



Injunctions and Recent Developments in Interim Relief

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The Speaker:

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A full CV can be found at the back of these notes.

Injunctions.

1. The injunction is a remedy which used to be granted by the old High Court of Chancery. It is an order which if it is broken is backed up with the threat of contempt proceedings – which can result in assets being seized by the court or a prison sentence.
2. The jurisdiction today has been that inherited from the court of Chancery and various statutory jurisdictions which extend that jurisdiction – ASBOs, Planning injunctions, injunctions sought by a local authority to restrain a nuisance etc, free standing injunctions in aid of other jurisdictions (section 25 CJA 1982), mareva injunctions (recognised by section 37 Senior Court Act 1981) and injunctions in aid of arbitral proceedings anywhere in the world.
3. Section 25 can be used to grant an injunction ancillary to execution in a foreign jurisdiction – see *Kensington International v Republic of Congo* [2008] 1 WLR 1144 where the injunction to prevent payment facilitated attachment and possible execution in Switzerland.
4. The jurisdiction to make an interim order in support of arbitration is confined to cases where the order is for the purpose of preserving assets or evidence. This is given a wide meaning and includes freezing injunctions, and orders to preserve documents. It would include an order which would enable an agreement to be specifically enforced in due course through compelling security to be given for the purchase price.
5. However the jurisdiction to act in support of arbitration without permission of the arbitrators under s.44(3) Arbitration Act 1996 only applies in cases of urgency. This will be where (1) an ex parte order is justified, or (2) (rarely) an ex parte on notice order is justified as opposed to waiting for the matter to be dealt with by the tribunal when appointed. Urgency means showing good reason to make an exception to the ordinary rule which requires the matter to be dealt with inter partes before the arbitrators. Furthermore the order will only last until arbitrators deal with the matter. They are the gatekeepers for interim relief. Urgency includes looking at the seriousness of the case (Are there some merits? Is there a risk of dissipation?) and whether it is truly impossible to deal with the matter before arbitrators.
6. There is a leave to appeal restriction in section 44(7) with leave only available from the first instance judge in respect of an order made under section 44 (which is a provision which applies absent contrary agreement). Clear words in the contract are required to remove the bar: *Re: Q's Estate* [1999] 1 Lloyd's Rep 931; *Miller v East African Breweries* [2010] EWCA Civ 1564, and general words contemplating a remedy by injunction are insufficient. It may also be that if the application is made under section 44 the applicant is constrained by section 44(7) even if had the application been made under section 37 Senior Court Act 1981 this would not have applied.
7. Where the injunction has been granted on the basis that the case is one of urgency and so not requiring permission of arbitration tribunal then the issue of whether the case was within the urgency gateway and whether the order was made under section 44 may be outside section 44(7) - the reasoning in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 considered the correct interpretation of section 44(7) and its statutory bar on appeals at paragraphs 20-28. In that case it decided that:
 - (1) The High Court has a limited jurisdiction under section 44(3);
 - (2) Whether the decision under challenge was a decision within the limits of jurisdiction under section 44(3) was properly a question for the Court of Appeal (leave to appeal was granted in that case);
 - (3) The judge at first instance cannot through saying that he had jurisdiction under section 44(3) thereby give himself jurisdiction which otherwise he lacked;
 - (4) Whether the judge had jurisdiction or not is to be determined by objective criteria.

8. **ICSID Arbitration:** There is no jurisdiction for the English court to grant an injunction under section 25 CJA or s 44 AA 1996 in aid of an ICSID arbitration: *E.T.I. Euro Telecom International Nv V (1) Bolivia (2) Empresa Nacional De Telecomunicaciones Entel SA* [2009] 1 WLR 665. The effect of the ICSID Convention and Rules is that provisional measures might be sought only from the tribunal itself, and not from national courts, unless the parties agreed otherwise.

Terminology

Ex Parte - only the applicant is before the court

Interim or Interlocutory injunction - literally an injunction between hearings, is an injunction other than a final injunction. Most injunctions are interim and all Mareva injunctions are interim.

Prohibitory Injunctions (or negative injunction) – an order which forbids specified conduct.

Mandatory Injunction - an order which compels some specified conduct. This could be release of a vessel from arrest in a foreign jurisdiction for example where the arrest proceedings are brought in breach of a London arbitration clause or where there is unconscionable misleading of the foreign court.¹ The rule requiring clear words applies with special force because someone has to do something and needs to know exactly what must be done where and by when. Freezing injunctions will contain mandatory provisions (e.g. on disclosure of assets)

Quia Timet - literally lest he fears. This refers to the class where there is a threat to do something wrongful unless restrained. There must be evidence of a real threat.

Mareva Injunction - an order which prohibits dealing with assets without an underlying proprietary cause of action, based on risk of non performance of a judgment whether existing or future.

Freezing Injunctions - any injunction prohibiting dealing with or disposing of a person's assets. This class includes Mareva and proprietary (based on a property right of claimant) injunctions. Normally there is a disclosure order as part of the order - which requires disclosure of assets and their value by letter and sworn to on affidavit.

Anti-Suit Injunction - this restrains a person from commencing or continuing with an action (or arbitration) which is normally abroad. (There is the possibility of restraining proceedings in England based on vexatious litigant provisions or if there is a threatened abuse of process of the court were proceedings are to be commenced.) An Anti-suit injunction can be based on an exclusive jurisdiction clause, an arbitration clause, or a no suit clause. It may also be founded on a threatened abuse of the process of the English court or where the restrained proceedings would be vexatious or oppressive.

Contempt proceedings - an application to the court normally made in the action in which the injunction has been granted seeking to prove breach of the injunction and the imposition of a penalty such as a fine or imprisonment (maximum is 2 years imprisonment).

Cross-undertaking in damages - an undertaking given to the court by the applicant as part of the price for the injunction which exposes the applicant to having to pay damages for (normally only foreseeable) loss caused by the injunction if it should not have been granted or the applicant's claim fails. The practice used to be only to require an undertaking in respect of loss sustained by the enjoined party or co-defendants in the suit. The practice in freezing injunctions is a cross undertaking which applies to parties and non-parties. CPR 25 PD rule 5.1A now reads for all injunctions:

When the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or

¹ *Phaethon International Co SA v Ispat Industries Ltd* [2010] EWHC 3446 (Comm).

any other person who may suffer loss as a consequence of the order.

Passport Order - an order requiring disclosure and in the meantime requiring surrender of passport(s) so that person cannot leave the country. (A modern form of order – cf *ne exeat regno writ* - literally “do not leave the realm”) . This can be obtained in support of a disclosure order until complied with or pending the outcome of committal proceedings for breach of a disclosure order² or breach of an order to attend for examination as a judgment debtor on means of satisfying a judgment or giving disclosure of those means.

Lord Cairns’s Act - Section 2 of the Chancery Amendment Act 1858. (now repealed) Section 2 enabled the Court of Chancery, (1) to award damages when declining to grant equitable relief or granting partial relief, rather than, as had been the practice sending suitors to the common law courts at Westminster Hall, and (2) to assess damages to include losses likely to follow from the anticipated future continuance of the wrong as well as losses already suffered. The power to give damages in lieu of an injunction imported the power to give an equivalent for what was lost by the refusal of an injunction: *Leeds Industrial Co-operative Society Ltd. v. Slack* [1924] A.C. 851, 859.

The Act thus allowed damages to be awarded rather than specifically enforcing a proprietary right. Section 50 Senior Court Act 1981 now provides:

“50. Power to award damages as well as, or in substitution for, injunction or specific performance

Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.”

(echoing words originally in Lord Cairns’s Act) allowing damages to be awarded against a defendant when there is an injunction jurisdiction invoked in the action against that defendant. This is a damages jurisdiction provided by statute which enables the court to award damages when an injunction could have been granted in the action against that person (even if otherwise there was no cause of action for monetary relief) – this might arise where there is an asserted proprietary claim against an asset holder and an injunction is granted against the D and the asset holder, who then parts with the assets to D in breach of the injunction. Damages could be granted under section 50 “in addition” to the injunction which has proved worthless because of the asset holder’s conduct. Such an order could then be enforced abroad.

American Cyanamid: This was a 14 day appeal concerning an interim injunction in a patent case due to be heard by the House of Lords which has given its name to a means of justly deciding an application for an interim injunction without becoming over involved in the strength of the merits. The House of Lords declined to become enmeshed in the merits of the underlying case – on the grounds that once a case of minimum threshold strength had been shown one moved into questions other than the strength of the merits to assess whether an injunction should be granted. Would the claimant be good for damages under the cross undertaking in damages? Would the defendant be good for damages if it was wrong? Can damages be readily calculated? Would they provide a just remedy? This does not apply to freezing injunctions for which there must be a “good arguable case”.

