

## TECHNOLOGY, PEOPLE AND NEW EQUITY \*

Developments in equity are often attributed to judges who decide leading cases. Other people have claims to be recognized as innovators, such as counsel, law-breakers and scientists. If the two great recent developments in equitable remedies, the Anton Piller order and the Mareva injunction, can be put down to technology, it is not the research scientists or inventors, but the developers of mass production, who have been most significant.

EQUITY is allowed to have new doctrines, up to a point, at any rate. "... [T]he rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them." Sir George Jessel said that in 1880.<sup>1</sup> Some of us are old enough to remember that there was equity in England before Lord Denning; and some of us are young enough to hope that there will be equity in England after his time. We may be encouraged by these words used by Leggatt J. in 1984: "... if this had been the first instance, it would not be a substantial objection; for, if so, every order made for the first time might be resisted on that ground."<sup>2</sup>

It is easy, often enough, to tell *when* a doctrine was invented; and even *why* it was invented. It is not so easy to be sure why a doctrine was invented *when* it was. The existence of a brilliant and innovative member of the judiciary, especially one with a thirst for justice above the average and a respect for judicial precedent below the average, must promise well for novelty, but it is not sufficient alone. Judges do not make equity on their own. They need counsel, litigants and facts.

The two most dramatic developments in equity in the past decade or so have been the Anton Piller order and the Mareva injunction. The Anton Piller order is an *ex parte* order made for the purpose of preserving evidence pending trial or execution, commonly in the form of calling on the defendant to allow the plaintiff's agents to enter the defendant's premises and seize chattels or documents or to take inventories or photographs. A Mareva injunction restrains a

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<sup>1</sup> *Re Hallett's Estate*, (1880) 13 Ch. D. 696.

<sup>2</sup> *Distributori Automatici Italia SpA v. Holford General Trading Co. Ltd.* [1985] 1 W.L.R. 1066, quoting Lord Redesdale in *United Company of Merchants of England, Trading to the East Indies v. Kynaston* (1821) 3 Blyth (O.S.) 153).

defendant, generally pending trial, from dissipating or hiding his assets. The idea of that is to strengthen the defendant's resolve and capacity to pay any damages that may be awarded to the plaintiff.

In accordance with tradition in Chancery, Anton Piller and Mareva are the names of persons or things not involved in the cases in which the orders were first made.

Anton Piller was the name of a German limited partnership, the plaintiffs in the second reported English case in which an order of that kind was made. That case was decided on 8th December 1975. Templeman J. had made a similar order on 5th December 1974 (in *E.M.I. Ltd. v. Pandi*<sup>3</sup>). He was able to mention three unreported cases in which similar orders had been made in 1974. Although he also appealed for support to an Irish case of 1888 and English cases of 1877, 1821 and 1799, it would be fair to regard 1974 as the beginning of a settled practice, now in daily use in England but settled in Singapore and Malaysia too, of making an order *ex parte* for the avowed purpose of taking the defendant by surprise and so depriving him of capacity to destroy evidence in his possession. The question I wish to pose is: why did that happen in 1974? That was certainly not the year in which defendants first conceived the idea of making away with inconvenient evidence; nor was it the year in which courts first withheld approval of such conduct by defendants.

Mareva was the name of a ship belonging to the plaintiffs in the second reported English case in which an interlocutory injunction of that kind was made, a Court of Appeal decision in 1975. Earlier the same year, the Court of Appeal had unanimously made a similar injunction.<sup>4</sup> That was the first case. The defendants had disappeared, apparently owing the plaintiffs hire due under a charterparty. Attempts to call on them in their office in the Piraeus had not got anywhere, but they had funds in London banks. The Court of Appeal could see nothing against keeping the money in the banks until the trial as to liability, and everything in favour of it. When they later made the same sort of order in the Mareva case itself,<sup>5</sup> the Court of Appeal, though still unanimous, became very tentative. That was because, although still seeing everything in favour of preserving defendants' assets for the potential benefit of plaintiffs, they now could see something against it in the shape of one of their own previous decisions. In *Lister & Co. v. Stubbs*,<sup>6</sup> the Court of Appeal had decided unanimously that a plaintiff could not get an injunction pending trial to restrain the defendant from dealing with assets to which he had title unless the plaintiff was claiming in the suit that the assets were his (the plaintiff's) property, for example under a constructive trust. As that was not so in *Lister v. Stubbs* which, although a case of fraud, was a suit for debt, like the *Nippon* and *Mareva* cases, the injunction was refused. In the *Mareva* case, *Lister v. Stubbs* was distinguished on the ground that both parties in the earlier case were

