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Kern Alexander

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THE *MAREVA* INJUNCTION AND *ANTON PILLER* ORDER: THE NUCLEAR WEAPONS OF ENGLISH COMMERCIAL LITIGATION

*Kern Alexander**

* Research Associate, Institute of Advanced Legal Studies, University of London, practicing Solicitor in England and Wales, and Attorney at Law, Gainesville, Fla. J.D., 1994, University of Minnesota; Ph.D., 1992, Cambridge University; M.A., 1990, Oxford University; A.B., 1986, Cornell University.

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I. INTRODUCTION

The *Mareva* injunction and *Anton Piller* order are interlocutory orders, which are generally made *ex parte* and before proceedings have been commenced, but they also may be issued at any stage of the proceedings and in aid of execution. The *Mareva* injunction basically imposes a temporary 'freezing' order against the assets of a defendant or potential defendant, which may later be required to satisfy a judgment in the plaintiff's favor. The purpose of the *Mareva* injunction is to prevent the defendant from dissipating or disposing of assets by removing them from or within the jurisdiction in a manner that would frustrate a potential judgment. Similarly, the *Anton Piller* order is an extraordinary form of presuit or prejudgment discovery that allows the plaintiff to search the defendant's premises and seize items or documents that might become evidence in any later action brought by the plaintiff against the defendant. Such a search may only be made by solicitors appointed by the court, and typically the judge will permit the plaintiff's solicitors to engage in the search, supervised in some instances by an independent solicitor experienced in the application of *Anton Piller* orders.[1] The purpose behind the *Anton Piller* order is to prevent a defendant from destroying evidence or documents before a writ is issued or before trial.[2]

Although the *Mareva* injunction and *Anton Piller* order are ancillary to the main action, they are extraordinary remedies and often have a decisive effect on a case. Indeed, the title of this article borrows a phrase from Lord Justice John Donaldson, who stated in *Bank Mellat v. Nikpour* that the *Mareva* injunction "is in effect, together with the *Anton Piller* order, one of the law's two 'nuclear' weapons."[3] For the plaintiff seeking swift justice or security in anticipation of obtaining a future judgment, the *Mareva* injunction and *Anton Piller* order offer effective preliminary remedies against defendants based in the United Kingdom or abroad with assets located in the United Kingdom or foreign jurisdictions. The swift nature in which these remedies may be obtained accounts for their frequent use amongst commercial litigation practitioners in England and Wales, especially in cases involving defendants with transnational business operations and property located in

1. Universal Thermosensors Ltd. v. Hibben, [1992] 1 W.L.R. 840, 860-61 (Ch.) (discussing procedures that should be followed when carrying out an *Anton Piller* order).
2. *Id.* at 842, 859.
3. [1985] F.S.R. 87, 92 (C.A.).

several jurisdictions.

Part II of this article describes the background and the context in which *Mareva* and *Anton Piller* orders were developed by English courts. Part III discusses the considerations and procedural requirements for obtaining a *Mareva* injunction. Part IV analyzes the use of *Anton Piller* orders and discusses some of the procedural, tactical, and legal issues involved in their execution. Part V analyzes both orders together and explains how they have become popular tactics for pre-writ and prejudgment relief for plaintiffs seeking to enforce various remedies in English civil litigation. Part VI discusses the *Mareva* injunction and its application to European Community members under the Civil Jurisdiction and Judgment Act. Finally, Part VII compares the use of *Mareva* and *Anton Piller* orders with similar U.S. procedural devices that enable claimants or creditors to act swiftly in protecting their interests.

II. THE DEVELOPMENT OF THE *MAREVA* INJUNCTION AND THE *ANTON PILLER* ORDER

The globalization of the world economy not only has brought increased wealth and economic opportunity to many, but also has resulted in more complexity and anonymity in international business transactions, which coupled with increased competitive pressures, has increased the willingness of many parties to breach contracts and leave debts unpaid. The growing potential for profits to be made in carefully constructed international deals has presented more opportunities for contracts to be broken. Further, the increasing sophistication of technology in the global economy has made it possible for financial assets and other resources to be transferred between jurisdictions in a very short time. As international trade increases throughout the global economy, there will be an increasing number of judgment debtors trying to evade their debts since a judgment, per se, will have little effect against a debtor who can easily transfer assets and operations to other jurisdictions.

On the international level, there is little protection for a party seeking to secure a claim against a debtor who has breached its obligations and poses a serious risk of transfer or dissipation of assets. The English courts have responded to the increased risks posed by globalization and improved technology by crafting judicial remedies that allow parties to act with speed and secrecy in protecting their interests in assets that would otherwise be disposed of or dissipated. These extraordinary remedies have significantly increased the attractiveness of English law as the choice of law for many international traders who seek security and stability of expectations in

conducting international transactions.[4]

The single most effective argument for granting a *Mareva* injunction is to prevent a defendant from escaping its obligations by disposing or transferring assets from the jurisdiction with the intent of preventing plaintiff from executing an eventual judgment against assets. As will be discussed later, applicants for a *Mareva* injunction, whether a plaintiff or counterclaiming defendant, have to make a " 'good arguable case' . . . that the refusal of a[n] . . . injunction would involve a real risk that a[n eventual] judgment or [arbitral] award in favor of the [applicant] would remain unsatisfied."[5] Similarly, an *Anton Piller* order allows a plaintiff, or a counterclaiming defendant, to serve an order on a party that authorizes entry onto premises controlled by the party in order to search and seize certain documents and other evidence that may be used later in a lawsuit or trial.[6]

To maintain the element of surprise, speed and secrecy are required in applying for both a *Mareva* and an *Anton Piller* order.[7] An ex parte order is therefore necessary otherwise the defendant will have notice of the action and the opportunity to dissipate assets if not restrained.[8] After the ex parte order has been issued, subsequent applications by either party generally will be made *inter partes* if at all possible.[9] It should be emphasized, however, that an application to discharge a *Mareva* or *Anton Piller* order is relatively rare, which suggests that these orders are successful tools in convincing defendants to settle.

Although English courts have only allowed *Mareva* and *Anton Piller* orders to be used since the 1970s, their effectiveness has led to their increasing use and popularity among commercial litigators, thereby strengthening the appeal of English courts as forums to resolve international commercial disputes. The use of these orders provides effective prejudgment relief for plaintiffs seeking to preserve financial assets and other property to which they can later attach judgments. Accordingly, many global companies and traders prefer English law as the choice of law and especially English

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4. *See* George C.J. Moore, *Choice of Law and Forum: Swift Justice in England, Including Pre-Judgment Tactics and Relief and Enforcement Throughout Europe*, Presentation at the ABA, International Law Section, 6-9 (Apr. 29, 1998 NYC) (on file with the author) (arguing why English law is the preferred choice of law in international transactions).

5. Ninemia Maritime Corp. v. Trave Schiffahrtsgesellschaft mbH und Co., [1983] 1 W.L.R. 1412, 1422 (C.A.).

6. Anton Piller K.G. v. Manufacturing Processes Ltd., [1976] 1 Ch. 55, 62 (C.A. 1975). The order's name is derived from the case. *Id.*; *see infra* text accompanying note 101.

7. Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 669 (C.A.) (speed); *Universal Thermosensors*, [1992] 1 W.L.R. at 860 (secrecy).

8. *Ninemia Maritime Corp.*, [1983] 1 W.L.R. at 1423.