World Wide Freezing orders and disclosure orders

(a) pre-judgment or award

9. There are 2 categories of case (1) where the substantive merits are to be resolved in England and therefore the court is acting as the court having jurisdiction to resolve the merits or in support of a London arbitration; and (2) where the English court is acting

² *Lexi Holdings v Luqman* [2008] EWHC 2908 (Ch).

in support of foreign arbitration or a foreign court which is to resolve the merits.

10. Category (1) – worldwide relief may well be granted in a fraud action. Relief in relation to assets outside the jurisdiction will need to be justified and the court will need to consider how the relief will operate in practice and the inter action with any foreign court order or local rules.
11. Category (2) is English involvement in a supportive role because of an English connection. Perhaps assets are in or controlled from London, or the defendant is physically here and amenable to the coercive jurisdiction of the English court to enforce effectively court orders against him through contempt proceedings. In category (2) the court is cautious about granting world wide relief except where fraud is alleged and supported by real evidence ³. The English court also needs to be satisfied that there is sufficient English connection to make it appropriate to intervene and to enforce its orders if necessary.

(b) Post judgment or award

12. The injunction or appointment of a receiver to collect assets or payment of future debts is not itself execution ⁴. Execution involves transfer of assets in satisfaction of a judgment - it has proprietary consequences. For this reason execution is limited to the courts having jurisdiction at the place where the assets are situated because normally it is the orders of those courts which are to be recognised internationally.
13. This is ancillary to eventual execution as is the process of finding out about assets by examination of the judgment debtor and disclosure of documents relating to assets, a process not confined to English assets ⁵. These measures are part of the exercise by the court of its substantive jurisdiction on the merits and can result in orders made against officers of a corporate defendant or third parties (such as the spouse of a judgment debtor who has assets which may be reached by a legal route which will require them to be applied in satisfaction of the judgment).
14. Where there is an English judgment or award enforceable in the same way as an English judgment the English court starts from the proposition that a judgment should be satisfied and will grant relief ancillary to that objective. This can be granted in respect of assets abroad and can include the appointment of a receiver in aid of enforcement of the judgment: *Masri v Consolidated Contractors* [2009] 2 WLR 621. This is not execution and not governed by exclusive jurisdiction in relation to execution under the Judgments Regulation. It can include relief in relation to future debts.
15. There is jurisdiction under CPR 71 to examine officers of a company which is a judgment debtor about its means of satisfying the judgment, but no jurisdiction to enable service on them out of the jurisdiction *Masri v Consolidated Contractors* [2010] 1 AC 90.

A Receiver can be appointed pre-judgment. In a case in which there is a proprietary claim to the assets the court will be more ready to do this than in a Mareva case on the basis that it secures the assets which are the subject of the action. Even in a Mareva case pre-judgment this may be appropriate relief when it is shown that freezing relief in itself is insufficient and it is just to make an appointment of a receiver. This may in particular be so when assets are held offshore in trusts or corporate structures and there is a real risk of injunctions being disregarded: *JSC BTA Bank v A* [2010] EWCA Civ 1141.

³ *Mobil v Petroleos de Venezuela* [2008] 1 Ll. Rep. 684 (s.44 Arbitration Act 1996, pre Award in support of foreign seat arbitral proceedings when no assets were in England and PDV had no presence in England).

⁴ *Munib Masri v Consolidated Contractors* [2009] 2 WLR 621.

⁵ *Munib Masri v Consolidated Contractors* [2009] 1 Ll. Rep. 42 (order for examination of a Greek director of a foreign corporate defendant which was a judgment debtor).

It is also possible where a disclosure order is being disregarded and there is no other way of enforcing the order to put the defendant at risk of being debarred from defending unless there is compliance: *JSC BTA Bank v Mukhtar Ablyazov* [2010] EWHC 2219 (QB) (a very strong case on the facts against the defendant and where the non-compliance was creating a serious risk of injustice).

Interaction with Restraint orders in criminal jurisdiction

16. Under the regime under section 69 of the Proceeds of Crime Act 2002 a criminal restraint order will not be varied to pay a judgment debt⁶. Priority is given to satisfaction of the eventual confiscation order (in fact a personal obligation to pay an amount quantified by reference to what benefit the convicted defendant has received from crime and regardless of what overall profit he has made from criminal activities taking into account repayments). In such circumstances the tracing claim and claim to an equitable charge on assets will gain priority but could be difficult to establish - it is essential to show a nexus between assets misappropriated and the assets sought to be released from the restraint order.

EC Rules - Brussels/ Lugano

17. The English Court can in accordance with its own rules grant an injunction in aid of proceedings on the merits in another member state which are governed by Brussels/ Lugano. The order must be provisional in the sense that it is both (1) an interim order and (2) the effects of it are capable of being reversed if it turns out to be wrong⁷.
18. *West Tankers* ("The Front Comor") - anti-suit injunctions: The English court cannot grant an injunction which would have the effect of interfering with proceedings in the courts of another member state which are subject to Brussels/Lugano, even in cases based on an arbitration agreement and notwithstanding the exception of arbitration from Brussels /Lugano.
19. An ex parte injunction will not be recognised or enforced - an inter partes injunction will be. It is important to get on quickly an application for an inter partes injunction, and this can be granted subject to power to discharge on defendant's application.

Practical Points

20. *Passport Orders* - seek an order sealing up the file and do not issue claim form in advance of service of the order. Have an immediate return date following service and surrender of passport for further directions. Normally requires a strong prima facie case of a person who may wilfully disregard court orders – eg *Lawson v Mizzi* [2010] EWHC 55 (Ch)
21. *Telephone Applications* - often done in QBD after about 5 pm or at weekends - these should be avoided if at all possible in complex cases because of problems of disclosure and fair presentation.
22. "Until trial or further order.." - always use a clear cut off from when injunction will lapse – e.g. "after judge hands down judgment and makes a final order at the end of the trial".
23. Consider whether the application should be made ex parte or on notice- it is not enough to create a situation of pressing urgency through delaying making the application: *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd* [2009] UKPC 16

⁶ *SFO v Lexi Holdings* [2009] 2 WLR 905 of the Criminal Justice Act 1988 regime considered in *Re X* [2005] Q.B. 133, which allowed payment of a judgment debt to be made when a restraint order had been made.

⁷ Case C-391/95 *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091; followed in Case C-99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I-2277 at [40 and 41]

24. Make sure that full disclosure is given on ex parte - this may include telling the judge that there are WP negotiations: *Linsen International v Humpuss* [2010] EWHC 303 (Comm).
25. CPR 25 PD 5.1A (see cross undertaking above) – Draw judge’s attention on ex parte to interested non parties and whether they should be protected by a cross undertaking
26. Order transcripts immediately – these will be better than the best notes. Serve notes asap on Ds restrained. Offer notes and materials read by the judge to non parties on whom order served.
27. Use affidavits in any important injunction application – it gives a much better impression. Details of jurats can be given when sworn – make provision in the undertakings in the order for this being done by fax or email later (as opposed to reserving in sworn form). Affidavits should normally be made by a witness and not a solicitor. Avoid applications where one is relying on what is said from the bar. Try to avoid using counsel as a witness (it can cause difficulties for counsel on a future application).
28. Further disclosure - after an ex parte application the court must be kept informed of any material development which affects whether the injunction should remain in force. This can be done by letter to the judge’s clerk. The letter should start “Dear Judge”.
29. Give a generous figure for security – it shows bona fides. Make sure you can provide security in the form you ask the judge to order. If it is to be by guarantee liaise with the furnishing bank and get wording agreed before application to the judge.
30. Draft order needs planning to make sure that (1) you can in practice comply with service requirements in the undertakings, and (2) service requirements are not illegal in the relevant foreign country, and will result in effective service. E.g. in Switzerland proceedings can only be served by the office of the procureur. In the case of Switzerland make direct contact with the office of the procureur by telephone and fax, and liaise with the relevant individual to ensure quick service.
31. Consider carefully whether you should be going ex parte and whether you can justify going ex parte. It can be used in cases of (1) real urgency; and (2) where giving notice could defeat the purpose of the injunction (e.g. tipping someone off so that assets are moved).
32. Without Prejudice material needs careful handling otherwise you may open up all WP material by waiver. In general try not to use WP material on ex parte application unless (1) clear risk of non disclosure if its existence is not disclosed, in which case disclose its existence separately from other materials and do not rely on it and expressly set out basis on which disclosure is made; or (2) an exception to WP clearly applies – e.g. to explain delay - restrict material to what is necessary for that exception, keep it separate from other materials, explain status to judge and record in affidavit, and use on the application solely within the relevant exception (e.g. to explain delay). In general “unambiguous impropriety” is an exception which is hard to establish.
33. Co-operate closely with the bank or other non-party on whom freezing order is served to get it to implement order - give it time by asking judge to allow respectable time between notice given to bank and notice given to D - contempt is hard to establish and negligence is normally not actionable. See *Customs & Excise v Barclays Bank* [2007] 1 A.C.181 and *The Remedies Carried by a Freezing Injunction* (2006) 122 LQR 535 (Steven Gee QC) (copy available at <http://www.stonechambers.com/barristers/steven-gee-qc.asp>).