<sup>3</sup> [1975] 1 W.L.R. 302.

<sup>4</sup> *Nippon Yusen Kaisha v. Karageorgis* [1975] 1 W.L.R. 1093.

<sup>5</sup> *Mareva Campania Naviera S.A. v. International Bulkcarriers S.A.* [1975]

2 Lloyd's Rep. 509.

<sup>6</sup> (1890) 45 Ch. D. 1.

English, which was not a reason that had occurred to the Court of Appeal in 1890 for refusing the injunction, whereas the 1975 Karageorgis brothers and Bulkcarriers were foreign defendants. By 1980 it had been settled in several cases that it is no bar to the grant of a Mareva injunction that the defendant is not a foreigner or is not foreign-based. The question I want to pose is: why did Mareva injunctions, now in common use in England, Singapore and Malaysia, begin in 1975? Certainly things did happen between 1890 and 1975: one was the decision in *Young v. Bristol Aeroplane Co.*<sup>7</sup> that the Court of Appeal is bound by its own decisions.

### ANTON PILLER ORDER

Rather to my surprise, I have not come across any case reported in the Malayan Law Journal of an Anton Piller order being granted, refused or discharged in Singapore, although there are many published references to the fact that they are granted here. Apparently the first time such an order was made in Malaysia was in August 1981, when Yusof Abdul Rashid J. in *Lian Keow Sdn. Bhd. v. Paramjothy*<sup>8</sup> secured for the plaintiffs documents relating to a trust of land in Johore Bahru. Typically, though, the order is sought in copyright cases, where the defendant is alleged to be selling tape recordings, in cassette form or otherwise, of sound, or videotapes, in breach of the plaintiff's copyright. The first such case in Malaysia was *Television Broadcasts Ltd. v. Mandarin Video Holdings Sdn. Bhd.*,<sup>9</sup> where Chan J., in a spirited rendering that would have drawn applause from Gilbert and Sullivan, did offer some guidance on the etiology. Another such case is *Television Broadcasts v. Seremban Video Holdings Sdn. Bhd.*<sup>10</sup>

It appears that what happened before Anton Piller came on the scene is that the owners of the copyright in, say, a videotape, wondering why their product was doing so badly while everyone had heard their sounds and seen their pictures, sent people round the less salubrious shops. Such an inspector would find a pirated copy and buy it. If he then taxed the shopkeeper, he would receive a profuse apology, an assurance that the shopkeeper had no idea such a thing was in his shop, and was saddened that there was someone in the world bearing him such malice as to have planted it there, and a further assurance that there could be no further stocks. Any other pirate loot there might be would then be removed until the coast was clear again. That was most frustrating for composers, writers and performers as well as publishers. After Anton Piller orders became available, the plaintiff's inspector would buy a pirated videotape, go away and get an order and thus secure the evidence. The order in the E.M.I. case, the first reported English case, was that the defendant let in up to three of the plaintiff's agents and a couple of people from the plaintiff's firm of solicitors between 8 a.m. and 9 p.m. for the purpose of inspecting and photographing tape recordings, labels, packets and documents, and allow the plaintiff to remove tapes which infringed the plaintiff's copyright and to inspect, test and

<sup>7</sup> [1944] K.B. 718.