9. MARK S.W. HOYLE, THE MAREVA INJUNCTIONS AND RELATED ORDERS 33 (3d ed. 1997).

courts as the preferred forum for resolving international commercial disputes.[10]

The *Mareva* injunction and *Anton Piller* orders are relatively recent phenomena in English civil litigation. Before 1975, it had not been the practice of the English courts to grant an injunction in circumstances where an order was sought to restrain a defendant from disposing of its property on the grounds of a likely recovery by a plaintiff in a civil action.[11] This changed in 1975 when the English Court of Appeal overruled a High Court judge and issued an interlocutory order in favor of the appellants, Japanese shipowners, who had leased their ships to Greek charterers who failed to pay certain sums for the use of the ships.[12] In *Nippon Yusen Kaisha v. Karageorgis*,[13] plaintiffs issued a writ against the charterers for the amount past due, and when they became convinced that the charterers would take steps to remove their funds from the jurisdiction of English courts, they applied ex parte to the High Court for an interim injunction restraining the defendants from transferring their assets outside of English jurisdiction.[14] The circumstances of the case were such that it was evident that the money was owing, and there was little question of an arguable defense, so summary judgment was likely.[15] The purpose behind this application therefore was to ensure that some funds would remain available, against which execution of a likely judgment could be obtained by plaintiffs.[16]

At the time, there was no case law supporting plaintiff's application for such an emergency injunction, and in keeping with established practice, Lord Justice Donaldson in the High Court denied the shipowner's application.[17] No previous plaintiff had ever appealed such a denial, most probably because many practitioners considered a reversal of the rigid rule to be unlikely in the absence of statutory intervention. However, plaintiffs filed an immediate appeal, which came before the Court of Appeal for judgment on May 22, 1975.[18] The appeal was granted, and an injunction was ordered restraining the defendant charterers from disposing of their assets in England or outside the jurisdiction.[19] As authority, the Court of Appeal relied on section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which provides: "The High Court may grant a mandamus or an injunction or

10. Moore, *supra* note 4, at 2.
11. Nippon Yusen Kaisha v. Karageoris, [1975] 1 W.L.R. 1093, 1094 (C.A.).
12. *Id.* at 1094.
13. *Id.* at 1093.
14. *Id.*
15. *Id.* at 1095.
16. *Id.*
17. *Id.* at 1094.
18. *Id.* at 1093.
19. *Id.* at 1095.

appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so."[20] Lord Denning expressed the view that if no restraint were imposed, the funds would be sent overseas and would be difficult to recover and stated that "[t]here [wa]s a strong prima facie case that the hire [wa]s owing and unpaid."[21]

Nearly a month later, before commercial practitioners had had sufficient time to adjust to this groundbreaking ruling, the same issue was considered again by the Court of Appeal in the case *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, which gave its name to this particular type of order.[22] *Mareva* involved shipowners who had leased their vessel, the *Mareva*, on a time charter to charterers who in turn subchartered the ship to the Indian government.[23] The voyage charter was to deliver fertilizer to India in return for payment which was scheduled to be made in London.[24] After making two installment payments, the charterers defaulted on the third payment to the shipowners, even though they had received full payment by the Indian High Commission.[25] The Indian government's payment was on deposit in a London account, and plaintiffs made an ex parte application on June 20, 1975 to freeze the proceeds as part of their claim for the amount due of US$30,800 plus damages.[26]

As in the *Nippon Yusen Kaisha* case, the shipowners feared that the charterers would dispose of their funds before execution of the judgment, and an application was made ex parte for an injunction restraining defendants.[27] Again Justice Donaldson had reviewed the application and granted it temporarily until June 23, 1975 in deference to the Court of Appeal's recent decision in *Nippon Yusen Kaisha* and to give the plaintiffs time to appeal.[28] But he refused to grant an extension based on the grounds that he had no jurisdiction to make such an order.[29] Plaintiffs made an ex parte appeal, and Lord Denning again stated his view unequivocally, relying on section 45 of the Supreme Judicature Act of 1925 for authority.[30] He stated: "If it appears that [a] debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to

20. Supreme Court of Judicature (Consolidation) Act 1925, 15 & 16 Geo. 5, ch. 49, § 45(1).
21. *Id.*
22. [1980] 1 All E.R. 213 (C.A.).
23. *Id.*
24. *Id.*
25. *Id.* at 214.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

prevent [the debtor] disposing of those assets."[31]

These two cases provided a radical change in the direction of English civil litigation, the principles of which would be applied in a wide range of actions with the intent of preventing defendants from making themselves judgment-proof.[32] Accordingly, a new practice has developed in English commercial litigation which has become undoubtedly one of the most useful to a party faced with an opponent who is likely to arrange its affairs in a manner that would frustrate a court judgment or arbitral award.

Following *Nippon Yusen Kaisha*, *Mareva*, and other cases, the British Parliament codified the *Mareva* injunction in section 37 of the Supreme Court Act 1981 and extended its scope to be used in respect of any dispute that is to be referred to or is in the course of domestic arbitration.[33] Later, in 1990, the English Court of Appeal upheld the use of the *Mareva* injunction and *Anton Piller* order on an international or worldwide basis so that a defendant's assets might be attached in a foreign jurisdiction and possible evidence might be examined with permission of the foreign government.[34]

Since the late 1970s, the grant of *Mareva* injunctions and *Anton Piller* orders have become relatively common. Both remedies are popular pretrial tactics for plaintiffs seeking to preserve financial assets and other property in order to satisfy an eventual judgment and to preserve evidence that would buttress the plaintiff's claim at trial. Indeed, by 1986, as Justice Bingham acknowledged in *Siporex Trade S.A. v. Comdel Commodities Ltd.*,[35] the use of the *Mareva* injunction and other ex parte orders had become quite common, as hundreds of orders were being made each year with few applications being rejected.[36]

III. THE *MAREVA* INJUNCTION: BASIC CONSIDERATIONS

The English court's authority to issue a *Mareva* injunction derives from its inherent power to grant an injunction in support of *only* a legal or equitable right within the jurisdiction of the English courts.[37] This essential twin test means that a *Mareva* injunction is completely ancillary to a claim, regardless of the fact that, in practice, it is the *Mareva* injunction and not the writ that often ends the dispute between the parties because of its draconian

31. *Id.* at 215.
32. *Id.* at 214.
33. Supreme Court Act 1981 § 37(3) (Eng.).
34. Derby & Co. Ltd. v. Weldon (No. 1), [1990] Ch. 48, 57-58 (C.A. 1988); Republic of Haiti v. Duvalier, [1990] 1 Q.B. 202, 215-217 (C.A. 1988).
35. [1986] 2 Lloyd's Rep. 428 (Q.B.).
36. *Id.*
37. *Mareva*, [1980] 1 All E.R. at 214.

effect. The ancillary nature of the *Mareva* injunction was demonstrated in *Veracruz Transportation v. V.C. Shipping Co.*[38] where the Court of Appeal stated that the principle to be drawn from *Siskina v. Distos Compania Naviera S.A.* was that the right to obtain an interlocutory injunction, such as a *Mareva*, "cannot stand on its own" because it is not a cause of action per se and therefore must be based on a legal or equitable right of the applicant over which the English courts have jurisdiction.[39] The party seeking a *Mareva* injunction therefore must not confuse the issues surrounding its operation with the issue of whether there is a legal right, within the jurisdiction of the English courts, that can be assisted by the *Mareva* or other interlocutory injunction.

A. *Procedure*

A *Mareva* injunction is sought because the plaintiff fears the consequences of not restraining a rogue defendant from disposing of or dissipating assets.[40] Although most *Mareva* applications used to be in the Commercial Court, they are now made in all divisions and sub-divisions of the High Court. The application may be made in the Chancery, Queen's Bench, or Commercial Divisions of the High Court.[41] It is suggested that applicant make an ex parte application because if notice is provided for an inter partes hearing, the defendant will have sufficient notice to remove assets or to destroy evidence.

In the Queen's Bench Division, the applicant should prepare a writ which contains the following documents: (1) a statement of claim, (2) an affidavit in support, and (3) two copies of the draft of the order that the plaintiff

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38. [1992] 1 Lloyd's Rep. 353 (C.A. 1991); *see also* Zucker v. Tyndall Holdings plc, [1992] 1 W.L.R. 1127, 1136 (C.A.) (holding that "a *Mareva* injunction can only be granted by the English court in support of a cause of action which the English court has jurisdiction to entertain").

