d) 591, 22 C.P.C. 179, 14 B.L.R. 233, 122 D.L.R. (3d) 498 at 503:
>
> > The adoption of the Mareva principle can lead to some sorry abuse. I would hate to see a defendant's assets tied up merely becaused he was involved in litigation. I do not think the American Cyanamid injunction rule can possibly apply.[77]

The next case, Feigelman et al v. Aetna Financial Services Ltd. et al is a decision of the Manitoba Court of Appeal, dated December 7th, 1982 from which leave to appeal to the Supreme Court of Canada has been granted.[78]

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76. Ibid, p. 229.
77. Ibid, p. 230.
78. Supra, fn. 16. This was a split decision, Matas J.A. (Freedman C.J.M. concurring) for the majority, and Huband J.A. dissenting. The Court split primarily on the issue of whether or not a Mareva injunction should be granted when there are other remedies available.

The Respondent defendant, by way of cross-appeal, sought to have a Mareva injunction set aside. In support of this position, counsel for the respondent:

> ... did not argue that the Mareva injunction has no place in Manitoba jurisprudence but argued that the practice is well settled here that the Court will not interfere to intercede before judgment and restrain a defendant from using his assets in the ordinary course of his business, in the absence of any improper conduct. If such conduct exists, it is argued, a creditor is entitled to pursue his remedies under the Fraudulent Conveyances Act, R.S.M. c. F160 (also C.C.S.M., c. F160), or the attachment provisions provided for in the Court of Queen's Bench Rules. And, assuming a Mareva injunction could be granted, counsel argued that the Court should be loathe to exercise its jurisdiction in the case of an unliquidated claim.79

In response to this argument, Matas, J.A., writing for writing for the majority, referred to an article by David Stockwood, Q.C.80 and a passage from B.P.

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79. Ibid pp. 27-28.
80. Mareva Injunctions, (1981) 3 Advocates' Q. 85, at pp. 97-98, quoted Ibid at pp. 28-29, as follows:

> The main argument which can be advanced against the granting of Mareva injunctions in Ontario is that there is in this province legislation which does not exist in England: The Fraudulent Conveyances Act R.S.O. 1970, c. 182 and The Absconding Debtors Act R.S.O. 1970 c. 2. The argument is that the Legislature has dealt with this situation, leaving the courts no room to grant Mareva injunctions. The counter-argument is that the legislation does not specifically oust the court's injunction jurisdiction in these situations and that there is no reason why the court should not supplement the statutory provisions by granting injunctions in cases which fall outside the strict statutory limits.

v. Hunt,[81] and held:

> If a claimant in Manitoba could bring his claim within the established procedure under either the Queen's Bench Rules or the Fraudulent Conveyances Act, it would not be necessary to invoke the Mareva injunction. In my view, the existence of these provisions does not preclude the issuance of a Mareva injunction in this jurisdiction.[82]

Mr. Justice Matas then went on to adopt the following, subject to general principles applicable to interlocutory injunctions, as applicable to Manitoba:

> ... the statement of principle expressed by Denning M.R. in Mareva, at pp. 214-215 [[1980] 1 All. E.R.], subject to the guidelines set out in Third Chandris Shipping Corp. v. Unimarine S.A. ... and Prince Abdul Rahman Bin Turki Ali Sudairy v. Abu-Taha, and subject

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81. Supra fn. 16, at p. 168, quoted Ibid, at p. 29 as follows:

> . . . learned counsel also submitted that there are rules of court dealing with absconding debtors and, accordingly, an equitable order should not be issued which is inconsistent with such provisions. The rules of court in this jurisdiction dealing with absconding debtors are not inconsistent with the injunctive relief sought: see RR. 490-98 [Northwest Territories Supreme Court Rules]. In my opinion such provisions do not deprive this court of granting a Mareva type injunction in this jurisdiction.