<sup>8</sup> [1982] 1 M.L.J. 217.

<sup>9</sup> [1983] 2 M.L.J. 346.

<sup>10</sup> [1985] 1 M.L.J. 171.

photograph typewriters and photocopiers, together with an injunction restraining the defendant from destroying or removing any of the foregoing.

In the *Mandarin Video Holdings* case, Chan J. quoted Bridge L.J. (in *Rank Film Ltd. v. Video Information Centre*<sup>11</sup>) as saying: "Modern technology has greatly facilitated the pirating of copyright material, especially in the form of sound recordings and films." And he quotes Lord Wilberforce in the same case as referring to "... acts of piracy which have become a large and profitable business in recent years." Finally, Chan J. records the assertion of Whitford J. in the same case: "Recent developments in the field of audio-visual recording on tape and reproduction by way of television receivers have brought about" all this piracy of moving pictures.

It was Oberlin Smith, in 1888, who first published the idea of storing electrical information by means of magnetised particles, though it was not until ten years later that Valdemar Poulsen produced the first practical tape recorder. As for television, it was Alexandre Edmond Becquerel who, in 1839, discovered the electrochemical effects of light, though it was not until 1936 that the B.B.C. started the first regular public television programmes. Improvements have been made in television sets much more recently: higher definition, colour; tape recording of sounds has also continued to be improved; and it is only in comparatively recent years that the videotape has replaced the film with sound-track as the main method of storing talking motion pictures and that the television set has replaced the big screen as the mode of displaying what is produced from a player instead of a projector. It is perhaps the entrepreneurs who made all these toys into a mass market who are the true begetters of Anton Piller orders rather than the scientists who found the technology. Or possibly it is Mr. Hugh Laddie, who was counsel for the plaintiffs in all the early English Anton Piller cases. He devised the form of the relief as well as persuading the courts to grant it to him. And after all, the Anton Piller case itself, while it had much to do with Mr. Laddie, had nothing to do with video pirates. The piratical defendants there were breaching the plaintiffs' copyright in and stealing their confidential information about power units and frequency converters for computers. Electronic computers only go back to the 1940s, incredible though that may seem in the light of how commonplace they have now been for a quarter of a century.

You can trace the strands of technological and legal development back through many people, but the Anton Piller order owes its genesis to one eternal item of equipment, money, and to the human characteristic of disloyalty. There is hardly a worthwhile copyright without a worthwhile breach of copyright, and it is noticeable how many Anton Piller orders have had to be sought by copyright owners against their own duly appointed agents or licensees. Perhaps the last accolade to be awarded in this class is to the unknown crook who worked out that you could make your master copy of someone else's film by paying a cinema projectionist a reasonable sum just to switch on your video-recorder when he started his legitimate work. Piracy may have its tawdry side, but it may still be a glorious thing to be a pirate *king*.

<sup>11</sup> [1982] A.C. 380.

## MAREVA INJUNCTION

“*Mareva* injunctions have been issued by the High Court in Singapore for some years now.”<sup>12</sup> In Malaysia they received their certificate of legitimacy from the Federal Court in January 1982 in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.*,<sup>13</sup> where the court held that power to grant such an injunction existed but refused to grant one because there was no evidence that the defendant intended to dissipate its assets, and by September 1984 Abdoolcader F.J., giving the judgment of the Federal Court in *S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd.*<sup>14</sup> could say: “The policy underlying and the principles governing an order of this nature have been expounded and ossified in a catenation of congeneric cases...”. It is possible that he had in mind not only the three previously reported Malaysian cases, but ossification by cases from England and elsewhere.