34. Consider applying in an appropriate case for an injunction restraining payment of a debt. The ordinary freezing order does not prevent receipt of payment for a debt except where this is a preliminary to breaking the freezing order and the non-party is collusively assisting disposal of assets. This may be an essential part of relief if there is a risk that a non party may otherwise feel it appropriate to pay its debt to the D (e.g. in a garnishee/third party debt order situation), and the proceeds will disappear.

*Fiona Trust v Privalov / Premium Nafta v Fili Shipping*⁸.

35. House of Lords case in which claim based on bribery allegations and the defendant who was a party to Charterparties with the claimants (one ship companies in the Sovcomflot fleet) sought to invoke LMAA arbitration clauses which referred to arbitration disputes under this charterparty. Could the defendant obtain a stay for the claims to go to arbitration? Although in the past the words ‘arising under the contract’ have sometimes been given a narrower meaning, the court held that should no longer continue to be so. The question was whether there was a valid agreement to arbitrate. This was a separate contract from the main contract. Bribery which affected the main agreement did not have the consequence that the arbitration agreement, a separate agreement from the main agreement, had been obtained by bribery and therefore a stay would be granted. This applies the approach adopted by the *US Supreme Court in Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁹, a case in which an allegation was made of fraudulent misrepresentation inducing the main agreement, to a bribery allegation.
36. Whether a bribed agent had authority to bind the principal to a contract was not argued. Whether a person has actual authority to conclude a contract on behalf of another depends on the interpretation of his mandate.

**Loss of assets caused by breach of a freezing injunction:
*Commissioners of Customs & Excise v Barclays Bank***

37. In *Commissioners of Customs & Excise v Barclays Bank* [2007] 1 A.C.181, the House of Lords decided that the facts disclosed no voluntary assumption of responsibility by the defendant’s bank to the claimant and that there was no duty of care owed. The case is reviewed in *The Remedies Carried by a Freezing Injunction* (2006) 122 LQR 535 (Steven Gee QC) (Article available at www.stonechambers.com/barristers/steven-gee-qc.asp). There was no duty of care because the respondent’s bank had not assumed any task for the applicant but was acting under compulsion to comply with the freezing injunction least otherwise it might be in contempt of court. The standard letter of the bank seeking reimbursement of costs under the applicant’s undertaking to the court was only working out under the order financial consequences of the bank having to incur administration costs in order to comply with that order. The order itself did not impose a duty of care, and the applicants’ remedies against the bank were confined to those carried by the order. It is important to observe that this was a prejudgment injunction granted under the Mareva jurisdiction and the position may be different where there is a proprietary claim.
38. There are interesting possibilities of obtaining a damages award under section 50 of the Senior Court Act 1981 when an injunction granted directly against the bank is broken by the bank. This creates a jurisdiction to award damages in addition to or instead of granting an injunction. Because a contemnor can be required by injunction to undo the effects of his contempt s. 50 may be a vehicle to enable the court to award damages for the effects of that contempt. It did not arise on the facts because

⁸ [2008] 1 Ll. Rep. 254.

⁹ 388 U.S. 395 (1967), approving *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, cert. granted, 362 U.S. 909, dismissed, 364 U.S. 801.

Barclays was not itself enjoined and did not have the necessary intent to interfere with the due administration of justice to justify contempt proceedings. On Lord Cairns's Act see Damages in Equity – A study of Lord Cairns' Act [1975] CLJ 224 (Jolowicz), referred to in *Jaggard v Sawyer* [1995] 1 WLR 269 at p.276. Under the provisions of Lord Cairns's Act there had to have been jurisdiction to entertain an application for an injunction at the time of the commencement of the proceedings¹⁰ in which damages were sought in addition to an injunction. This requirement flowed from Lord Cairns's Act being in concept a procedural statute to enable the pre-Judicature Acts High Court of Chancery jurisdiction to award damages in a Chancery suit which had properly been commenced in Chancery rather than requiring the plaintiff to bring an action in a common law court. Thus even though specific performance or an injunction had been refused on discretionary grounds damages could be awarded instead of that remedy. Section 50 of the Senior Court Act 1981 uses language derived from but different to Lord Cairns's Act which was limited to where there was jurisdiction to entertain an application "for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement ..". In contrast section 50 applies where there is jurisdiction to entertain an application for an injunction or specific performance, without specifying the grounds for the application. An application for an injunction might for example be to prevent frustration of the process of the court or to restrain what would otherwise be a contempt of court. Whereas Lord Cairns's Act was enacted at a time when different courts had different jurisdictions and it conferred a useful additional jurisdiction on the court of Chancery to award damages, thus avoiding the need to have recourse to a common law court, section 50 was enacted over a hundred years after the Judicature Acts and when there was no difficulty in principle in the High Court granting the remedy of damages. In fact the jurisdiction went wider than that available at common law in allowing damages to be awarded prospectively when there was merely a threatened breach or wrongful act and when there was no complete cause of action for damages at common law. It is suggested that section 50 creates a damages remedy when an injunction could have been granted on the application of a claimant for his benefit, whether this is on the grounds specified in Lord Cairns's Act¹¹ or otherwise.

Piercing the Corporate Veil-Injunction against assets belonging to Non Parties

39. Piercing the corporate veil is an unusual event in English litigation. But there are occasions when the doing of justice requires the court to do this. In *Kensington International Limited v Congo* [2005] EWHC 2684 (Comm) fraudulent and dishonest means were employed by the judgment debtor to defeat the enforcement of a judgment against it. Entities which were controlled by it were used as a façade and transactions entered into which were not at arm's length in furtherance of a deliberate scheme to create an appearance of a chain of transactions between independent oil traders to enable oil to be traded free from enforcement of the judgment. The court "pierced the corporate veil" and treated the legal position as if a debt was owed by the buyer to the Republic of Congo, and made a final third party debt order on that debt, which was owed by a third party within the jurisdiction apparently to one of

10 *Mills v Ruthol Pty Limited* (2004) 61 NSWLR 1, a case on s. 68 of the Supreme Court Act 1970 (NSW), rejecting the view in Meagher Gummow and Lehane's Equity Doctrines & Remedies (4th ed: 2002) para 23-050, that for Lord Cairns's Act to apply it sufficed if there was jurisdiction to entertain an application for an injunction or specific performance which arose in the course of the action, and did not exist at its commencement.

11 *Marcic v Thames Water Utilities (No 2)* [2002] Q.B. 1003, not affected on this by the successful appeal in [2004] 2 A.C. 42, allowed damages for a breach of article 8 of the Human Rights Act 1998 which could have been the subject of a mandatory restorative injunction. This was an act, which was itself actionable at the suit of the claimant as breach of a duty owed to the claimant, and which itself could have grounded an award of damages. It is considered that this would have been a 'wrongful act' within Lord Cairns' Act and therefore the decision does not advance the debate.

those entities. There can be a piercing of the corporate veil where assets held by a company or person are treated as the assets of another. See also in the context of criminal restraint orders: *Re H (Restraint Order : Realisable Property)* [1996] 2 AER 391 and *Re K* [2006] BCC 362. “Piercing the corporate veil” can be viewed as a doctrine based in public policy where the court declines to give effect to separate legal personalities on the ground of public policy; see also *Adams v Cape Industries Plc* [1990] Ch 433 at pp.539-544.

40. In *Re A Company*,¹² the plaintiffs (which were companies in liquidation) brought an action against the defendant alleging deceit, and for breach of trust and fiduciary duty. The evidence disclosed ‘an elaborate and most ingenious scheme brought into operation at the instance of the ... defendant, whereby his personal assets were organised in such a way that they were held by foreign and English corporations and trusts in a manner that effectively conceals his true beneficial interest in English assets’. There was strong evidence that the defendant had deliberately set up this network of companies and trusts to defeat the defendant’s creditors and those with claims against him. In these circumstances the Court of Appeal upheld orders requiring disclosure of information of ‘an unusually extensive and detailed character’ and imposing injunctions restraining the defendant from disposing of his shares in companies or his rights under the trusts, and from causing the companies or trusts to dispose of those assets. The court did so on the ground that it would use its powers ‘to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration’.¹³

41. At that time the courts were restricting Mareva relief to assets within the jurisdiction, and accordingly the relief was directed to restraining dealings with assets within the jurisdiction, although they were held by a foreign company or trust. As for the possibility that non parties might be entitled to, or claim, an interest in the relevant assets, Cumming-Bruce LJ said:

“If there are other genuine interests vested in third parties beneficially, the first defendant can state the facts in his answer to the interrogatories, and the notice of the injunctions can be served on the parties alleged to be beneficially interested, and their objection can be made to the court and its validity upheld. When there is such massive evidence of nominees, and puppet directors dancing to the first defendant’s tune, it is for him to state on oath his belief, if he holds it, that one or more persons implicated in the silken skein of his spider’s web has a genuine beneficial interest.”