82. Supra, fn. 16, at p. 29.

> to the principles expressed by Megarry V.C. in Barclay Johnson, in particular at p. 195 [[1980] 3 All E.R.], where the learned Vice-Chancellor said that the Lister principle would remain the rule with the Mareva doctrine constituting a limited exception to it.[83]

In addition to setting out this general statement of principle, Matas J.A., also dealt with two ancillary issues. First, he noted that the Mareva injunction had not been confined to liquidated claims, and that "depending on the circumstances ... [he] would not refuse an injunction only on the ground that a claim for unliquidated damages is in issue."[84]

Secondly, Mr. Justice Matas considered what standard was appropriate for measuring the strength of a plaintiff's case where an application for Mareva injunction was made. He concluded that:

> In Manitoba, this Court has held, in Lambair Ltd. v. Aero Trades (Western) Ltd., [1978] 4 W.W.R. 397, 87 D.L.R. (3d) 500, [Leave to appeal to Supreme Court of Canada refused 87 D.L.R. (3d) 500n (S.C.C.)]that generally the test of a prima facie case should continue to be applied on applications for an interlocutory injunction. I would not apply any lesser test to applications for a Mareva injunction.[85]

83. Ibid at pp. 30-31.

84. Ibid., p. 31, As authority for this proposition, Matas J.A, cited Allen v. Jambo Holdings Ltd. [1980] 2 All E.R. 502, [1980] 1 W.L.R. 1252, (C.A.) where an injunction was granted based on a claim for damages in a personal injuries action; and, Faith Panton Property Plan Ltd. v. Hodgetts [1981] 2 All E.R. 877, [1981] 1 W.L.R. 927 (C.A.), where an injunction was granted to restrain disposal of assets in respect of court costs which had not been taxed.

85. Ibid, pp. 31-32

One other facet of the Feigelman decision is worthy of note. First, Matas J.A. found that the possible insolvency of the defendant should have no bearing on whether or not a Mareva injunction was granted since the purpose of the injunction, as expressed by Ackner L.J. in A.J. Bekhor & Co. v. Bilton

> ... was not to improve the position of claimants in an insolvency but simply to prevent the injustice of a defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment. It is not a form of pre-trial attachment but a relief in personam which prohibits certain acts in relation to the assets in question.[86]

The factor Mr. Justice Matas considered to be relevant in this context was "the clear intention of Aetna to transfer its assets from Manitoba to Montreal, albeit that the intention is openly expressed. And Quebec is not a reciprocating province with respect to enforcement of judgments".[87] He then weighed the balance of convenience and concluded:

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86. Ibid, p. 33.
87. Ibid, pp. 33-34. In Deane v. LDS Cpn (1970) Ltd. supra, fn. 61, the B.C. Supreme Court granted an application for dissolution of an ex parte Mareva injunction. The Court held at p. 374 that "any judgment granted the plaintiff in this jurisdiction could be expeditiously enforced, if necessary, by registration in Manitoba, as a reciprocating jurisdiction under the provisions of the Court Order Enforcement Act, R.S.B.C. 1970, c. 75."

> As between the inconvenience to Aetna in requiring the money to be held in this province (or by Aetna posting security) and the inconvenience to the plaintiffs (if successful) in having to sue on its judgment in Quebec, I would hold that Aetna will be prejudiced to a lesser degree than the plaintiffs. But I would vary the judgment of Wilson J. to the extent of permitting the discharge of the injunction, on the posting of security by Aetna.[88]

In his dissent, Mr. Justice Huband did not take issue with the jurisdiction of the Manitoba Courts to grant Mareva injunctions in the appropriate circumstances. He concluded however that the present case was not an appropriate occasion for the exercise of this jurisdiction. First, he noted that the corporate defendant in this case was "ostensibly, a responsible company which ... [was] continuing to meet its obligations as they ...[fell] due" and that the shareholders themselves were "responsible Canadian corporations which ... [had] the capacity to inject additional capital into ... [the defendant] if it ... [became] necessary to do so".[89]

Secondly, he suggested that the mere intention of the defendant to move assets from Manitoba to Montreal did not in itself "signal an abortive judgment should the plaintiffs' succeed in their action in Manitoba".[90]

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88. Ibid, p. 35.
89. Ibid, p. 39.
90. Ibid, p. 39.

Thirdly, Huband J.A. noted that there already existed in Manitoba "a variety of laws which are available to a plaintiff in order to tie up a defendant's assets before judgment."[91]

In conclusion, Mr. Justice Huband stated:

> 1. Where other specific remedies are available those remedies should be the first resort, and a Mareva injunction should not be issued where other remedies are available.
>
> 2. If the other remedies are not available the Courts should be cautious to fill the void by a Mareva injunction.
>
> It seems to me that a Mareva injunction should be issued in this jurisdiction only where a strong case has been made out that it is necessary to do so to prevent an imminent injustice.
>
> Far from a strong case, I think the present application for injunctive relief is decidedly weak. It has none of the elements of fraud or sham or movement of assets in order to escape lawful claims which have become part of the jurisprudence justifying Mareva-type injunctions.[92]

It remains to be seen what the Supreme Court of Canada decides with respect to the availability of Mareva injunctions in Canada generally; and, more specifically, what view it takes of the circumstances in the Feigelman case.