39. *Id.* at 357 (quoting *Siskina*, [1979] A.C. 210, 256 (1977)). The *Siskina* court stated:

> It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

Siskina, [1979] A.C. at 256. The decision would now be different because of the 1968 Brussels Convention and the British Civil Jurisdiction and Judgements Act 1982, but the principles remain valid. *See infra* notes 128-33 and accompanying text.

40. *Id.* at 229.

41. Practice Direction (Interlocutory Injunction: Forms), [1996] 1 W.L.R. 1551 (High Court of Justice) [hereinafter *1996 Practice Direction*]; ANTHONY D. COLMAN & VICTOR LYON, THE PRACTICE AND PROCEDURE OF THE COMMERCIAL COURT 97 (4th ed. 1995).

requests the court to issue.[42] These papers should ordinarily be filed in chambers with the clerk to the Judge at the Royal Courts of Justice in London by 3 p.m. on the day before the application is to be heard.[43] The ex parte application is made in chambers.[44] In the case of a "worldwide *Mareva*," it is strongly suggested that the applicant submit the filing four to five days before the scheduled presentation in chambers to allow the judge sufficient time to consider the impact, if any, of the order on the law of the foreign jurisdiction.[45] In the Chancery Division, the applicants follow a similar procedure with the exception that the court often directs that arguments in support of the order be made in a public motions hearing though sometimes applications are permitted to be heard in Chambers.[46]

In the Commercial Court, an applicant must submit the writ or draft before the court, together with an affidavit (in draft form in an emergency), that "sets out the nature of the amount of the claim, and fairly states the points [if any] made against it by the [actual or proposed] defendant."[47] The addition of a statement or points of claim is helpful because it outlines in proper pleadings the plaintiff's case, even if it is a draft.[48] If necessary, counsel should remind his solicitor to ensure that the undertakings, which in practical terms are for the solicitor to carry out, are completed. Unless stated otherwise, all undertakings given to the court by plaintiff are his personally,[49] even if it is anticipated that the solicitor will carry them out on plaintiff's behalf.[50] If there is a breach, liability, costs, and legal fees will be imposed on plaintiff;[51] however, in some instances where the actions of the plaintiff's solicitor have been especially egregious, the solicitor may incur liability.

For all divisions, the affidavit in support must also show that it is reasonable to believe that the defendant has assets within the jurisdiction, and that there is a real risk that the defendant will insulate itself from judgment by deliberately dealing the assets unless restrained.[52] Moreover, full and

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42. Practice Direction (Judge in Chambers: Procedure), [1983] 1 W.L.R. 433, 434 (Q.B.) [hereinafter *1983 Practice Direction*]; COLMAN & LYON, *supra* note 41, at 98. This draft order is known as a "draft minute of order." *1983 Practice Direction*, [1983] 1 W.L.R. at 434.

43. *1983 Practice Direction*, [1983] 1 W.L.R. at 434.

44. COLMAN & LYON, *supra* note 41, at 97.

45. ALG Inc. v. Uganda Airlines Corp., (1992) Times Weekly Reporter (Q.B. Div.) (transcript July 31).

46. HOYLE, *supra* note 9, at 29.

47. COLMAN & LYON, *supra* note 41, at 98.

48. *See 1996 Practice Direction*, [1996] 1 W.L.R. at 1551.

49. COLMAN & LYON, *supra* note 41, at 98.

50. HOYLE, *supra* note 9, at 63.

51. COLMAN & LYON, *supra* note 41, at 98.

52. *Id.*

frank disclosure of all material matters must be made; for in fact, the plaintiff should include more information than is necessary to avoid omissions that could lead to the judge rejecting the application.[53] The affidavit can be sworn by an individual plaintiff, a senior officer or director of a plaintiff corporation, or the plaintiff's solicitor in control of the action.

A draft order, usually drafted by counsel and based on the standard forms, must include all the terms of the injunction applied for, together with the undertakings, and should be attached to the writ and affidavit, which are generally delivered to the court before the hearing.[54] Oral arguments based on the submitted documents can then take place, and if the judge approves the application, he will initial the draft order, which will include any amendments, and it will become immediately operative.[55] At that point, plaintiff may provide notice to defendant and to third parties in control of assets, by telephone if necessary, and the written order will be sent to an agent for service of process. The notice should contain a penal notice warning of the consequences of a breach of the injunction.[56] The award of costs on a ex parte application are usually reserved for a later hearing.

A *Mareva* injunction must contain a provision authorizing a defendant within the jurisdiction to draw a certain amount of money as reasonable living expenses to avoid undue hardship and granting the defendant permission to make subsequent applications to the court to change the order only to adjust the amount for living expenses.[57] Moreover, a *Mareva* injunction may state a specific amount of the defendant's assets that is to be frozen, or it may simply be a general order covering all the defendant's assets.[58] Either party may apply later to have this amount altered or discharged.[59] The purpose of a specific maximum amount is to permit the defendant to have use of the balance of the assets; but the application of a maximum amount to third parties who have no knowledge of what other assets are held by or for the defendant can cause problems, because of the danger that any release of funds or assets in the belief that other assets are frozen will possibly be in breach of the order. The solution is for an order for discovery to be made as part of the *Mareva* application in order to

53. Negocios del Mar S.A. v. Doric Shipping Corp. S.A., [1979] 1 Lloyd's Rep. 337 (C.A. 1978).

54. *See* HOYLE, *supra* note 9, at 61-67, app. 4 at 183-201 & n.1 (based on the precedent contained in *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms)*, [1996] 1 WLR 1552).

55. *Id.* at 29. The courts now request submission of a disk with the draft order. *1996 Practice Direction*, [1996] 1 W.L.R. at 1551 ¶ 4.

56. COLMAN & LYON, *supra* note 41, at 127-28.

57. *Id.* at 125.

58. *Id.*

59. Moore, *supra* note 4, at 19.

identify and determine exactly the defendant's assets, so that assets above the claim can be released. Plaintiff's counsel should calculate that the maximum amount to be frozen to cover not only the amount claimed, but also costs, legal fees, interest, and the likely damages and costs incurred for third parties, such as banks or custodians of property.

Although the order freezes the assets until a fixed date, variations to this practice occur regularly as the circumstances of a case may demand. Most judges will rarely accept an order freezing assets "until judgment or later execution".[60] The usual course is to apply for an extension of the *Mareva* after judgment, even in cases involving default judgment if the writ includes a claim for an injunction.[61] The most recent amendment to the procedures governing *Mareva* and other interlocutory applications became effective in 1995 and is found in Order 29 of the Rules of the Supreme Court (RSC).[62] It provides:

> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.
>
> (2) Where the case is one of urgency such application may be made *ex parte* on affidavit but, except as aforesaid, such application must be made by motion or summons.
>
> (3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.[63]

The amended Order 29 codifies, in a procedural sense, the court's authority to issue such emergency *ex parte* orders based on both section 37 of the Supreme Court Act 1981 and *Mareva* case law.[64]

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60. COLMAN & LYON, *supra* note 41, at 126.

61. Stewart Chartering Ltd. v. C & O Managements S.A., [1980] 1 W.L.R. 460, 460-61 (Q.B. 1979) (citing R.S.C., Ord. 13, r. 16).

62. HOYLE, *supra* note 9, at 29 & n.3.

63. *Id.* (quoting R.S.C., Ord. 29, rule 1).

64. *Id.*

B. *Legal Costs*

A party that obtains a *Mareva* or *Anton Piller* order is entitled to recover legal fees and costs by filing a motion with the court with an attached affidavit of attorneys' fees and costs. The hearing to determine legal costs almost invariably occurs at a later date, or after trial if there is no settlement. A successful party may be deprived of its legal fees and costs if it can be shown, for example, that the party knew the defendants were likely to be prepared to remedy the matters on which the complaint was made.[65] Moreover, there are rare situations when the court, even though it initially approved a plaintiff's ex parte application, will later decide that the plaintiff must pay not only its own legal costs, but also the legal costs or damages of defendant if it later turns out that the *Mareva* was without foundation. The usual consequence where a plaintiff was legally justified in applying for an injunction but arguably should not have done so, given the facts of the case, is that the plaintiff who so acted precipitatively loses its own legal costs. Moreover, a solicitor can be ordered to pay his client for wasted costs, so as to indemnify the client against a costs order in favor of the other side, if the solicitor incurred the costs as a result of seeking a hasty injunction when other alternatives would have been more appropriate.[66] In awarding costs, the courts are increasingly looking to the time immediately prior to the application for the injunction to see whether or not there was scope for a reasonable compromise, or whether one side acted too quickly.