If you were about to be sued for damages, and expected to be held liable for every cent you had, you might have been tempted in any century to blow your substance on a pleasant life between issue of the writ and trial, or to hide away with a view to its enjoyment when the dust had settled on your non-payment of the judgment debt. You might be deterred from spending it all by the possibility that you might win at the trial, or be held liable to pay less than your all, but those possibilities need not deter you from fraudulent concealment. The suggested reason for suddenly stopping that in 1975, at least by foreign defendants transferring assets out of the jurisdiction, is that such transfers had become much easier than in earlier days. In the *Century Hotel*<sup>15</sup> case, Raja Azlan Shah C.J. (Malaya), giving the judgment of the Federal Court, said: “While in former days it was difficult for defaulting debtors to transfer assets out of the jurisdiction to stultify a judgment, today, vast sums of money can be transferred out of the country in a matter of seconds as a result of a few words spoken by telephone or by sending a telex message.” Well, ignoring diaphragms connected by a piece of wire or string, by which Robert Hook was able to organise telephonic communication over a few feet in 1667, practical telephones were patented by Alexander Graham Bell in 1876. It is true that telex did not get going until 1932, but banks have been widespread for centuries. I have, incidentally, found it impossible to get my bank to do anything significant as a result of a telephone conversation, but perhaps other people have better luck. Civil proceedings, though, do not come upon one swiftly, and I could imagine a person in, say, 1860, even before telephones, going to his London bank when the writ arrived, drawing out his money, taking the train and steamer to Calais and depositing his wealth with a French bank. That is not totally dissimilar from the way in which the National Union of Mineworkers tried to avoid the clutches of the English court of equity when they were in contempt of court in 1984.

<sup>12</sup> *Art Trend Ltd. v. Blue Dolphin (Pte.) Ltd.* [1983] 1 M.L.J. 25, per Lai Kew Chai J., at p. 29, whose actual decision in the case was affirmed on appeal: [1983] 2 M.L.J. 93.

<sup>13</sup> [1982] 1 M.L.J. 260.

<sup>14</sup> [1985] 1 M.L.J. 62.

<sup>15</sup> [1982] 1 M.L.J. 260.

Raja Azlan Shah C.J. actually quoted a passage from a judgment of Lawton L.J. in *Third Chandris Shipping Corp. v. Unimarine S.A.*<sup>16</sup> from which this is a small extract: "Nowadays defaulting on debts has been made easier for the foreign debtor by the use of corporations, many of which hide the identities of those who control them, and of so-called flags of convenience, together with the development of world-wide banking and swift communications. By a few words spoken into a radio telephone or tapped out on a telex machine balance can be transferred from one country to another and within seconds can come to rest in a bank which is untraceable..."

Let us for a moment confine ourselves to foreign debtors transferring assets out of the jurisdiction. Let us admit that methods of making such transfers and making them untraceable are continuously being developed and refined. Nevertheless, such transfers have never been impossible. In limited circumstances, the courts of equity have long had the writ of *ne exeat regno* to prevent a defendant leaving the jurisdiction to avoid paying a debt. Corporations, with their potential for obfuscation, have existed for a century and a half. Banks are much older, but the development of world-wide banking may be more recent. It is certainly only in the last decade or so that I have noticed how difficult it is to buy things in a town centre because there are only banks and building society offices where the shops used to be. Not that, if one needs to cash a cheque, they ever include a branch of one's own bank. Radio telephones and telex may be products of the 1930s, but there were some swift communications before that. When Euripedes depicted the news of the Greek victory in Troy being brought to Greece by telegraph, I do not suppose he had in mind any such message as: "Sell all Trojan government stock and put proceeds in numbered account in Carthage." Nevertheless, the first suggestion for sending messages by electric telegraph was published in 1753 by an anonymous Scot six years after Sir William Watson demonstrated that an electric current could be transmitted through a long wire, using the earth for completion of the circuit. There are many claimants for the title of inventor of modern telegraphy between their day and the formation of the Electric Telegraph Company in 1845. Messages were being sent by 1774 and teleprinters in commercial use internationally antedate the refusal to invent Mareva injunctions in *Lister v. Stubbs* in 1890.