42. The expression “piercing the corporate veil” can be used to describe different situations¹⁴, and it is helpful to the analysis to be clear in what sense or senses it is being used. Thus:

- a. One situation is where a company or trust is used to hold assets which are controlled by and held for the benefit of the defendant. In that situation the analysis is that the assets are owned beneficially by the defendant and can be frozen based on the substantive claim against him.
- b. Another analysis is that although the assets belong beneficially to another person the defendant has rights the value of which depends upon the preservation of those assets, there is a legal route by which those assets can be required to

12 [1985] BCLC 333. Also reported as *X Bank v G* (1985) The Times, 13 April; followed in *International Credit and Investment Company (Overseas) Limited v Adham* 20th November 1996 (Robert Walker J), a claim for huge amounts based on allegations of dishonesty found proved at trial in the Cayman Islands, in which a receiver was appointed in respect of assets covered by Mareva relief. See also *Bank Bumiputra Malaysia Bhd v Lorrain Osman* [1985] 2 MLJ 236 (Malaysia).

13 Applied in relation to criminal restraint orders in *Re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391 at pp 401-402 which was followed in *Crown Prosecution Service v Compton* [2002] EWCA Civ 1720 at paras 44 and 48.

14 *The Tjaskemolen* [1997] 2 Ll. Rep.465 at p.471 LHC; *Crown Prosecution Service v Compton* [2002] EWCA Civ 1720 at para. 55.

satisfy a judgment and therefore an injunction can be granted to preserve those assets.

- c. Another is that the underlying cause of action is also available against that person because of “piercing the veil”¹⁵, with the consequence that his assets can be frozen.
- d. Another is when a transfer of an asset is regarded as “a sham” transaction in the sense that “..the outward and visible form does not coincide with the inward and substantial truth.”¹⁶. The asset is treated as that of the transferor.
- e. Another is where public policy requires that assets belonging to A are treated as belonging to B¹⁷.

These categories are not mutually exclusive and the granting of an injunction or appointment of a receiver can be made without carrying out a category by category analysis.

- 43. Category b applies irrespective of whether the defendant or judgment debtor owns the asset. Freezing relief can be granted over assets which belong to a non party when those assets will be used to pay the defendant and the non party is only acting as a gateway for onward transmission - *Yukos v Rosneft Oil* [2010] EWHC 784 (Comm)

Section 25 CJJA

- 44. In *Kensington International Limited v Republic of Congo* Friday 26th May 2006 (Cresswell J) interim relief granted under section 25(1) of the Civil Jurisdiction and Judgments Act 1982 was upheld against a third party in support of Swiss attachment proceedings against that third party founded on an English judgment. The jurisdiction to grant interim relief against third parties in aid of execution of a judgment is not limited to injunctions directed to preserving particular assets which exist and are presently amenable to execution, and permits relief for the purpose of preventing collusive arrangements or transactions designed to evade enforcement of the judgment, in this case a threatened pre-payment for an oil cargo.
- 45. Normally for relief under section 25 in support of foreign proceedings on the merits there needs to be some connection of England with the defendants or the assets to be frozen: *Belletti v Morici* [2009] EWHC 2316 (Comm).
- 46. In *Fourie v Le Roux* [2007] 1 WLR 320 an ex parte injunction had been granted when there was no formulated claim to substantive relief in South Africa or in England. That injunction was discharged and the decision to do so was upheld in the Court of Appeal and the House of Lords. This was because as a general proposition it is necessary to formulate the claim for substantive relief at the application for an injunction under s. 25 CJJA 1982 because otherwise the court would not be able to consider fairly what, if any relief should properly be granted taking into account the legitimate interests of the respondent to the application. “One of the safeguards ...is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted , by dissipating his assets, to prevent.” per Lord Bingham at [3]. The

15 e.g. *Trustor AB v Smallbone No 2* [2001] 1 WLR 1176 (where a transfer had been made to a company, and both that company and the individual who controlled it, were held liable as constructive trustees for knowing receipt of trust money); *Creasey v Brechwood Motors* [1992] BCC 638 (transferee of business liable for claim of dismissed employee of transferor when the transfer carried out in the knowledge of the existence of the claim and without making any provision for it); *Gilford Motor Co Limited v Horne* [1933] Ch 935 (injunction also granted against the company); *Jones v Lipman* [1962] 1 WLR 832 (specific performance of the contract entered into by the individual ordered against both him and his company).

16 *Miles v Bull* [1969] 1 Q.B. 258 at p.264 D-E; *Snook v London & West Riding Investments Limited* [1967] 2 Q.B. 786 at p.802; *The Tjaskemolen* [1997] 2 Ll. Rep.465 at p.474 (concealed retention of beneficial ownership); *Garnac Grain Co Inc v Faure Fairclough* [1966] 1 Q.B. at p.684 (not a sham unless it was proved that “..the ostensible contract should not give rise to legally enforceable rights or liabilities.”); *Haryanto v E.D.& F Mann* [1986] 2 Ll. Rep. 44 (need to prove different transactions to displace the apparent contracts).

17 E.g. *Kensington International Limited v Congo* [2005] EWHC 2684 (Comm).

injunction is a means to an end; the failure of the applicant to specify in more or less precise terms what end is to be attained, how and based on what allegations, stultifies fair determination of the application, and for this reason it should normally be refused.

47. The case is also interesting because the House set aside the inquiry as to damages, granted when the injunction was discharged. This was premature. At that stage it was not yet clear whether the respondent had been enjoined from dealing with assets which the respondent had fraudulently obtained or their proceeds, or whether the injunction had only enjoined dealing with assets equivalent in value to the loss caused to the applicant by the respondent's fraud. The cross undertaking in damages given to the court provides a jurisdiction to the court to award compensation for loss caused by an injunction which ought not to have been granted. But although in this case the injunction should not have been granted it did not follow that compensation should be awarded even if the respondent had acted fraudulently.
48. The speech of Lord Scott (the leading judgment) draws a distinction between (1) the *jurisdiction* of the Court to grant an injunction and (2) whether it is proper to grant an injunction. On (1) a case in which the court lacks jurisdiction is where as in the *Siskina* there was no territorial jurisdiction over the defendant on the substantive claim and there could be no injunction at that time because there was no equivalent to section 25 of the CJA 1982. As a general proposition an absence of jurisdiction in a court to grant an injunction at all is a rare circumstance¹⁸. On (2) at the first instance level the judge ought to apply certain established principles which are relevant to whether it would be just to grant the injunction. At the appellate level the question is to be viewed bearing in mind the limits that an appellate body imposes upon itself in interfering with an exercise of discretion by the judge.

Cross-examination of a non party about the “wrong” in which he was “mixed up”

49. In *Kensington International Limited v Republic of Congo and Dr Ikehukwu Nwobodo* [2006] EWHC 1848, Morison J granted an order for cross examination of a person under the Norwich Pharmacal jurisdiction when there was good reason to suppose that he had assisted the judgment debtor in a course of conduct of defeating execution of the judgment through fabricated documents and other improper means, had information about the course of conduct which might assist them to enforce that judgment, and where cross examination was needed to enforce relief granted against him in a search order.

Disclosure Provided under Freezing Order Post Judgment

50. The purpose of the order is to facilitate execution or enforcement of the judgment. This may be through enforcement against a third party e.g arrest of a sister ship or alter ego doctrine. Disclosure may be used for this purpose: *Vitol v Capri Marine* [2010] EWHC 458 (Comm).

The cross-undertaking in damages.

51. In *SmithKline Beecham Plc v Apotex Europe Limited (No 3)* The Times June 9th 2006, [2006] EWCA Civ 658, an undertaking instead of an interim injunction and subsequently an interim injunction were obtained by the claimant in a patent infringement action against defendants which subsequently failed on the merits. Manufacturers in Canada who were not defendants and who had not provided the

¹⁸ E.g an injunction granted under section 44(3) Arbitration Act 1996 because no tribunal has been appointed or it has not given permission, in a case which is not one of “urgency”.

undertaking in the first order and were not respondents to the interim injunction in the second order sought to recover for losses caused to them by the undertaking and then the interim injunction. The cross undertaking in damages only protected the defendants against loss to them. At first instance an argument seeking insertion of a wider undertaking applying to “any other party served with or notified of the order” as required in support of an injunction under the then Practice Direction to part 25, PDA para 5.1(1) unless the court otherwise ordered, was rejected. That read:

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

(1) an undertaking by the applicant to the court to pay any damages which the respondent(s) (or any other party served with or notified of the order) sustain which the court considers the applicant should pay,