C. *Scope*

The assets to which the injunction attaches may be tangible or intangible, realty or personalty.[67] In addition to bank accounts and choses in action, they include chattels such as motor vehicles, jewelry, objets d'art and other valuables.[68] Where money is held in a bank account in foreign currency, the bank may convert sufficient sums into the currency stated in the order to meet the requirements of the order.[69] Unless the plaintiff seeks a worldwide *Mareva*, there must be some grounds for showing that the defendant has

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65. Bluebell, Inc. v. Farmer Int'l Ltd., (1980) 130 N.L.J. 303, 318 (C.A.).

66. *See generally* R.S.C., Ord. 62, r.11. Because this rule has been cited for different orders in different cases, reference should be made to the *Supreme Court Practice and Supplements*.

67. COLMAN & LYON, *supra* note 41, at 107.

68. C.B.S. United Kingdom Ltd. v. Lambert, [1983] Ch. 37 (C.A); HOYLE, *supra* note 9, at 33-34.

69. Z. Ltd. v. A-Z & AA-LL, [1982] 1 Q.B. 558, 593 (C.A. 1981). The conversion may be made at the bank's current rate of exchange. The converted sum should then be held subject to the order. *Id.*

assets within the jurisdiction.[70] The *Mareva* will apply to assets that are acquired after the injunction has been granted, but before the eventual execution of any judgment obtained in the action.[71]

1. Worldwide *Mareva*

In most cases involving *Mareva* orders, the assets that are the subject of the order are not those at issue in the underlying cause of action, but are assets out of which the plaintiffs will seek to recoup the judgment debt if they obtain judgment. It was therefore considered for a longtime that the *Mareva* injunction, originally based on a blend of judicial discretion, inherent jurisdiction, and statute, could not affect property abroad except in limited instances, even if the form of the order was to bind the defendant, rather than the property.[72] Until 1988, the English courts generally refused to make orders concerning assets outside of the jurisdiction except in those limited cases where, on the basis of statute or the Rules of the Supreme Court, they felt authorized to do so.[73] This all changed in the summer of 1988 when the English Court of Appeal decided three cases within weeks of each other in which the court extended the *Mareva* jurisdiction to include orders regulating the behavior of parties in foreign jurisdictions. This "Worldwide *Mareva*" was established in *Babanaft International Co. S.A. v. Bassatne*,[74] *Republic of Haiti v. Duvalier*,[75] and *Derby & Co. Ltd. v. Weldon (No. 1)*.[76] In these cases, the English courts were authorized in certain circumstances to grant an order against a defendant otherwise within its jurisdiction relating to assets held by the defendant overseas.[77]

In deciding whether to apply for a worldwide *Mareva*, however, counsel should consider the substantial costs involved. In each of the three cases above, the claims were worth more than £10 million.[78] In each case, the

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70. Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, 668 (C.A.).

71. T.D.K. Tape Distributor (U.K.) Ltd. v. Videochoice Ltd., [1986] 1 W.L.R. 141, 145 (Q.B. 1985).

72. Ashtiani v. Kashi, [1986] 2 All E.R. 970, 977 (C.A.).

73. Interpool Ltd. v. Galani, [1988] 1 Q.B. 738, 741-42 (C.A.); *see also* Maclaine Watson & Co. Ltd. v. International Tin Council, [1988] 1 Ch. 1, 17-20 (C.A. 1987). These cases involve judgment creditors relying on R.S.C. Order 48 1(1) using post-judgment discovery orders to make inquiries concerning a judgment debtor's assets outside of the jurisdiction. *Interpool*, [1988] 1 Q.B. at 740-41; *Maclaine Watson*, [1988] 1 Ch. at 17-20.

74. [1990] 1 Ch. 13 (C.A. 1988). *See generally* RICHARD M. OUGH & WILLIAM FLENLEY, MAREVA INJUNCTIONS AND ANTON PILLER ORDERS (2d. ed. 1993).

75. [1990] 1 Q.B. 202 (C.A. 1988).

76. [1990] 1 Ch. 48 (C.A. 1988).

77. *Duvalier*, [1990] 1 Q.B. at 215; *Babanaft*, [1990] 1 Ch. at 32; *Derby No. 1*, [1990] 1 Ch. at 57.

78. *Duvalier*, [1990] 1 Q.B. at 204; *Babanaft*, [1990] 1 Ch. at 15-16; *Derby No. 1*, [1990] 1 Ch. at 51.

court emphasized that, although it had jurisdiction to grant the requested order, the granting of such orders should only occur in extraordinary circumstances.[79] The application for the order in England, and the steps necessary to attempt enforcement abroad, will be expensive, and should be considered only in exceptional cases where large sums are at stake and the risk of incurring substantial costs is justified.

In all three cases, it was acknowledged that English courts may not grant a *Mareva* injunction over foreign assets in precisely the same manner as they would over assets within England and Wales.[80] Where foreign assets are involved, the court will insert a proviso within the order, known as the *Babanaft* proviso.[81] Since the actual *Babanaft* case, the proviso has been modified by subsequent rulings.[82] Today, courts accept the version that was stated by Lord Donaldson in *Derby & Co Ltd v. Weldon (Nos. 3 & 4)*:

> Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of the order.[83]

The parties affected by the proviso are generally classified in three groups: (1) the defendant or other party to proceedings in which the order is granted who have property within England and Wales; (2) persons who are subject to the jurisdiction of the English court, have been given notice of the order, and are able to prevent breaches of the order outside of England and Wales; and (3) other persons, for instance, foreign nationals or institutions not subject to the jurisdiction of the English court, or persons who are subject to the jurisdiction of the English court but have not been notified. In the first group, the *Mareva* would apply to all activities and property belonging to the

79. *Duvalier*, [1990] 1 Q.B. at 215; *Babanaft*, [1990] 1 Ch. at 33; *Derby No. 1*, [1990] 1 Ch. at 55.

80. *Duvalier*, [1990] 1 Q.B. at 217; *Babanaft*, [1990] 1 Ch. at 29; Derby & Co. Ltd. v. Weldon (Nos. 3 & 4), [1990] 1 Ch. 65, 84 (C.A. 1988).

81. *Babanaft*, [1990] 1 Ch. at 28; COLMAN & LYONS, *supra* note 43, at 106.

82. COLMAN & LYON, *supra* note 41, at 106.

83. *Derby Nos. 3 & 4*, [1990] 1 Ch. at 84.

defendant within England and Wales. In the second group, the courts have ruled that, so long as the defendant is a proper party to the proceedings brought in England and Wales, the English court has jurisdiction to order the defendant to do anything outside England and Wales that the court would be able to order him to do inside England and Wales. The jurisdiction is essentially in personam and not in rem.[84] The English courts therefore have jurisdiction to issue a worldwide *Mareva* to order a defendant who has been properly joined as a defendant to transfer assets from one foreign jurisdiction to another, if this will prevent the defendant from taking action that would render any future judgment or award of the court unsatisfied.[85] This discretion, however, should be exercised with great care. Accordingly, the first issue will be whether a party is properly joined to proceedings in England. This depends on the Rules of Court and whether the court can obtain personal jurisdiction over someone who is outside of the territorial jurisdiction.