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91. Ibid, p. 40. See pp. 40-43 for details.
92. Ibid, p. 43.

The last appellate court decision to be considered is the judgment of Nemetz C.J.B.C. in Sekisui House Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima et al,[93] issued on December 15, 1982. In this case, the authority of the British Columbia courts to grant a Mareva injunction was not in question. Rather, the Court of Appeal was concerned with the refusal of the Chambers Judge in the court below to grant the plaintiff's application for

> ...an order that the defendants submit to an examination for the purpose of enforcing an injunction granted under R. 45, akin to what is sometimes called a 'Mareva' injunction, granted ex parte some weeks prior...[94]

The Chambers Judge had not granted such examination on the ground "that the making of such an order would be tantamount to ordering discovery in aid of execution before judgment".[95]

Chief Justice Nemetz summarily affirmed the availability of Mareva injunctions in British Columbia under authority of s. 63 of the Law and Equity Act, R.S.B.C. 1979, c. 224, subject to the guidelines set out in Third Chandris[96]. He went on to consider and apply the words of caution expressed by the English Court of Appeal in A.J. Bekhor & Co. v. Bilton:

93. Supra, fn. 16.
94. Ibid, p. 43.
95. Ibid, p. 46.
96. Ibid, p. 46.

> ... It is therefore clear that, although the Mareva plaintiff, who has satisfied the guidelines set out by Lord Denning MR in Third Chandris Shipping Corpn. v. Unimarine SA [1979] 2 All ER 972 at 984, [1979] QB 645 at 668, and in particular has provided adequate grounds for believing that there is a risk of the defendant's assets being removed before the judgment or award is satisfied, is *in a privileged position, this privilege must not be carried too far.* The courts must be *vigilant to ensure that the Mareva defendant is not treated like a judgment debtor.*" (The italics are mine.)[97]

Despite this cautionary note, the learned Chief Justice recognized that a Mareva injunction has "little value if one does not know either the amounts or whereabouts of these assets"..., and, that such a lack of knowledge created an untenable situation for both the litigant in possession of such a court order and any prospective third parties.[98]
Accordingly he held:

> ... In my view, to order a general examination at this time would be premature. However, in order to breathe some life into the injunction, I would order that a list of assets and their location as of the date of the injunction be set out in affidavit form by the defendants and delivered to counsel for the plaintiff forthwith. In the event that the affidavit is unsatisfactory, the plaintiff may apply to a trial Judge in Chambers for an order for cross-examination on the affidavit. In the event that no affidavit is delivered within two weeks from the date of this judgment, then the appellant will have liberty to re-apply to this division of the Court.[99]

97. Ibid, p. 47.
98. Ibid, p. 47.
99. Ibid, p. 47.

III Comments on Principle and Form

From the preceding review of the history of the Mareva injunction in Canada, several generalizations about the principle itself can be made. First, subject to the decision of the Supreme Court of Canada in Feigelman, the availability of the Mareva injunction, as a species of interlocutory injunction, appears to be fairly well established in Canada. What remains uncertain is the proper test to apply in determining whether a plaintiff's case is sufficiently strong to support an application for a Mareva injunction.[100] This issue remains to be determined by the Supreme Court of Canada.

Secondly, the guidelines set out by Lord Denning in Third Chandris, and further refined in Prince Abdul Rahman and Barclay-Johnson v. Yuill, appear to have received general approval by Canadian courts at the appellate level.[101]

Thirdly, as illustrated by the Sekisui House case, Canadian courts have begun to deal with the kinds of questions,

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100. See text, supra, at pp. 27-28, and p. 31.
101. See text, supra, at pp. 8-12.

such as the availability of discovery and interrogatories, raised in the later English cases discussed above.[102] Canadian courts have not yet had to deal directly with the position of third parties. However, the treatment of the discovery question in Sekisui House suggests that English cases in this area will be used as guides.[103]