52. The first order was not an order for “an injunction” and so the then para 5.1(1) did not apply. As for the second order, at the time it was made there was no example order which contained it and in practice applicants were not offering the required undertaking and Chancery judges and associates were not insisting upon it. Therefore it could not be said that the undertaking had been “accidentally” omitted from the order when this was a deliberate choice by the claimants acceded to by the court. There is a *dictum* by the judge at para 37, to the effect that “..if a limited cross-undertaking is offered and accepted by the court, there is in general no room for implying some further offer of an undertaking beyond that which is expressly offered and accepted.” However this dictum which relied on *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249 overlooked that that case concerned the effect of an express undertaking and was not about implying an undertaking based on silence. It also was not a decision about an undertaking which it is mandatory to give under the rules of court absent contrary order by the court. There is the possibility that where there is an abuse of the process of the court through disregarding the mandatory requirement of the rules, the court has jurisdiction to treat the required undertaking as having been given because the court will not permit the claimant to take advantage of its own abuse of the process of the court: see *The Undertaking in Damages* [2006] LMCLQ 181 (Steven Gee QC)(<http://www.stonechambers.com/barristers/steven-gee-qc.asp>)
53. On appeal the slip rule point was not argued and the non parties sought to obtain compensation in “restitution”, an argument which failed because the claimant had not received something under either order which they were bound to restore to the non-parties. The Court of Appeal held that there was no cause of action for restitution and no unjust enrichment because the claimant had not received anything from the non-parties under either order and the jurisdiction to order restitution consequential on an order being set aside or having been wrongly made was limited to restoring benefits transferred to and received by it as a result of the wrongly made order. It has been suggested that although there was no “wrong” in obtaining interim injunction the Court of Appeal might have found room for a restitutionary claim based on unjust enrichment because the injunction was predicated on there being a good claim for patent infringement and subsequently it was held on the merits that the claim failed therefore removing “the basis” for the original injunction, which had resulted in the enrichment, which it was therefore unjust for the claimant to retain ¹⁹.
54. The court also held that there was no room for an estoppel argument based on what had passed between the parties to vary the undertaking. Since the undertaking is given

19 There is an interesting commentary on the reasoning concerning restitution in “Restitutionary Perplexity: election, wrongs, property, et cetera” [2006] LMCLQ 295 (Chee Ho Tham).

to the court and breach of the undertaking would be a contempt of court it cannot be varied by the dealings between the parties, at para 107: “An estoppel cannot create an agreement. No doubt if there were an actual binding agreement by which the parties agreed that the Canadian companies should be defendants for all purposes, not only for the future but retrospectively, the Court would give effect to it. But that would be by reason of the express agreement -- an agreement that the existing order should be varied. And even then there is no way, supposing there had been past infringement by the newly added party, that that party could be a contemnor by reason of those past acts. Even an express agreement cannot change the meaning of the order. All an express agreement can do is lead the court to varying its order with effect for the future.”

55. Under the 42nd update of the CPR , the following changes were made:

“PRACTICE DIRECTION SUPPLEMENTING PART 25

(a) For paragraph 5.1(1), substitute -

“an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.”.

(b) After paragraph 5.1, insert -

“5.1A When the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.”.

The effect of these changes is that for all injunctions the order should contain an undertaking in damages protecting the respondent who is the person enjoined, and the court “should consider” whether to require an undertaking in damages protecting anyone else. Whilst this removes the problems of language in the former para 5.1(1) it does not meet the problem that on the without notice application the court may not be able accurately to foresee who might be adversely affected by the order, nor does it address what happens if the applicant and the court overlooked this or, for one reason or another, including fault of the applicant’s representatives, the position was not dealt with on the without notice application: see *The undertaking in damages* [2006] LMCLQ 181 (Steven Gee QC). The change cuts down the width of protection under the undertaking made compulsory, absent contrary order, by the new paragraph 5.1(1), because under the former wording it was mandatory to have an undertaking in damages which gave protection for a co-defendant served with the order²⁰, whereas under the new wording other than for a respondent there is no mandatory protection at all. Paragraph 5.1A gives no guidance as to how a court hearing a without notice application should approach whether to require protection for non-respondents. In freezing injunction cases an undertaking protecting everyone including non-parties is part of the example order whereas it is not part of the example order for a search order. It is suggested that the practice ought to be that unless it is clear on the without notice application that the contemplated injunction or search order will not affect others, the court should require an undertaking in damages protecting them, absent good reason to the contrary. This will then provide the court with the jurisdiction to arrive at a just result for them at a later stage of the proceedings.

Undertaking (7) in the example freezing injunction

56. Undertaking (1) in the example freezing injunction covers only “the Respondent” and not a co-defendant who is not enjoined. Undertaking (7) reads:

²⁰ It had been the ordinary practice of the court for over a hundred years before the CPR to require an undertaking in damages protecting co-defendants regardless of whether they were personally enjoined or whether they were served with the order: *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249.

“The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent’s assets and, if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.”

This standard form wording is not readily altered by the court ²¹.

57. The judge in *Harley Street Capital Limited v Tchigirinski (No 1)* [2005] EWHC 2471 (Ch) at para 14 considered the possibility that another interpretation of undertaking (7) was that the cross-undertaking in damages was limited so that “such person” in references to “loss” ²² means a person who finds out that he is holding some of the respondents’ assets, or possibly a person who has incurred cost by reason of the order who, by reason of having incurred cost, is then entitled to recover also the loss under the cross-undertaking.” At paragraph 16 of his judgment he rejected this suggestion and agreed with the view that the second limb of undertaking (7) applies to enable the court to order compensation for any innocent sufferer of loss. The judge said: “...the underlying principle is that a cross-undertaking in damages, as the *quid pro quo* for the court making an interim order without having determined the facts or the claimant’s entitlement to it, is given not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted....”
58. It is thought that the undertaking consists of two limbs separated by the words “and if the court”. The first part is limited to reasonable costs incurred as a result of the order. It applies regardless of whether in the event the non-Respondent holds any of the Respondent’s assets, so for example potentially it applies to a bank served with the order which reasonably searches for assets of the Respondent but in the event does not find any. It is suggested that the words “such person” include a bank served with notice of the injunction but which in fact does not hold any of the defendant’s assets.
59. The other possibility was that the non-Respondent has had to incur some costs covered by the first limb before qualifying for protection under the second limb. First, the words of the second limb do not expressly say this. Secondly as a matter of language, “such person” appears to refer to the person mentioned in the first limb, and “that person” in the first limb, which would be “anyone other than the Respondent”. The words about reasonable costs incurred in the first limb do not define “such person” but provide the entitlement of “such person” under the first limb. Thirdly, the costs in the first limb can include costs other than costs of finding out whether “that person” holds any of the Respondent’s assets, for example legal costs incurred in taking advice about the effects of the order. It would be odd if entitlement to protection under the cross-undertaking was parasitic upon whether the person might be able to point to certain costs which he had incurred after the order which were recoverable under the first limb. The commercial purpose seems to be as stated by the judge to give protection to all non-parties who might suffer loss as a result of the order. It was suggested that if this was so one would have expected there to be a single cross-undertaking required for the freezing injunction, protecting both Respondents and non-Respondents. However historically the cross-undertaking in favour of defendants whether enjoined or not can be found in the third edition (1862) of Sir Henry Seton’s *Forms of Decrees in Equity* p.867. This practice which applied to all injunctions became replaced under the CPR with an undertaking in favour of Respondents required under paragraph 5.1(1) of the Practice Direction - Interim Injunctions supplementing part 25. Protection by requiring an undertaking in favour of non-parties was introduced well over 100 hundred years

²¹ *Banco Nacional de Comercio Exterior Snc v Empresa de Telecomunicaciones* [2007] ILPR 16

²² The judge rejected the submission that “loss” in the second limb meant only “costs”: *Harley Street Capital Limited v Tchigirinski (No 1)* [2005] EWHC 2471 (Ch) at para 15.

later following the establishment of the Mareva jurisdiction, and was a particular additional feature of Mareva relief, with the additional undertaking being required in the standard form order. Accordingly it is suggested that the existence of undertaking (7) as a separate undertaking from undertaking (1) in freezing injunctions should not be taken as an indication that the cross-undertaking for loss under undertaking (7) only applies to a limited class of persons who are not Respondents.

60. Undertaking (7) applies only to "...costs of anyone other than the Respondent which have been incurred as a result of this order..." and loss caused to such person by "this order". Where it is contemplated that an order might be obtained in a foreign court preserving assets which is not simply by way of enforcement of the English order, it might be the foreign court order which would cause the costs or loss and not the English freezing injunction which merely provided part of the context in which the application was made to the foreign court. The English court might itself require an undertaking from the claimant as the price for giving permission to bring the foreign proceedings under undertaking (10), see *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at para 33, or as part of the price for the original injunction if the point is raised on the initial without notice application, or the court may leave the foreign court to deal with this aspect.

Certainty in the wording of a court order.