In the third group, defendants who are foreign nationals and not subject to the jurisdiction of the English courts are not bound to obey the order unless or until there is an order of the foreign court which has jurisdiction over them. Even then, they are bound only to the extent of the order of the foreign court. Essentially, once the plaintiff obtains the English *Mareva*, it must then apply to the foreign court to have the *Mareva* recognized and enforced against the foreign defendant. The proviso makes clear that the English court does not claim jurisdiction. So the plaintiff will need to make a further application in the foreign jurisdiction where it believes the defendant's assets are located. Plaintiff will need to consider whether the country has a procedure equivalent to the *Mareva* jurisdiction, and whether it is likely to exercise it in support of the order of the English court. But before application can be made in the foreign court, leave must be granted by the English court.

2. Requirements for Worldwide *Mareva*

The court has jurisdiction to grant a worldwide *Mareva* in support of proceedings brought in England, both before and after judgment. All such orders must contain a *Babanaft* provisio. In addition, the following requirements are common to prejudgment and postjudgment applications: the plaintiff must have a good arguable case on the merits and must show that there are insufficient assets in England to meet judgment, that the defendant has foreign assets, and that there is a real risk of disposal of assets so as to

84. Derby & Co. Ltd. v. Weldon (No. 6), [1990] 1 W.L.R. 1139, 1149 (C.A.).
85. *Id.*

frustrate enforcement of the plaintiff's judgment if one is obtained.[86] Even then, the court will rarely issue a worldwide *Mareva*, but as Lord Justice Kerr said in a famous passage that has been cited in other cases: "[S]ome situations . . . cry out — as a matter of justice to the plaintiffs — for disclosure orders and *Mareva* type injunctions covering foreign assets of defendants even before judgment."[87]

The types of cases that "cry out" for justice are large claim cases in which the defendant's conduct has been most egregious and underhanded in trying to frustrate the legitimate claims of plaintiffs in English courts. A case in point is *Duvalier*, [88] in which the Government of Haiti had a claim against former President Duvalier and his family for US$120 million for embezzlement.[89] This was a good case for a *Mareva* injunction because the defendants had admitted that they had been moving their assets around the world in an attempt to evade the efforts of the plaintiff to freeze them.[90] Lord Justice Staughton stated: "[I]f ever there was a case for the exercise of the court's powers, this must be it."[91] Moreover, in *Derby No. 1*, the claim was for £25 million.[92] The defendants included a Panamanian and a Luxembourg company.[93] The trial judge had found that the plaintiffs had a " 'highly arguable' " case, and that there was a high risk that the defendants would dissipate their assets, as they were " 'well used to moving funds worldwide.' "[94] In summary, the worldwide *Mareva* appears to be appropriate only where large sums are involved and where there is evidence that the defendants are adept at moving assets around the world through sophisticated means so that enforcement of the judgment or orders would cause considerable difficulty.

IV. THE *ANTON PILLER* ORDER: BASIC CONSIDERATIONS

In some cases it is vital for a plaintiff to ensure that the defendant does not destroy or dispose of evidence in the defendant's possession so as to make it difficult, if not impossible, for the plaintiff to prove its case.[95] In this situation, the *Anton Piller* order permits the plaintiff to demand entry to the defendant's premises (business or residential) in order to inspect and

86. *Derby No. 1*, [1990] 1 Ch. at 48.
87. *Babanaft*, [1990] 1 Ch. at 33; *see Duvalier*, [1990] 1 Q.B. at 217 (Lord Justice Staughton quoting Justice Kerr in *Babanaft*, [1990] 1 Ch. at 33).
88. *Duvalier*, [1990] 1 Q.B. at 202.
89. *Id.* at 204.
90. *Id.* at 217.
91. *Id.*
92. *Derby No. 1*, [1990] 1 Ch. at 51.
93. *Id.* at 50.
94. *Id.* at 54 (quoting Judge Mervyn Davis) (citation omitted).
95. *Anton Piller*, [1976] 1 Ch. at 61-62.

photograph documents and chattels on the premises, and to remove documents or other items for a short time if such items might form evidence in the action, or proposed action, against the defendant. Generally, the order will provide that it must be served by an independent solicitor in the presence of the plaintiff's solicitor.[96] The plaintiff's solicitor then executes the order, supervised by the independent solicitor.[97] In some situations, the order may provide for service and execution by the plaintiff's own solicitor without supervision. The *Anton Piller* order must be clear and concise, and it must be based on full disclosure to the court.[98] The court's power to issue the order derives from its inherent jurisdiction to prevent a defendant from frustrating judgment, for instance by destroying or disposing of either the evidence or the subject matter of the dispute before the proceedings have begun. The *Anton Piller* order often includes a direction to give details on affidavit of assets and other premises, or to deliver up goods, and is often considered as a tool to be used ancillary to a *Mareva* injunction.

The whole concept of the *Anton Piller* order is very controversial — an anathema to most jurists. In *Anton Piller KG v. Manufacturing Processes Ltd.*,[99] Lord Denning clearly set forth this view:

> Let me state at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out."[100]

Lord Denning argued, however, that the order was only to be undertaken with the defendant's permission and was justifiable under certain circumstances. He stated:

> It seems to me that such an order can be made by a judge ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends

96. *See 1994 Practice Direction*, [1994] 1 W.L.R. at 1233 § 3(b)(1)(a).
97. *Id.*
98. COLMAN & LYON, *supra* note 41, app. B, at 205, 207.
99. *Anton Piller*, [1976] 1 Ch. at 55.
100. *Id.* at 60.

of justice be defeated: and when the inspection would do no real harm to the defendant or his case.[101]

There are three essential preconditions for this order: (1) plaintiff must demonstrate an "extremely strong" prima facie case; (2) the potential or actual damage to the applicant must be "very serious," and (3) clear evidence must exist that the defendants have incriminating documents or things in their possession, and that there is a "real possibility" that the defendants may destroy the material before an application inter partes can be made.[102] The overriding consideration in issuing this order is that "it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available."[103]

A. *Procedure*

An *Anton Piller* order may be granted at any stage of litigation from the period before the writ was issued until after judgment while in aid of execution. It may be granted in all divisions of the High Court and in the Court of Appeal. It may also be granted in the Patents County Court, but not in any other county court. Cases within the jurisdiction of the county court should be transferred to the High Court for such application. The order is most often heard in the Chancery Division where requests for injunctions are heard in open court. Therefore, a request for the court to review the application *in camera* is essential to minimize publicity and maintain complete surprise.[104]

The order is not a "civil" search warrant. The only recourse a plaintiff has if the defendant denies the Supervising Solicitor entry to the premises is to apply to the court for a contempt order. Force cannot be used, and though defendants risk being penalized for contempt, their desire to take legal advice before permitting entry has been recognized as reasonable, and must be stated in the standard order form.[105] The order cannot be used to discover evidence on which to base a later claim,[106] but it can probably extend to overseas premises so long as the defendant is within the jurisdiction of the English courts.[107] However, this will not extend to Scotland based on

101. *Id.* at 61.
102. *Id.* at 63.
103. *Id.*
104. Vapormatic Co. Ltd. v. Sparex Ltd., [1976] 1 W.L.R. 939, 940 (Ch.). Orders may also be granted in the Family Division. *See* Emanuel v. Emanuel, [1982] 1 W.L.R. 669 (Fam.).
105. Manor Elec. Ltd. et al. v. Dickson et al., [1988] R.P.C. 618 (Q.B. Div.).
106. Hytrac Conveyors Ltd. v. Conveyors Int'l Ltd., [1983] F.S.R. 63 (C.A. 1982).
107. Cook Indus. Inc. v. Galliher, [1979] 1 Ch. 439, 443 (1978).

internal comity within the United Kingdom.[108]

The application for an *Anton Piller* order must include an undertaking to the court by the solicitors that they will not use documents and goods seized on the execution of the order for any purpose other than in the action in which they were seized, without leave of court or consent of the party from whom they were taken.[109] If solicitors negligently fails to provide accurate information to the court based on their undertakings, the court may issue a contempt order against them.[110]

B. *Tactics*

The successful execution of an *Anton Piller* order depends on good planning and logistical tactics. Many firms of solicitors employ extra staff or consultants to handle the logistics of enforcement, which include having adequate numbers of people on or near the site over and above those permitted to enter the premises. It is especially necessary to watch all exits and check if observation can be kept on rooms where shredding machines or other disposal units are kept. Staff may want to have hand-held tape-recorders, video cameras, and light cameras.