Finally it appears that some Canadian Courts are focusing their attention on questions that are bound to arise in a federal system of government and are prepared to distinguish between the movement of assets among provincial jurisdictions and the movement of assets into truly foreign jurisdictions.[104] It is submitted that this kind of focus can be misleading to the extent that it confuses the fundamental purpose of a Mareva injunction as an interlocutory

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102. See text, supra, at pp. 11-16.
103. See supra, fn. 16, at pp. 46-47. There is another "new development" in England which should be noted in this context. In CBS UK v. Lambert [1982] 3 All E.R. 237 (C.A.), a defendant was ordered to deliver up assets that would be necessary to satisfy the plaintiff's judgment if the plaintiff succeeded at trial, and set out guidelines for the making of such orders. Gertner, supra, fn. 4, at p. 15 notes: "Given the Canadian Courts sometimes begrudging acceptance of the Mareva injunction it will be interesting to see how quickly they follow the new trail blazed the English Court of Appeal."
104. See supra, fn. 87, and accompanying text.

pre-judgment remedy, and the enforcement of a judgment after a final disposition of a case has been made. It is further submitted that, if accepted, the Reciprocal Enforcement of Judgments argument with respect to the movement of assets among provinces could equally apply as a bar to the granting of a Mareva injunction where Reciprocal Enforcment of Judgments legislation exists between Nations.[105]

As noted earlier in this paper, procedural requirements for obtaining a Mareva injunction will vary from jurisdiction to jurisdiction, depending on the applicable rules of civil procedure.[106]

The form of the order is important since it sets out the limits of the plaintiff's and defendant's rights and obligations. A good source of information and precedent with respect

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105. See, for example, The Reciprocal Enforcement of Maintenance Orders Act. R.S.S. 1978, Cap. R-4, s.2(1)(f) which defines "Reciprocating state" to include England and Northern Ireland, and states declared under this Act to be reciprocating states. The latter category, for example, includes some states of the U.S., Zimbabwe, Australia, New Zealand, Barbados, Papua, and New Guinea, Guernsey, Rhodesia and Fiji.

106. <u>Supra</u>, text at p. 8. A detailed discussion of procedure, as it applies to Mareva applications in Ontario, can be found in McAllister, <u>supra</u> fn. 2, at pp. 79-90.

to the Mareva principle and the form of the order is provided by Atkin's Court Forms.[107] Two sample forms are attached hereto as Appendix A. Precedents for the form of Mareva orders can also be found in some of the reported cases.[108]

IV The Anton Piller Order

In recent times, the English Courts have also developed a remedy, somewhat parallel to the Mareva injunction, which provides for the detention or preservation of assets.[109] Most jurisdictions have rules dealing with the interim preservation of property, but the Anton Piller order goes far beyond this: One writer has commented:

> Although this order has several variants its most stringent form, which is granted ex parte, is unique. It allows the Plaintiff, with its solicitor, to enter

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107. Atkin's Court Forms 2d. ed. (1980) Vol 22, Form 13 at p. 777, and, (1980) Vol. 6, Form 61 at p. 370
108. See, for example: B.P. v. Hunt, supra, fn. 16 at pp. 171-173.
109. See supra, fn. 3. See also Myers, Search and Seizure in Civil Cases: The Anton Piller Orders, (1984) 42 The Advocate 41, for a discussion of the development of "Anton Pillers" in Canada. Lord Denning noted the similarity between the Mareva and the Anton Piller injunctions in Third Chandris, supra fn. 7, at p. 985.

> the Defendant's premises during normal business hours, show the Defendant a copy of the order and search the premises for the documents or materials mentioned in the order. If any of these materials are found, the Plaintiff may remove them for safe keeping pending the normal discovery process and trial. The order is an extremely powerful one. It is of use where it is expected that the material sought to be seized may disappear or be secreted prior to discovery of documents. Although its primary use has been in copyright and related areas, it can and has been of use in any area where this suspicion justifiably arises. The order does not depend upon a proprietory interest. The sine qua non of the order is the need to protect vital material from possible destruction.[110]

As in the case of the Mareva injunction, Lord Denning was a major force in the development of the Anton Piller order, although he was not the first to grant the order.[111] Lord Denning has described the initial development as follows:

> So the owners of the copyright made an application--ex parte--for an order enabling them to enter on the premises and look for the infringing copies. The judge realised that it appeared 'at first blush, to be a trespass of property and invasion of privacy'. But he made the order, see EMI v. Pandit. Similarly, orders were made in like cases by other Chancery Judges: until one judge doubted the validity of them. Mr. Laddie then brought a case before us to test the point. It was again ex parte--so that the other side knew nothing of it. We looked into it all carefully and upheld the new procedure. It is Anton Piller KG v. Manufacturing Processes Ltd.[112]

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110. Myers, Ibid at p. 41.
111. The first "Anton Piller" order was granted by Templeman J. in E.M.I. Ltd. v. Pandit, [1976] R.P.C. 333; [1975] 1 W.L.R. 302.
112. The Due Process of Law, supra, fn. 3 at p. 124.