61. The CPR PD supplementing part 25 – Interim Injunctions provides that

5.3 Any order for an injunction must set out clearly what the respondent must do or not do.

In *Tajik Aluminium Plant v Ermatov* [2006] EWHC 7 (Ch) an injunction restraining dealings in assets derived from (inter alia) "unlawful payments" was too uncertain because it required the enjoined party to reach a conclusion which might be fraught with difficulty about whether a payment was "unlawful" and could require a difficult enquiry in contempt proceedings. The principles are:

- (1) An uncertain injunction will not be granted or upheld;
- (2) An injunction which is ambiguous on a material point will not ground successful contempt proceedings.

Paragraph 6 of the example Order.

62. Para 6 reads:

6. Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

63. The words "all the Respondent's assets" unless extended would mean only the assets beneficially belonging to the Respondent²³. In *JSC BTA Bank v Kythreotis* [2010] EWCA Civ 1436 the Court of Appeal referred to the history of the words after the first sentence coming into the example order, which was through judges of the Chancery Division intending to catch sham trusts where the assets appeared to be the subject of a trust but were in truth still held beneficially by the Respondent: "...These were cases in which assets owned or controlled by the defendant were held by third parties in a trust or other similar entity ostensibly for the benefit of a third party. Concern was expressed that the forms of order prepared for the applications contained additional

23 *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695.

words which, on one view, would extend the order to cover assets held by the defendant merely as a trustee for a genuine third party or by some third party for the benefit of persons other than the defendant.”²⁴

The Court of Appeal felt able to interpret the words as being no more than a specific illustration of assets which are beneficially owned. In that case further words had been added: “.. whether the Respondent is interested in them legally, beneficially or otherwise” at the end of the first sentence of para.6 of the example. These were sufficiently clear to catch assets irrespective of beneficial ownership. The history of the amendment to the wording was significant in that the Chancery judges who approved it thought that it was clear that it applied to sham trusts and not to assets other than those beneficially owned. In practice there are cases in which assets should be preserved allowing arguments later about whether they can be taken through execution. The JSC case indicates that clear words must be used if an order is to be so interpreted.

In *Raja v van Hoogstraten* [2004] 4 AER 793 at paras. 96-98 the Court of Appeal questioned whether paragraph 6 of the example order, besides extending the restraint imposed by paragraph 5 also extends the meaning of “all his assets” in the disclosure order in paragraph 9. The second sentence of paragraph 6 commences with the words “For the purpose of this order..” which appear to make the extended meaning applicable to the entire order including the disclosure order in paragraph 9. The court considered that the extension could work well enough for the restraint. However if written into the disclosure order, it would require disclosure of assets which the defendant does not own but where a third party might in practice act in accordance with the defendant’s instructions if such instructions were to be given. The court considered that this produced material uncertainty about what had to be disclosed, particularly for one who had in fact made arrangements to divest himself of, or avoid, ownership of assets. This objection is not simply one of language but questions on grounds of uncertainty whether a mandatory order can properly be made for disclosure, where what has to be disclosed depends upon what third parties might in practice do in certain hypothetical circumstances. In view of JSC this difficulty does not arise on the example order because the Court of Appeal in JSC held that this extension did not apply to assets other than those beneficially owned by the Respondent. However, in a case in which the order applies regardless of beneficial ownership there needs to be clear words for both the restraint and the disclosure parts of the Order. The disclosure order should be formulated by reference to existing facts (e.g. all assets held in a safety deposit box) and avoiding use of a formula which depends upon what a third party might do in the future in certain hypothetical circumstances.

Delivery Up Orders

64. These do not involve a search but are executed at premises and require immediate compliance. The CPR 25 PD provides:

DELIVERY-UP ORDERS

8.1 The following provisions apply to orders, other than search orders, for delivery up or preservation of evidence or property where it is likely that such an order will be executed at the premises of the respondent or a third party.

8.2 In such cases the court shall consider whether to include in the order for the benefit or protection of the parties similar provisions to those specified above in relation to injunctions and search orders.

Non Parties

65. Non Parties affected by and serve with an order are entitled under the PD to certain documents:
- 66.

INJUNCTIONS AGAINST THIRD PARTIES

9.1 *The following provisions apply to orders which will affect a person other than the applicant or respondent, who:*

- (1) *did not attend the hearing at which the order was made; and*
 (2) *is served with the order.*

67.

9.2 *Where such a person served with the order requests –*

- (1) *a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or*
 (2) *a note of the hearing,*

the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise.

Search Orders and Privilege against self incrimination.

68. In *O Limited v Z* [2005] EWHC 238 (Ch) a search order was made against an ex-employee, no claim was made to the privilege against self incrimination and the material obtained under the search order included paedophile pornography, possession of which could be a criminal offence. Once a witness has answered a question under compulsion without claiming the privilege it is lost. The judge also decided that once the material had been handed over by the defendant under the search order to the supervising solicitor, the privilege against self incrimination was lost “by an objective view of Z’s behaviour”. In that case the order had been formulated on the basis of the then practice direction and example order, and preceded on the assumption that privilege against self incrimination would not arise because of the exclusionary effect of section 72 of the Senior Court Act 1981²⁵. No-one had foreseen the possibility of child pornography.
69. In *C plc v P* [2006] Ch 549; appeal dismissed on other grounds [2007] EWCA Civ 493, a search order was made in an action for breach of confidence and copyright infringement which did not specifically make provision about materials which might be incriminating or about the possible application of privilege against self incrimination. The proceedings were within the scope of s.72 of the Senior Court Act 1981 which affects certain proceedings concerning intellectual property rights and was enacted following the decision of the House of Lords in *Rank Film v Video Information Centre* [1982] A.C. 380. Where it has effect, section 72 removes the privilege but makes any statement or admission obtained inadmissible in evidence in criminal proceedings. The defendant did claim the privilege through his solicitors informing the claimant’s solicitors and the supervising solicitor, before allowing the search to proceed under the order.
70. The judge held that on the facts the act of handing over the materials did not result in the loss of the privilege. It is understandable that the judge wished to avoid a result where, although the defendant had asserted the privilege before the search

²⁵ Under paragraph 8.4 of the then Practice Direction.

commenced, through the defendant's compliance with a mandatory court order which made no provision for the assertion of the privilege, the privilege was lost. However because the privilege is limited to conduct of the defendant providing information, once that information had passed from the defendant and been provided to the supervising solicitor and the independent computer expert, it is considered that no privilege against self incrimination could be asserted in respect of what happened to the materials held by them. They did not hold it to the order of the defendant nor were they subject to his control. In addition it is considered that the defendant could enjoy no enforceable private right of confidentiality over the pornography which would prevent it being disclosed to the police or a prosecutor.

71. The judge then went on to hold that the effect of the Human Rights Act 1998 was that privilege against self incrimination did not apply to "*free standing evidence not brought into existence by [the defendant] under compulsion*" of the court (e.g computer discs or pre-existing documents). Leaving aside that Act, it is well established by decisions at the highest level that the common law privilege does apply to excuse the defendant from having under compulsion to produce such materials. The judge held that he could "modify" privilege against self incrimination to produce this result.
72. The case has now been decided on appeal. The Court of Appeal upheld the decision on the ground that the computer had been delivered up in proceedings to which section 72 applied and the question was then whether privilege affected whether the supervising solicitor could provide materials to the police. It did not because the materials existed independently of any act of the defendant and were the product of what was a legitimate order. One adds that in England there is no doctrine equivalent to that in the US of excluding the "fruit of the poisonous tree" – namely pre-existing materials discovered through a confession made as a result of improper questioning²⁶ or an illegal search warrant. Thus the Court of Appeal did not address the HRA ground. Whilst the privilege has been judicially criticised on repeated occasions, one would have expected that "modification" of the privilege would be a matter solely for Parliament.
73. In his judgment Lawrence Collins LJ examined whether common law privilege should exist when the defendant already had materials in his possession, saying that "*I accept that there is a powerful case in policy terms for there being no privilege with respect to disclosure of free-standing documents or other material not brought into existence under compulsion*". The point is that if the materials already exist and there is no testimonial aspect in the defendant producing them then there is no policy ground for the privilege. Also the right to a fair trial under article 6 does not prevent the prosecution deploying materials which already exist as opposed to an admission made by the defendant under compulsion. Whilst this is logically so it does not remove the authorities which consider that the privilege includes opening the door to those seeking to enforce a search order or the act of giving information about where pre-existing materials are to be found.
74. Privilege against self incrimination in fraud cases has undergone an important statutory change in section 13 of the Fraud Act 2006 which came into force on 15th January 2007 which abrogates it in cases of bribery and conspiracy to defraud, whilst making answers given under compulsion not admissible in criminal proceedings. This has been considered in *Kensington International v Republic of Congo* [2008] 1 WLR 1144.

26 *R v Warickshall* (1783) 1 Leach 263 referred to by Lord Hoffmann in *R v Hertfordshire C.C ex parte Green* [2000] 2 A.C. 412 at p.421.