As Mareva injunctions ceased to be confined to foreign defendants—thus rendering it unnecessary after 1980 for people like the deceased in *Allen v. Jambo Holdings Ltd.*<sup>17</sup> to choose a Nigerian aircraft propeller to be decapitated by—and as they ceased to be confined to transferring assets out of the jurisdiction but extended to any spiriting out of sight of the plaintiff, and as they extended to dissipation as well as hiding, it became plainer that the original reasons given for granting Mareva injunctions were closely geared to distinguishing *Lister v. Stubbs*. In other words, perhaps I should have originally posed the question: how was it that, by 1980, a brave 1975 exercise in distinguishing had developed, without the assistance of Parliament as a Legislature or the House of Lords as a court, into making a completely dead letter of a Court of Appeal

<sup>16</sup> [1979] Q.B. 645.

<sup>17</sup> [1980] 1 W.L.R. 1252.

decision of 1890 given when the very danger perceived in 1975 was actually threatened?

The fact is that the decision in 1890 was wrong. It is easy to see how it came about. The unitary High Court under the Judicature Acts was only fifteen years old. Before 1876, the Court of Chancery had issued injunctions to maintain the *status quo* pending trial, but only in cases where a permanent injunction, specific performance or some other equitable remedy was claimed as relief at the trial. The common law courts had only shortly before acquired statutory power to grant injunctions and were confined to the practice of the courts of equity in doing so. It appeared to the Court of Appeal in 1890 that the new departure they were requested to make was undesirable for at least two reasons. First, to grant an interlocutory injunction to restrain the defendant from dealing with his assets pending trial was unduly restrictive of the freedom of a property owner who had not been held liable yet. Secondly, such a grant appeared to be giving the plaintiff security for his debt in circumstances in which there had been no stipulation between the parties for security and it was not even established yet that there was a debt.

Now that we have experienced Mareva injunctions for ten years, we can see that those objections can be answered. The defendant is not unduly restricted. The common form of Mareva injunction allows the defendant to use his assets for ordinary living expenses. He can apply to the court at any time to be allowed extraordinary items of expenditure. Equity acts *in personam* and therefore the plaintiff does not acquire security in the sense of being able to foreclose on any particular property for payment. If the defendant has debts due for payment, he or any creditor can apply to the court for authority to pay despite the injunction. That such authority is readily given makes plain that the plaintiff given Mareva protection does not steal a march on an unrepresented world. Finally, as with all interlocutory injunctions, the plaintiff granted a Mareva injunction gives an undertaking in damages. That means that if the defendant wins at the trial he will be awarded against the plaintiff damages for any loss he has suffered through being subject to the Mareva injunction while awaiting trial.

What spreading banking facilities and the speeding up of communications did was not to make the Mareva injunction necessary, which it always had been, but to make its absence a disadvantage which was much more widely suffered. In emphasising how long some technology has been with us, in one state of development or another, I have not meant to deny that technological advance sometimes requires new responses by courts, including courts of equity. In some instances, there are obviously direct and pressing problems. For example, short of legislation, how is one to protect from industrial theft a computer programme expressed in machine language? Is unauthorised copying of the programme breach of copyright despite the fact that there is no visual means of examining it, no words, no picture? Or should the work be patented? That is a question made acute by the micro-chip. But like the other questions I have referred to, such issues are not raised for lawyers by scientists who get results from fundamental research, nor by inventors who manage

to coax a prototype into activity, nor yet by the developers of the first practical production model, but by the teeming teams of developers, businessmen and financiers who eventually put the products within the reach of the average consumer.

If you want to start now considering what equity you might persuade a court to invent in 1995, you do not need to foresee the progress of science, design or development. You need to know what ideas lying around now, what models developed for practical use, are available to a few multi-millionaires but will become within the reach of millions of consumers. I hope it will not be nuclear weaponry. I do not think it will be family spaceships — not that soon. I do not know what it will be. If I did, I should not be forthcoming: I should simply go away and draft my precedents, ready to be first in the field.

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