It is from the Anton Piller case [113] that this form of order derives its name. While on its face, the "Anton Piller" order appears to be like a "civil search warrant," the English Court of Appeal made it quite plain that the order is not to be treated as such. According to Lord Denning:

> 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 this 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'. That was established in the leading case of Entick v. Carrington. None of us would wish to whittle down that principle in the slightest. But the order sought in this case is not a search warrant. It does not authorize the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor 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 defendants' permission. But it does do 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.[114]

Lord Justice Ormrod echoed this concern when he described the Anton Piller as "an order at the extremity of this

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113. [1976] 1 All E.R. 779; [1976] Ch. 55 (further references are to [1976] 1 All E.R.).
114. Ibid, at pp. 782-783.

court's powers" and set out "three essential pre-conditions for the making of such an order, . . .

> ... First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the plaintiff. Thirdly, there must be clear evidence that the defendants have in their possesion incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.
>
> The form of the order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant in personam to permit inspection. It is therefore open to him 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 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 damming evidence against the defendant at the subsequent trial. Great responsibility clearly rests on the solictors for the plaintiff 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 MR has said, of applying to the court, should he feel it necessary to do so, before permitting the inspection.[115]

Canadian courts appear to be prepared to grant Anton Piller type orders, albeit with a considerable degree of caution. In <u>Bardeau Limited et al v. Crown Food Service Equipment Limited et al</u>, Steele J., of the Ontario High Court of Justice stated:

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115. <u>Ibid</u> at p. 784.

> The nature of the relief sought is that granted in Anton Piller KG v. Mfg. Processes Ltd., [1976] Ch. 55, [1976] 1 All E.R. 779 (C.A.). Orders in this nature are apparently quite common in at least copyright and industrial design cases in England and in many other countries in the Commonwealth. However, I was referred to only one Ontario decision in R.T.Z. Services Ltd. v. Robert E. Stewart, Ont. H.C., Saunders J., December 12, 1980 (unreported).
> An Anton Piller-type order is a most exceptional remedy and should be approached with the greatest of caution. In the present case, the writ of summons has not yet been issued but counsel have undertaken that if an order is granted it will be issued within two days of any inspection authorized in the order and, on behalf of the applicant, have undertaken to indemnify the defendants for any damages that they may suffer as a result of the granting of the order and the solicitor for the plaintiffs serving the order will offer to explain to such defendants fairly and in every-day language, the meaning and effect thereof, and advise such defendants that they have the right to obtain legal advice before disclosing the specified information. The draft writ and draft statement of claim were presented to me, as well as the consent of the interim receiver. The application for relief is only against two corporate defendants and three personal defendants.
> I am of the opinion that R. 372 and the inherent jurisdiction of the Court authorized the granting of relief requested and the hearing in camera prior to the issuance of the writ.[116]

Mr. Justice Steele went on to find that the plaintiffs had:

> ... made out an extremely strong prima facie case that the defendants may be usurping the copyrights and industrial designs of the plaintiffs. I am also

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116. (1982) 36 O.R. (2d) 355; 26 C.P.C. 297 (Ont. H.Ct.) (further references are to 26 C.P.C.) at pp. 299-300. Linda Robinson's annotation, at pp. 298-9 of the C.P.C. report provides a good summary of the conditions of availability and the requirements commonly stipulated as safeguards on the execution of the order.