75. Section 13 provides:

13 Evidence

- (1) A person is not to be excused from—
 - (a) answering any question put to him in proceedings relating to property, or
 - (b) complying with any order made in proceedings relating to property, on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related offence.
- (2) But, in proceedings for an offence under this Act or a related offence, a statement or admission made by the person in—
 - (a) answering such a question, or
 - (b) complying with such an order,
 is not admissible in evidence against him or (unless they married or became civil partners after the making of the statement or admission) his spouse or civil partner.
- (3) “Proceedings relating to property” means any proceedings for—
 - (a) the recovery or administration of any property,
 - (b) the execution of a trust, or
 - (c) an account of any property or dealings with property,
 and “property” means money or other property whether real or personal (including things in action and other intangible property).
- (4) “Related offence” means—
 - (a) conspiracy to defraud;
 - (b) any other offence involving any form of fraudulent conduct or purpose.

76. Previously the risk of prosecution for conspiracy to defraud was sufficient to ground the claim to the privilege and there was no statutory removal because the removal under the Theft Act 1968 only applied to offences under that Act. Section 13 operates with a double hurdle: by reference to the (1) characterisation of the civil proceedings in which a plea of privilege might be made; and (2) the particular criminal offence which the defendant might face. On (1), if the proceedings are “proceedings relating to property” within the definition in sub-section this satisfies that requirement. For example an action to trace assets belonging to the claimant of which he has been allegedly dishonestly deprived would satisfy item (1). On (2) this includes conspiracy to defraud. “Related offence” is defined in subsection (4) as meaning conspiracy to defraud and any other offence involving any form or fraudulent conduct or purpose.

77. The Practice Direction supplementing part 25 now provides:

7.9 There is no privilege against self incrimination in:

(1) Intellectual Property cases in respect of a ‘related offence’ or for the recovery of a ‘related penalty’ as defined in section 72 Senior Courts Act 1981;

(2) proceedings for the recovery or administration of any property, for the execution of a trust or for an account of any property or dealings with property, in relation to –

(a) an offence under the Theft Act 1968 (see section 31 of the Theft Act 1968); or

(b) an offence under the Fraud Act 2006 (see section 13 of the Fraud Act 2006) or a related offence within the meaning given by section 13(4) of that Act – that is, conspiracy to defraud or any other offence involving any form of fraudulent conduct or purpose; or

(3) proceedings in which a court is hearing an application for an order under Part IV or Part V of the Children Act 1989 (see section 98 Children Act 1989).

However, the privilege may still be claimed in relation to material or information required to be disclosed by an order, as regards potential criminal proceedings outside those statutory provisions.

78. This takes into account the observations in *O Limited v Z* and supersedes the former

para 8.4 of the Practice Direction and the former note 8 to the example search order which provided that no reference should be made to the privilege against self incrimination in cases within section 72 of the Senior Court Act 1981.

79. The present law on privilege against self incrimination, at least that outside of child pornography, consists of common law substantially altered by recent statutory amendments, which remove the privilege. In order to see whether section 13 applies one looks to the type of conduct which is covered by the criminal offence - *JSC BTA Bank v Ablyazov & Ors* [2009] EWCA Civ 1124 (section 328 Proceeds of Crime Act)
80. In *Compagnie Noga v ANZ* [2007] EWHC 85 Steel J was of the view that where a person had made disclosure of assets without claiming the privilege in 5 affidavits it was too late to try to invoke it in relation to subsequent disclosure because his right to claim it had been waived. However in that case it was not available on the facts because of lack of risk of prosecution in the UK. Whether the privilege can be waived in this way through not taking the point on earlier occasions is open to doubt. First one wonders whether it should be waivable at all. It is a privilege grounded in public policy and confidence in the due administration of justice. Secondly assuming that it can be, one wonders whether decisions not to try to invoke it on earlier occasions when circumstances were different can properly be regarded as an agreement or even a decision not to invoke the privilege in other circumstances.
81. In *Hughes v Carratu International Limited* [2006] EWHC 1791 (QB) a pre-action disclosure order was made against the defendant enquiry agents whose agent was to be prosecuted under s. 55 Data Protection Act 1998. He had apparently obtained bank account details of the claimant. The purpose of the order was so that the claimant could have information enabling him to consider bringing proceedings for an injunction and damages for invasion of his privacy and misuse of his confidential information against the defendant and third parties. The case shows that the use of enquiry agents and what they produce must be kept within the confines of what is legally permissible and that unless this is done lawyers may find themselves being sued.

Customs and Excise v Egleton [2007] 1 AER 606

82. First Instance Chancery case on the jurisdiction and practice for obtaining a freezing injunction against a non party where the proceedings were creditors winding up petition based on an allegation of VAT fraud carried out by those standing behind the company. The winding up petition was against the company and the provisional liquidator or liquidator would be able to bring proceedings in the name of the company against directors and others in respect of their participation in the fraud so as to indemnify the company or contribute to the company's liabilities. The usual practice will be to seek the appointment of a provisional liquidator who can then take proceedings against the non parties, and the injunction granted was only short term pending the application to appoint the provisional liquidator.

Contempt Proceedings

83. Proceedings for contempt in civil proceedings can be taken against a person who has broken a court order, which may be mandatory or a negative injunction. In the case of a negative injunction it is essential that the wording clearly prohibited the acts said to be in breach where the breach is inadvertent, this is sufficient to ground the contempt.

Interpretation of an undertaking given to the court and to an order of the court

84. No order will be enforced by committal unless it is expressed in clear, certain and

unambiguous language²⁷. This principle has been restated in a large number of cases, including:

- i. *Iberian Trust Ltd v Founders Trust & Investment Company* [1932] 2 KB 87 in which, at [95] Luxmoore J held that “[i]f the court is to punish any one for not carrying out its order the order must in unambiguous terms direct what is to be done”.
 - ii. *Fishenden v Higgs* (1935) 153 LT 128 in which, at [142] Maugham L.J. held that

“I think a mandatory injunction, except in very exceptional circumstance, ought to be granted in such terms that the person against whom it is granted ought to know exactly what he has to do...the general course adopted in both divisions of the High Court, has been to tell the defendant precisely what he is bound to do”.
 - iii. *Morris v Redland Bricks Ltd* [1970] AC 652 at [666G], Lord Upjohn quoting with approval Sargant J’s judgment in *Kennard v Cory Bros & Co* [1922] 1 Ch. 265, held that “the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact”.
 - iv. *Video Arts Ltd v Paget Industries* [1986] FSR 623, in which, at [625], Knox J held that “it is necessary in any interlocutory order for the maximum degree of certainty to be provided for a defendant, or respondent, as to what is or what is not permitted”.
85. If the language of the order is not clear, ‘the injunction [or undertaking] becomes a snare to the defendant who violates it at all at the peril of imprisonment’²⁸.
86. Because the potential consequence of a breach is imprisonment, the interpretation of an undertaking should not be approached in the same manner as the construction of a contract²⁹:
- i. The order must be taken to mean what it says: “a contempt is proved only where it is shown that the deliberate conduct of the alleged contemnor is contrary to the literal wording of an injunction or undertaking in force at the time of the alleged breach”³⁰.
 - ii. It is not normally permissible to imply terms into a court order: in *Deodat v Deodat* (unreported) 15 April 1975 at 9F Megaw LJ said “[i]n relation to a matter of committal for contempt involving the liberty of the subject it is impossible to read implied terms into an order of the court in that way”.
 - iii. An order should not be interpreted by reference to other material. A person to whom an order is addressed ought to be able to ascertain his precise obligations from the face of the order, and from the order alone³¹;
 - iv. If an undertaking is open to more than one construction, a defendant cannot be committed for contempt on the ground that upon one of the possible constructions he has broken his undertaking, see *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 at 390. The reasons for this are that (1) a man is not lightly to be deprived of his liberty, (2) contempt proceedings are

27 *Harris v Harris* [2001] 2 F.L.R. 895 at [288] et seq.

28 *Low v Innes* (1864) 4 DeGJ&S 286, at 285. See also *Coflexip v Stolt Comex* [1999] FSR 473 in which Laddie J found that “[a] defendant who has been enjoined must know what he can and cannot do. He should not be set a puzzle”.

29 per Scott J in *The Staver Company v Digitext Display Ltd* [1985] FSR 512: “The approach to construction of a contract is not in my judgment suitable for construction of a court order, breach of which represents a contempt of court and may give rise to committal proceedings”.

30 Enforcement of Injunctions and Undertakings, Fricker, N. & Bean, D., 1991, at 11.15, Cited in support is *Spectravest Inc v Aperknit Ltd* [1988] FSR 161.

31 *Re A Bankrupt: Rudkin-Jones v The Trustee of the Property of the Bankrupt* [1965] 109 Sol Jo 334

only to be employed in cases of genuine contumaciousness and (3) where the undertaking has been required by the court as the price for a court, this is in accordance with fairness.