If more than one address is within the order, it is important that staff and consultants coordinate their execution of the order. For example, if defendants work from or have control of other addresses, a watch must be kept on them to see if service of the order at the main address causes a reaction elsewhere. If the defendants have something to conceal, they will most likely have efficient means of alerting their colleagues; therefore, plaintiff can prevent the loss of much important evidence by keeping a close watch on the appropriate locations. Moreover, the courts disapprove of the police being asked to stand by unless there is a real risk of a breach of the peace. In such a case, the use of the police should only be made with leave of court.

Plaintiffs must ensure that when serving *Anton Piller* orders, they observe the procedural requirements in the order. Before 1986, *Anton Piller* orders were regularly being granted in all divisions of the High Court, and their popularity was due primarily to their effectiveness in forcing defendants to settle plaintiffs' claims once the defendants were served with these orders. Needless to say, the broad scope of these orders was prone to abuse. Abusive execution of an *Anton Piller* order was at issue in *Columbia Picture*

108. Altertext Inc. v. Advanced Data Communications Ltd., [1985] 1 W.L.R. 457, 462 (Ch. 1984).

109. EMI Records Ltd. v. Spillane, [1986] 2 Ch. 1.

110. VDU Installations Ltd. v. Integrated Computer Sys. & Cybernetics Ltd., [1989] 1 F.S.R. 378 (Ch. 1988).

Industries Inc. v. Robinson.[111] Because hundreds of *Anton Piller* cases previously had been settled, *Columbia* provided Justice Scott with the opportunity to consider the development and operation of these orders.[112] He delivered a devastating critique, observing that one of the immediate effects of an *Anton Piller* order was to close down defendant's business.[113] He also queried:

> 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?[114]

Moreover, Justice Scott stated 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."[115]

Until 1992, *Anton Piller* orders had been granted in a wide variety of circumstances, but their use dramatically declined after *Universal Thermosensors Ltd. v. Hibben*.[116] *Universal Thermosensors* was a very important case because it was the first step by the courts in adopting an agreed upon, uniform approach to *Anton Piller* orders. This also made it easier to adopt a uniform approach to *Mareva* injunctions and eventually, to standard form injunctions. The Vice Chancellor's ruling in *Universal Thermosensors* is the basis for the standard form for an *Anton Piller* order.[117] The standard form shows a clear emphasis on the rights of the defendant by underlining the original safeguards required when *Anton Piller* orders were first developed and by providing additional safeguards, such as strict scrutiny of the evidence produced by plaintiff; emphasis upon issuing less draconian orders which the court may grant; further developments of the undertakings that the plaintiff must give before an order is granted; new safeguards for the defendant in execution of an order; and specific standards of when and to what extent the plaintiff or the plaintiff's solicitors may be liable to the defendant for nondisclosure at the ex parte application or errors in execution of the

111. [1987] 1 Ch. 38, 39 (1985).
112. *Id.* at 73.
113. *Id.*
114. *Id.* at 73-74.
115. *Id.* at 76.
116. [1992] 1 W.L.R. 840 (Ch.).
117. *See id.* at 860-61.

order.[118] In particular, it appears that courts will approve of exemplary damages against plaintiff or its solicitors for wrongful or oppressive execution of the order.[119]

C. *Scope*

The scope of an *Anton Piller* order is as broad as a *Mareva* injunction and involves many potential difficulties, not only because of consequent interference with the rights of individuals and companies, but also because of its effect on third parties. The *Anton Piller* order is a powerful tool for preserving evidence and preventing empty judgments. There are three principal areas of law where the order is used: (1) cases involving intellectual property rights, such as trade marks, copyrights patents, and trade secrets, (2) cases involving industrial espionage or anticompetition claims brought by ex-employers against ex-employees, and (3) matrimonial proceedings where it is thought that a spouse has failed to make truthful statements of his or her assets. There is a distinctive difference between the practice in the first two types of cases and the third, namely, in intellectual property and anticompetition cases, there is likely to be a preemptive strike by the plaintiff in which the application is made before or at the time the writ is issued and before it is served. In matrimonial cases, the order is likely to be made as a last resort, when other measures are considered not to have resulted in truthful disclosure. *Anton Piller* orders also may be used in other types of cases, but recent cases have cast doubt on the use of *Anton Piller* orders in cases involving criminal conduct because of the privilege against self-incrimination.[120]

V. STRATEGIC CONSIDERATIONS

Because *Mareva* injunctions and *Anton Piller* orders are ordinarily granted ex parte, the defendant has no opportunity to address the court and object to the applicant's request for the order.[121] To a lawyer in the United States, this is striking because such an order issued by a U.S. court would appear to violate basic principles of due process requiring notice and a hearing before a defendant may be deprived of its property. An English court's review of a party's ex parte request to freeze a potential defendant's assets and to invade its property to search for evidence creates a substantial risk that such an order will be issued without knowledge of arguments that

118. Moore, *supra* note 4, at 190-201 (presenting "Precedent for an Anton Piller Order").
119. *Columbia*, [1987] 1 Ch. at 87.
120. *See* Lord Justice Scott et al., *Anton Piller Orders — A Consultation Paper* (Lord Chancellor's Dep't, Nov. 1992).
121. *1994 Practice Direction*, [1994] 1 W.L.R. at 1233.

might be properly made on behalf of the defendant. To protect against this, the plaintiff must provide certain information and guarantees as part of making an ex parte application, which includes the following: (1) full and frank disclosure of any points which the defendant might raise if he were present to oppose the application; (2) indemnification of the defendant in compensation for damages if the order later proves to be without merit; and (3) serving the evidence on the defendant as soon as practicable and notifying the defendant of the right to apply to have the order discharged. As will be shown, *Mareva* injunctions must contain provisions that protect the security interests of banks and their right to setoff. Similar undertakings must be made by plaintiff's solicitors in executing an *Anton Piller* order, including returning originals of all documents obtained as a result of the order within two days of seizure.

Today, both orders remain extremely useful weapons in a claimant's legal arsenal. For instance, a company that suspects a competitor has misappropriated confidential trade secrets may obtain and execute an *Anton Piller* order to search the premises of the competitor and obtain any documents relevant to the demand in the order. While the *Anton Piller* order is being executed, the plaintiff also may obtain a *Mareva* injunction to temporarily freezes the assets of the defendant while the search of the defendant's premises and the copying of all relevant documents is being conducted. One of the likely effects of the *Anton Piller* order is to close down the business of the defendant, which, based on the applicant's evidence, operates in violation of the plaintiff's rights. The use of the *Anton Piller* order may effectively deprive citizens of their property and terminate their business operations through orders that were obtained *ex parte* based on applications against which the defendants were not permitted to be heard and which they must obey.

In recent cases involving *Anton Piller* orders, courts have been more vigilant in ensuring that procedural safeguards are maintained for defendants by enforcing a strict interpretation of the requirements placed on the plaintiff.[122] For example, in *Universal Thermosensors*, the court addressed serious irregularities in the execution of orders by the plaintiff's solicitors by requiring adherence to a new set of guidelines when serving *Anton Piller* orders.[123] Before *Universal Thermosensors*, English courts were reluctant to impose damages against the plaintiffs or their solicitors when failing to observe procedural safeguards to protect the defendant. In *Universal Thermosensors,* the plaintiff's solicitors obtained ex parte orders against the

122. *Lock*, [1989] 1 W.L.R. at 1280 (citing Booker McConnell Plc. v. Plascow, [1985] R.P.C. 425).

123. *Universal Thermosensors*, [1992] 1 W.L.R. at 860-61.

defendant's business property without revealing to the court certain material evidence which, if known to the court, might have dissuaded it from issuing the order.[124] The plaintiff's solicitors were held to have acted so egregiously that the court ordered them to pay £20,000 in damages as compensation to the defendants.[125] The *Universal Thermosensors* case reflects the tendency of courts to scrutinize more thoroughly applications for *Anton Piller* orders.