> satisfied that by the alleged past conduct of the personal defendants they have total disregard for the plaintiffs' rights and that they are not persons who may necessarily respect the rules of production in an action, and that there is a serious risk that evidence will be destroyed if not maintained for the purpose of the projected action.[117]

Accordingly, he granted the Anton Piller order sought.[118]

Three days after the above order was issued, an application was made by the defendants for its rescission or discharge. In granting the application, Mr. Justice Steele stated:

> The present application is one of the first in Ontario of this nature. The remedy is a most exceptional one, and there must be an extremely high standard of conduct on the part of any applicant bringing such an application, including full disclosure. Whether or not the applicant believes that the matters are of material consequence they must be disclosed so that the Court may determine their relevance.[119]

Another reported case in which an Anton Piller order was granted by a Canadian court is Nintendo of America Inc. v. Coinex Video Games Inc. et al, a decision of the Federal Court of Appeal.[120] It involved an appeal by the

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117. Ibid, at p. 302.
118. Ibid, at pp. 304-306.
119. Ibid, at p. 308.
120. (1982) 34 C.P.C. 108; (1983), 46 N.R. 311 (F.C.A.) (further references are to 34 C.P.C.)

plaintiff in an action for infringement of its registered copyright from the refusal of an Anton Piller order by the Trial Division. The Federal Court of Appeal allowed the appeal and permitted the order to issue, with the proviso that:

> since the remedy granted herein is a strong one, the plaintiff must, in enforcing it, "act with due circumspection" . . . Likewise, the interests of the defendants must be preserved and protected as well as those of the plaintiff."[121]

In granting the order, Heald J., adopted the preconditions set out by Lord Justice Ormrod in the Anton Piller case.[122] He also found that the material presented by the plaintiff met the test adopted by the English Court of Appeal in the later case of Yousif v. Salama.[123]

The Myers article points out that one area of potential difficulty for plaintiffs who seek an Anton Piller

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121. Ibid at p. 119. The provisions of the order designed to protect the interests of the defendant are reproduced at pp. 119-20.
122. Supra, fn. 113, at p. 784. See also accompanying text which states these preconditions.
123. Supra, fn. 120 at p. 117. The citation for the Yousif case is [1980] 1 W.L.R. 1540, [1980] 3 All E.R. 405, (C.A.)

order lies in the Court's interpretation of the "possibility of destruction" requirement. He suggests that the Courts in Nintendo and Bardeau were correct in not requiring the plaintiff to produce direct proof that the Defendant will destroy the material, since this kind of evidence will often be unobtainable. 124 Myers states:

> ... [W]ith the exception of our Federal Court, [Trial Division], the courts seem to have taken a realistic approach. They have inferred a risk of destruction when it is shown that the Defendant has been acting dishonestly, for example where material has been acquired in suspicious circumstances, or where the Defendant has knowingly violated the Plaintiff's rights . . . [T]he strength of the inference (or its absence) will influence the form of the order.[125]

He points out that where the court has required direct proof, and has refused an "Anton Piller" application on the ground that the concrete, factual evidence is lacking, the result can be the disappearance of the material in ques-

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124. Supra, fn. 109, at p. 42. But c.f. Chincan Communication Corporation et al v. Chinese Video Centre Ltd. et al. (1983) 70 C.P.R.(2d) 185. (F.C.T.D.) where an application for an Anton Piller order was dismissed because the applicants had not presented the court with concrete or factual evidence of circumstances showing serious potential or actual damage or clear evidence that the defendants had in their possession incriminating documents or things.
125. Ibid, at p. 42.

tion.[126]

As in the case of the Mareva injunction the procedural requirements with respect to Anton Piller orders will vary from jurisdiction to jurisdiction. With respect to form, Atkin's Court Forms also provides good background and precedents for Anton Piller orders.[127] A precedent from Atkins has been attached hereto as Appendix B. It is also useful to study the orders issued by courts in specific cases, where they have been included as part of reported judgments, as for example in the Bardeau case discussed above.

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126. Ibid, at p. 42. He cites as an example the Chincan case, supra, fn. 124.
127. Supra, fn. 107. Form 12, at pp. 276-277.

13

ORDER for preservation of assets of foreign defendants before judgment—"Mareva" injunction (*t*)

IN THE HIGH COURT OF JUSTICE
Queen's Bench Division
[Commercial Court]
Mr Justice ....
[Tuesday] the .... day of .... 19...

Between A. B. Ltd. ... ... Plaintiffs
and
C. D. Ltd. ... ... Defendants

UPON an ex parte application made in this Court by Counsel for the Plaintiffs

AND UPON READING the Writ of Summons herein [issued the .... day of .... 19...] and the affidavit of A. B. and the exhibits thereto

AND the Plaintiffs by their Counsel undertaking to abide by any Order this Court may make as to damages in case the Court shall hereafter be of the opinion that the Defendants shall have suffered any damages by reason of this Order which the Plaintiffs ought to pay

IT IS ORDERED AND DIRECTED that the Defendants whether by their officers, agents or servants or otherwise howsoever be restrained and an injunction is hereby granted restraining them [until the .... day of .... 19... *or* until further order] from the removing from the jurisdiction of this Honourable Court or otherwise disposing or changing or dealing with any of their assets at present within the jurisdiction and in particular any monies forming an account in the name of the Defendants standing at the Bank of (*state the name of the Bank and the branch and its address at which the said account is maintained*) [save in so far as the sum exceeds £... or U.S. $... *or as the case may be*]

AND IT IS ORDERED that the Defendants be at liberty to apply to vary or discharge this order upon giving [12 hours *or* 1 day *or as the case may be*] notice to the Plaintiffs' Solicitor of their intention to do so.

... Practice, Paragraph 9, *ante*; Vol. 1 (1979 Issue), title ADMIRALTY, Practice, Paragraph

Branch (*address*), save in so far as the sum standing to the credit of the account or accounts shall exceed the sum of £......... until the hearing of the action herein or until further order.

DATED the .... day of .... 19...

This Summons was taken out by E. F. & Co of (*address*), [Agents for (*name*) of (*address*),] Solicitors for the Plaintiffs.

To the Defendants and to G. H. & Co. of (*address*), their Solicitors.

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ORDER for preservation of assets including money in bank account: Mareva injunction (*h*)

IN THE HIGH COURT OF JUSTICE 19... X. No. ...

Queen's Bench Division

Commercial Court

The Honourable Mr Justice ...., Judge in Chambers

Between X. Y. Shipping Company Limited ... Plaintiffs

and

S. T. Shipping Company S. A.... ... Defendants

UPON HEARING Counsel for the Plaintiffs

AND UPON READING the Affidavit of P. Q. filed herein the .... day of .... 19...

AND the Plaintiffs by their Counsel undertaking to abide by any Order the Court or a Judge may make as to damages in case the Court or a Judge shall hereafter be of opinion that the Defendants shall have sustained any by reason of this Order which the Plaintiffs ought to pay.

IT IS ORDERED AND DIRECTED that the Defendants by their servants or agents or officers or otherwise be restrained and an injunction is hereby granted restraining them from removing from the jurisdiction of this Court or otherwise disposing of any of their assets including any money forming, or forming part of an account in their names with the C. D. Bank................. Branch save in so far as the sum standing to their credit shall exceed £................. until after judgment of this action or until further order in the meantime.

AND the Defendants are to be at liberty to move this Court to vary or discharge this Order upon giving to the Plaintiffs [24] hours notice of their intention so to do.

DATED the .... day of .... 19...

(*h*) For a summons see Form 60 *ante*.

4: INSPE

SUM

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[TAKE NOTICE above-named Def

DATED the .....

This Summons said Defendants.

To the above-nam and to the M. N. E

AFFIDA

I, E. F. of (*addre* and say as follows:

1. I am informe and up to the pr the................

(*j*) Bankers' Books E 38, r 13; 3 Halsbury's La 22 item (6). The applica should be made by sum (1887) 36 Ch D 731. account is sought and on

(*k*) Inspection may be is in form or substance *Howard v Beall* (1889) 23

(*l*) As to costs, see the Edn) 848).

(*m*) Whilst the order materiality of the eviden a third person the affida the proceedings or is kep

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"Appendix B"
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12

ORDER for preservation of infringing or incriminating property and documents—"Anton Piller" order (*s*)

IN THE HIGH COURT OF JUSTICE 19...A. No. ...
Chancery Division
Group [A *or* B]
Mr. Justice ...... in Chambers (*j*[1])
[Tuesday] the .... day of .... 19...