Unlike *Anton Piller* orders, the recent cases on *Mareva* injunctions have not been so concerned with protecting the defendant's rights. Instead, these cases emphasize a broadened scope of application of freeze orders, such as the worldwide *Mareva*, against assets that are located not only within the United Kingdom but also in foreign jurisdictions. In some circumstances, the courts will also permit plaintiffs to pierce the corporate veil in order to prevent individuals from escaping the effect of *Mareva* injunctions by the use of companies that they wholly control. Notwithstanding the broadened scope and power of *Mareva* injunctions in recent case law, courts have developed certain protections for defendants, namely, the imposition of damages against plaintiffs for failing to disclose all material information related to the strength of their claim and for not disclosing evidence that would have shown the defendant to be no threat to the dissipation or transfer of the assets sought by the plaintiffs.

VI. THE CIVIL JURISDICTION AND JUDGMENT ACT 1982

The harmonization of the procedures of the European Economic Community (EEC), the convention on the jurisdiction of courts, and the recognition and enforcement of judgments in civil and commercial cases were agreed to by the Member States of the European Community in 1968 and went into force in 1973.[126] The United Kingdom, Denmark, and Ireland signed an accession agreement to cover their new membership in 1978.[127] The Civil Jurisdiction and Judgments Act 1982 enacted by the British Parliament provided clear legal guidelines for Member States to adopt the necessary procedural rules so that orders and judgments of courts of the European Community could be recognized in the United Kingdom.[128] For

124. *Id.* at 842, 859.
125. *Id.* at 858.
126. STEPHEN WEATHERILL & PAUL BEAUMONT, EC LAW 282-86 (1993).
127. The Convention on the Accession to the 1968 Convention and the 1971 Protocol of Denmark, the Republic of Ireland and the United Kingdom, *signed at* Luxembourg, Oct. 9, 1978 [Accession Convention].
128. Civil Jurisdiction and Judgments Act 1982, 52 STATUTES 381 (Eng.). This discussion can only be brief regarding *Mareva* and *Anton Piller* orders. For a full analysis of the Civil Jurisdiction and Judgments Act 1982, which gave the 1968 Brussels Convention the force of law, and the Civil Jurisdiction and Judgments Act 1991, which gave the 1988 Lugano

purposes of this article, the broadest and most far-reaching provisions allow protective measures to be taken by any person of a contracting country even if proceedings have already begun in another Contracting State. Article 24 of the 1968 Brussels Convention on jurisdiction sets out the basis of this power: "Application may be made to the courts of a Contracting State for such provisional measures, including protective measures, as may be available under the law of that State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."[129]

In addition, section 25 of the Civil Jurisdiction and Judgments Act clarifies the position as to interim relief pending the trial or appeal and allows English court jurisdiction to grant relief even if the subject matter of the continuing proceedings is a question of jurisdiction, or is a reference to the European Court under the 1971 Protocol to the 1968 Convention.[130] Section 25 reverses the effect of the *Siskina* case where the Privy Council had decided that a plaintiff could not obtain a *Mareva* injunction from an English court against a defendant's property in England when the plaintiff had brought the action in a foreign jurisdiction and the legal or equitable right on which the *Mareva* injunction was based arose under foreign law.[131] At present, with the standard provisions of the Act now in force, a plaintiff suing, for example, in France, can apply to the English courts to freeze the defendant's assets in England, provided the Convention applies to the original claim.[132] Once a foreign judgment has been given in France, the party can enforce the judgment debt against defendant's assets in England under the recognition and enforcement procedures of the Convention.[133] Therefore, there is now complete interaction between the Member States of the EEC on the principle that a party's assets may be frozen in one way or another pending the outcome of a trial.

VII. EMERGENCY PRETRIAL RELIEF UNDER UNITED STATES LAW

United States law has traditionally provided an array of prejudgment security mechanisms that are available to creditors to restrain debtors from dissipating or disposing of property that would otherwise be available to

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Convention the force of law, *see* the Jenard Report, 1979 O.J. (C 59) 1, 66; the Schlosser Report, 1979 O.J. (C 59) 71; *see also* LAWRENCE COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 (1992).

129. The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *signed at* Brussels, Sept. 27, 1968 [hereinafter 1968 Convention].

130. Civil Jurisdiction and Judgments Act 1982, *supra* note 128, pt. 4, § 25.

131. *Siskina*, [1979] A.C. 210; COLLINS, *supra* note 128, at 6.

132. 1968 Convention, *supra* note 129, arts. 1-3.

133. Section 4, Civil Jurisdiction and Judgments Act 1982, *supra* note 128, pt. 1, § 4; *see* 1968 Convention, *supra* note 129, art. 31(2).

satisfy a judgment.[134] In particular, the attachment procedure is available in a situation where a defendant is likely to avoid payment of the debt if judgment is secured.[135] Most state laws will allow an attachment to issue if the defendant is a nonresident, has been absent from the jurisdiction for a long period, has attempted to avoid being served with a summons, is on the verge of removing or has already removed property from the state, or has sold or transferred property with intent to avoid payment to creditors.[136] For a creditor to enforce its rights, most states require that certain procedures be followed: for example, in addition to serving a defendant with a summons and a copy of the complaint, the creditor also may obtain security before a debt matures if it appears probable that the debtor is attempting to defraud creditors.[137] Moreover, most state courts have the equitable power to issue ex parte orders in favor of a creditor without notice to the debtor if it is likely that the creditor would suffer irreparable injury if "the order were delayed."[138] As a general matter, however, these pre-suit and prejudgment remedies must be pursued in compliance with the requirements of the U.S. Constitution's Fifth and Fourteenth Amendments so that debtor's property rights are protected with due process of law during these procedures.[139] The constitutional requirements primarily include adequate notice and an opportunity to be heard in a timely manner on the merits of the creditors claim.[140]

In addition, the Federal Rules of Civil Procedure establish the procedure

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134. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 96-184 (1991).

135. A good sample of U.S. prejudgment attachment statutes are: CAL. CIV. PROC. §§ 481.0101-493.060 (1997); FLA. STAT. §§ 76.01-.32 (1997); KY. REV. STAT. §§ 425.301-.316 (1997); N.Y. CIV. PRAC. LAW & RULES §§ 6201-6226 (1997); TEX. CIV. PRAC. & REM. CODE §§ 61.021-.023 (1997). Attachment also may be used as security for litigation pending outside the state where assets are located. Barclay's Bank, S.A. v. Tsakos, 543 A.2d 802 (D.C. App. 1988). The Fair Debt Collection Practices Act also contains a procedure whereby the U.S. government can obtain prejudgment remedies to secure a debt. 15 U.S.C. § 1692 (1994).

136. KY. REV. STAT. § 425.301(1)(a)-(h); TEX. CIV. PRAC. & REM. CODE § 61.002.

137. FLA. Stat. § 76.05.

138. KY. REV. STAT. § 425.308. The creditor is required to post a bond the value of which must be twice the amount of the claim. *Id.* § 425.309. The debtor may dissolve the attachment and regain control of the property if the debtor posts a bond equal to the creditor's claim, including court costs and attorney's fees. *Id.*; *see* FLA. STAT. §§ 76.08, .12.