Between A. B. Ltd. and R. S. Ltd. ... ... Plaintiffs
and
C. D., T. U. Ltd. and X. Y Ltd. ... Defendants

UPON MOTION this day made unto this Court by Counsel for the Plaintiffs

AND UPON READING the writ of summons issued on .... 19... and the affidavits of A. B. and R. S. filed on .... 19... and the exhibits therein referred to

AND the Plaintiffs by their Counsel undertaking

(1) to keep in safe custody any articles and documents obtained as a result of this Order

(2) to serve this Order by a Solicitor of the Supreme Court

(3) to abide by any Order this Court may make as to damages in case this Court shall hereafter be of opinion that the Defendants or either of them have sustained any by reason of this Order which the Plaintiffs ought to pay

AND the Solicitor for the Plaintiffs by Counsel for the Plaintiffs being their Counsel for this purpose undertaking that all designs, tapes, equipment, documents or other articles or copies or photocopies thereof (*or as the case may be*) obtained as a result of this Order will be preserved and retained in their safe custody and control until further order

THIS COURT DOTH ORDER that the Defendants and each of them do permit such persons not being more than 2 in number as may be duly authorised by the Plaintiffs and at least 1 member and employees not exceeding 4 of the Plaintiffs' Solicitors to enter forthwith the premises known as (*address*) and any other premises under the control of the Defendants or any outhouse or any other building which forms a part of the said premises at any hour between 8 o'clock in the forenoon and half past 6 o'clock in the evening for the purpose of:

(*s*) Adapted from the order made in *Anton Piller K.G. v Manufacturing Processes Ltd.* [1976] Ch. 55, [1976] 1 All E.R. 779; and see Practice, Paragraph 8, *ante*. The form of order printed here is obtainable only in extreme cases. It includes an ex-parte injunction restraining infringement and an order for immediate disclosure of the pirated works, an injunction restraining the defendant from communicating with that source (a form of order which has been granted in several unreported cases) and an order compelling the defendant to permit a search for pirated works and documents relating thereto: Vol. 12 (1978 Issue), title COPYRIGHT, Practice, Paragraph 16. Further, if there is evidence that the defendant has assets which may be removed to defeat a claim for damages in appropriate cases an order restraining such removal can be made: Vol. 12 (1978 Issue), title COPYRIGHT, Practice, Paragraph 16, note (*p*). The formal parts of the order together with the usual undertaking must be included. For a full "Anton Piller" order see Vol. 12, title COPYRIGHT, Form 21 (Supplement).

(1) inspecting and photographing such documents, files and things relating to the design, manufacture, sale or supply of the Plaintiff's equipment or parts thereof (*describe the same if necessary*)

(2) removing into Plaintiffs' Solicitors' custody any of the above mentioned articles, documents and fees which relate to the manufacture, operation and maintenance of the Plaintiffs' equipment which had been supplied by the Plaintiffs to the Defendants, together with copies of all such documents

AND the Defendants and each of them are to be at liberty to move this Court to vary or discharge this Order upon giving to the Plaintiffs 12 hours' notice in writing of their intention so to do

AND the Plaintiffs are to be at liberty to serve on the Defendants short Notice of Motion for .... 19...

13

ORDER for preservation of assets of foreign defendants before judgment—"Mareva" injunction (*t*)

IN THE HIGH COURT OF JUSTICE
Queen's Bench Division
[Commercial Court]
Mr Justice ....
[Tuesday] the .... day of .... 19...

Between A. B. Ltd. ... ... Plaintiffs
and
C. D. Ltd. ... ... Defendants

UPON an ex parte application made in this Court by Counsel for the Plaintiffs

AND UPON READING the Writ of Summons herein [issued the .... day of .... 19...] and the affidavit of A. B. and the exhibits thereto

AND the Plaintiffs by their Counsel undertaking to abide by any Order this Court may make as to damages in case the Court shall hereafter be of the opinion that the Defendants shall have suffered any damages by reason of this Order which the Plaintiffs ought to pay

IT IS ORDERED AND DIRECTED that the Defendants whether by their officers, agents or servants or otherwise howsoever be restrained and an injunction is hereby granted restraining them [until the .... day of .... 19... *or* until further order] from the removing from the jurisdiction of this Honourable Court or otherwise disposing or changing or dealing with any of their assets at present within the jurisdiction and in particular any monies forming an account in the name of the Defendants standing at the Bank of (*state the name of the Bank and the branch and its address at which the said account is maintained*) [save in so far as the sum exceeds £... or U.S. $... *or as the case may be*]

AND IT IS ORDERED that the Defendants be at liberty to apply to vary or discharge this order upon giving [12 hours *or* 1 day *or as the case may be*] notice to the Plaintiffs' Solicitor of their intention to do so.

(*t*) Practice, Paragraph 9, *ante*; Vol. 3 (1979 Issue), title ADMIRALTY, Practice, Paragraph 30.