139. U.S. CONST., amends. V, XIV. The Fourteenth amendment provides that states may not deprive persons of property without due process of law. *Id.* amend. XIV. The Supreme Court has interpreted what "process is due" and has outlined certain requirements with which state prejudgment attachment statutes must conform. Connecticut v. Doehr, 501 U.S. 1 (1991); North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

140. Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

for securing preliminary injunctive relief in civil actions.[141] The purpose of the preliminary injunction is to preserve the status quo between parties pending a final determination on the merits.[142] A federal court is vested with full authority to determine whether to grant the injunction and to determine its scope.[143] As part of its broad authority to issue injunctive relief, Rule 65 of the Federal Rules of Civil Procedure authorizes U.S. district courts to issue temporary restraining orders to freeze assets when those assets are the subject matter in dispute.[144] More recently, the Second Circuit has ruled that Rule 65 also authorizes a district court to issue a temporary restraining order "to protect [a] plaintiff's right to recover monetary damages when there is a threat of defendant's insolvency or its dissipation of assets," and the assets in questions are "not directly involved in the pending litigation."[145] The use of a temporary restraining order in this context is similar to the use of a *Mareva* injunction to freeze assets either before trial or before a writ is issued. Unlike the *Mareva* injunction, the temporary restraining order is ordinarily issued only after both notice is given to the party whose property would be deprived by such order and an adversarial hearing. The application for a *Mareva* injunction typically involves no notice to the opposing party and is issued by the court on an ex parte basis.

However, there is no counterpart in U.S. civil procedure to the *Anton Piller* order. The nearest equivalent of an *Anton Piller* order under U.S. law is the use of a criminal warrant issued by a judge on *ex parte* basis so that law enforcement authorities may seize important evidence before it is destroyed. United States law has no counterpart to the *Anton Piller* order in civil actions most probably because the enforcement of such orders in the United States would infringe the defendant's due process rights under the Fifth and Fourteenth Amendments.

The use of the temporary restraining order to freeze the assets of a defendant who is at risk of dissipating or transferring assets out of jurisdiction, even when those assets are not the subject matter of the dispute, is a significant change in the equity jurisprudence of the federal courts and has

141. *See* FED. R. CIV. P. 65(b).

142. Arthur Guinness & Sons, PLC. v. Sterling Publ'g Co., 732 F.2d 1095, 1099 (2d Cir. 1984).

143. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). In this case, the U.S. Supreme Court stated: "An appeal to the equity jurisdiction conferred on district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Id.*

144. FED. R. CIV. P. 65(b); *see* Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).

145. Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, 143 F.3d 688, 693-95 (2d Cir. 1998). Moreover, on occasion, a party will rely on Federal Rule 65 not only to freeze financial assets but also to obtain an order preventing another from continuing a course of conduct that either violates the rights of others or has that potential.

its origins in past U.S. Supreme Court decisions. In *Deckert v. Independence Shares Corp.*,[146] the plaintiffs sought an order enjoining the defendant from disposing of any assets pending the outcome of their damage action for fraudulent misrepresentation.[147] The plaintiffs alleged that the defendant "[wa]s insolvent and threatened with many lawsuits, that its business [wa]s virtually at a standstill because of unfavorable publicity, that preferences to creditors [we]re probable, and that its assets [we]re in danger of dissipation and depletion."[148] The Court held:

> [T]he injunction was a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill. . . . As already stated, there were allegations that [defendant] was insolvent and its assets in danger of dissipation or depletion. This being so, the legal remedy against [defendant], without recourse to the fund . . . would be inadequate.[149]

In a more recent case, the Supreme Court upheld a preliminary injunction freezing assets in order to assure the enforceability of an eventual money judgment.[150] These two Supreme Court cases support a district court's exercise of general equitable power to ensure the preservation of an adequate remedy.[151] Today, equity jurisprudence supports the use of a preliminary injunction to protect a plaintiff's right to recover monetary damages when there is a threat that the defendant will become insolvent or dissipate assets.[152]

The equitable nature of the remedy and its intent to prevent an alleged irreparable harm from occurring justify a court's use of broad powers under the temporary restraining order. The same standards that apply for a preliminary injunction also apply in the temporary restraining order context.

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146. 311 U.S. 282 (1940).

147. *Id.* at 285.

148. *Id.*

149. *Id.* at 290.

150. United States v. First Nat'l City Bank, 379 U.S. 378, 384-85 (1965). In *First Nat'l City Bank*, the U.S. government sought payment of back taxes. *Id.* at 379. The Court stated that "[o]nce personal jurisdiction of a party is obtained, the District Court has authority to order the party to 'freeze' property under its control." *Id.* at 384.

151. *See* United States *ex rel.* Taxpayers Against Fraud v. Singer Co., 889 F.2d 1327, 1330 (4th Cir. 1989) (citation omitted).

152. Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 189 (3d Cir. 1990) (holding that a preliminary injunction is authorized in "extraordinary circumstances" in a suit seeking only money damages, such as when there is a possibility that the defendant will be insolvent at the time of judgment); *see also* Teradyne, Inc. v. Mostek Corp., 797 F.2d 43, 52-53 (1st Cir. 1986) (holding that it lay within the district court's power to enjoin the defendant from disposing of assets when there is a danger that the defendant will become insolvent prior to judgment).

The requirements are: (1) the likelihood that plaintiff will prevail on the merits; (2) the threat of irreparable injury to plaintiff if no injunction is issued; (3) the degree of harm that an injunction would cause to the defendant; and (4) the public interest.[153] A wide range of conduct may be subject to a temporary restraining order including: (1) the defendant's violation of a trademark by marketing protected goods, (2) the defendant's marketing of goods in a geographic area or under circumstances which violate an exclusive right in the claimant, or (3) the defendant's violation of a covenant not to compete agreement in the employment context.[154]

The use of temporary restraining orders is similar to the *Mareva* injunction and has been approved by most U.S. federal circuits.[155] In *Republic of Philippines v. Marcos*, the Second Circuit upheld a preliminary injunction prohibiting the family of former Philippine President Ferdinand Marcos from encumbering real property located in New York that allegedly had been purchased with funds embezzled from the Philippines.[156] Moreover, in a related case, the Ninth Circuit Court upheld a California federal court that had issued a temporary restraining order that would apply extraterritorially against the Marcoses personally to prevent them from transferring assets wherever located, including their assets in banks in foreign jurisdictions.[157]

VIII. CONCLUSION

Mareva injunctions and *Anton Piller* orders have become popular and effect tools for creditors in England and Wales to preserve the financial assets of questionable debtors while a legal action is pending. The use of these emergency interlocutory orders has strengthened the appeal of English courts as forums to resolve international commercial disputes. Moreover, since 1990 the national legal systems of the European Union have recognized the application of *Mareva* injunctions and *Anton Piller* orders with the result

153. FED. R. CIV. P. 65(a)(1) (preliminary injunctions), 65(b) (temporary restraining orders), *cited in* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES, RULES OF CIVIL PROCEDURE 210 (1996); *see also* Sampson v. Murray, 415 U.S. 61 (1974) (holding that a temporary restraining order be issued in an employment dispute); Nutrasweet Co. v. Vit-Mar Enter., Inc., 112 F.3d 689 (3d Cir. 1997) (holding that an injunction against Russian exporter of "grey market" goods be issued); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211 (7th Cir. 1993) (holding that a temporary restraining order be issued in an employment dispute at securities firm).

154. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 5.16 (1994).

155. *See Hoxworth*, 903 F.2d at 197; Foltz v. U.S. News & World Report, 760 F.2d 1300, 1309 (D.C. Cir. 1985).

156. 806 F.2d 344, 346 (2d Cir. 1986). The Second Circuit issued the injunction to provide assistance to the Philippine government in its attempt to recover funds wrongfully taken during Marcos's reign of power. *Id.* at 350-52.

157. *In re* Estate of Marcos, 25 F.3d 1467, 1480 (9th Cir. 1994).

that these orders have become effective weapons for creditors to enforce their rights throughout the European Community. Although courts in recent years have been more willing to issue *Mareva* injunctions, they have become more vigilant and circumspect in reviewing the use of *Anton Piller* orders. Although the liability risks of using *Anton Piller* orders have increased significantly in recent years, many litigants are finding the use of both orders in tandem to be a particularly effective way of minimizing risk when pursuing a claim against a risky debtor. The *Mareva* and *Anton Piller* orders are valuable pretrial tactics for the litigant and will continue to be utilized in all divisions of the English High Court. Moreover, the international scope of such orders will become more pronounced in the future as more and more international transactions involve debtors seeking to transfer their property and assets to different jurisdictions to avoid creditor claims.