87. *Arlidge, Eady & Smith on Contempt*, 3rd Ed., 2005 states (at 12-48) that the rules governing the construction of undertakings and orders are analogous to those which govern the interpretation of penal statutes. Section 271 of Bennion, *Statutory Interpretation*, 2008 (5th Ed): *"It is a principle of legal policy that a person should not be penalised except under clear law...The court...should strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful"*.

Examples:

- i. In *Spectravest v Aperknit* [1988] FSR 161 concerned an undertaking by a party to a copyright dispute to "deliver up to the second plaintiff all garments or other articles in their possession bearing the plaintiffs' 'Puss-N-Boots' design...". At [167] the judge held that *"on the true construction of the order and undertaking...the defendants were required to deliver up to the plaintiffs only articles which were in their possession at the date of the service of the order, and not articles which came into their possession subsequently."*
- ii. In *M. Petrushkin Ltd v Stark's Ltd* [1971] FSR 310, another copyright dispute in which an order had been made requiring the destruction of certain articles, Whitford J determined that a *"if a defendant did not have any articles in his custody or control at the time when the order was made, he cannot, in the terms of this order, be obliged quite obviously to destroy non-existent articles and there is no reason therefore why he should ever make any affidavit about destruction of articles which were not in his possession at the relevant time."*
- iii. In *Harris v Official Solicitor* [2001] EWHC 798 the Court of Appeal held that it was 'far from clear' whether an undertaking that Mr Harris would not loiter 'at any point along the route of the children to and from school' meant that he would not loiter on the route in use as at the date when the undertaking was given or any route which might from time to time be used in the future.

Particularisation of breaches.

88. Fairness requires the applicant to specify in the application notice bringing the contempt proceedings exactly what breach or breaches had occurred. The Practice Direction supplementing RSC Order 52 (Schedule 1 to the CPR) entitled 'Committal Applications' section 2.5(2) states:

'the claim form must set out in full the grounds³² on which the committal application is made and must identify, separately and numerically, each alleged act of contempt, including, if known, the date of each alleged act,'

89. In *Dorrell v Dorrell*³³ the Court of Appeal held that an application to commit must set out seriatim the nature of the acts alleged to be in breach of the order or undertaking since the person whose liberty was in jeopardy was entitled to know the precise charges against him. Sir John Arnold cited with approval³⁴ the following report of the judgment of Bagnall J in *Woolley v Woolley*³⁵:

'In Woolley v Woolley an application was made to commit a former husband to prison for writing letters to his former wife in breach of an undertaking given to the

³² This is not confined to particularising breaches.

³³ [1985] F.L.R. 1089

³⁴ Ibid

³⁵ N.L.J. 1974 (15 August)

court not to speak to her in the street or on the telephone and to communicate with her only through solicitors. A question arose as to what matters should be pleaded to support such an application. It was held that pleaders should set out *seriatim* the acts alleged to be in breach of the undertaking. A person whose liberty was in jeopardy was entitled to know the precise charges made against him. It should be apparent on the face of the summons whether or not there were breaches of the undertaking.’³⁶

90. *Dorrell v Dorrell*³⁷ was a case where the application contained no particulars at all of the alleged breach. The law was taken further in *Chiltern District Council v Keane*³⁸ where the Court of Appeal had to consider the degree of detail required in the statement of the alleged breaches in the notice initiating the committal proceedings. Sir John Donaldson stated:

‘The notice of motion was personally served on Mr. Keane, but it only stated the grounds of the application to commit in general terms. It recited the undertaking and the injunction, and then alleged that there had been a breach. This, on the authorities, is not sufficient. It has been said in many cases that what is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do constitutes a contempt of court...

... Every notice of application to commit must be looked at against its own background. The test, as I have said, is: does it give the person alleged to be in contempt enough information³⁹ to enable him to meet the charge?’⁴⁰

91. This ‘test’ was approved in *Harmsworth v Harmsworth*⁴¹ by Nicholls LJ who added that in satisfying this test, if lengthy particulars were required they may be included in a schedule or other addendum to the notice, rather than being set out in the notice itself. However, it was not sufficient to make reference in the notice to a wholly separate document (in that case an affidavit).⁴²
92. The requirement is one of fairness to the alleged contemnor. The alleged contemnor must be given fair notice so that he can understand the case against him and have a fair opportunity of meeting it.
93. This principle requires sufficient information so that (1) the alleged contemnor could obtain advice on and prepare the evidence which he might wish to adduce at a hearing if a submission of no case to answer failed⁴³ (only if the case continues can the alleged contemnor be put to a decision on what evidence to adduce in his defence) and (2) at the hearing it is what is the applicant’s case both on breach and matters said to aggravate the contempt; see the principle in *Z Bank v D1* [1994] 1 Lloyd’s Rep 656, 667’⁴⁴ which requires the applicant to prove to the criminal standards matters said to aggravate the contempt.

Proof of the breaches on the criminal standard of proof.

94. It is for the applicant on the criminal standard to prove the particular breaches and

³⁶ [1985] F.L.R. 1089 at 1091

³⁷ [1985] F.L.R. 1089

³⁸ [1985] W.L.R. 619 CA

³⁹ This is not confined to particulars of breaches but extends to what he needs to know so that he can meet the case made against him.

⁴⁰ Ibid at 622

⁴¹ [1987] 1 W.L.R. 1676

⁴² Ibid at 1683

⁴³ A submission of no case to answer can be made in Contempt proceedings - see Attorney-General for *Tuvalu v Philatelic Distribution Corporation Ltd* [1990] 1 WLR 926.

⁴⁴ Ibid at paragraph 16

to prove on criminal standard that matters offered in mitigation were not true, and matters offered in aggravation of the contempt were true, including that the contempt was “contumacious”.

95. Arlidge, Eady & Smith on Contempt [3rd Ed.] at 12-43 ‘It is submitted that, whenever an alleged contemnor is brought before the court, the breach must be proved beyond reasonable doubt.’ This is based on the dictum of Denning LJ in *Re Bramblevale Ltd*⁴⁵:

*‘A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.’*⁴⁶

Subsequent cases in the Court of Appeal *Bartrum v Healeswood*⁴⁷, *Kent County Council v Batchelor*⁴⁸, *Re C (a Minor) (Contempt)*⁴⁹ and *Dean v Dean*⁵⁰ have confirmed this.

96. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Others*⁵¹ Rix LJ, delivering the leading judgment, stated at paragraph 30:

‘The burden lies on the claimants to establish the facts constituting an alleged contempt beyond reasonable doubt, so that the court is sure of those facts.’

97. The criminal standard of proof applies in relation to each and every breach alleged. In *Gulf Azov Shipping Co Ltd v Idis*⁵² the claimant had alleged that there were seven heads of contempt made out. Lord Phillips MR stated that:

*‘It is not right to consider individual heads of contempt in isolation. They are details on a broad canvas. An important question when that canvas is considered is whether it portrays the picture of the Defendant seeking to comply with the orders of the Court or of a Defendant bent on flouting them. It is right that the individual details of the canvas should be informed by the overall picture. But, having said that, each head of contempt that has been held proved must be established beyond reasonable doubt.’*⁵³

The necessity for ‘contumacious’ behaviour to justify a committal Order.

98. The intention of the contemnor is relevant to mitigation of the penalty. In *Re Mileage Conference Group of The Tyre Manufacturers’ Conference Ltd’s Agreement*⁵⁴ Megaw J stated:

*‘Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt.’*⁵⁵

99. For a party to be committed to prison for contempt of court it is necessary for the breach of the undertaking to be contumacious. Lord Phillips MR in *Gulf Azov Shipping Company v Idisi*⁵⁶ said at paragraph 70:

45 [1970] Ch. 128
 46 Ibid 137
 47 [1973] 10 F.S.R. 585 CA
 48 (1977) 33 P. & C.R. 185
 49 [1986] 1 F.L.R. 578 at 588 per Mustill LJ
 50 [1987] 1 F.L.R. 517 CA
 51 [2008] EWCA Civ 389
 52 [2001] EWCA Civ 21
 53 Ibid at paragraph 18
 54 [1966] 1 W.L.R. 1137
 55 Ibid at 1162
 56 [2001] EWCA Civ 21

*'I turn to the second issue as to whether, having regard to those of the findings made by the Judge which I consider to have been properly made, it was appropriate for him to impose a term of imprisonment. Such a course is only appropriate where there is serious, contumacious flouting of orders of the Court.'*⁵⁷

100. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems NV & Others*⁵⁸ the Court of Appeal considered the following question:

*'whether Bean J was right in being satisfied on the criminal burden of proof that Mr Mehta, on 31 January, was not only in contempt of court, which of course he was, but was contumaciously so and in such a way as to entitle the court, as a matter of justice, to impose upon him an order of committal'*⁵⁹

The test for what constitutes contumacious conduct is an exacting one, which is not easily satisfied - see also *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems & Others*⁶⁰

101. 'Wilful disobedience' alone will not necessarily give rise to a finding of contumacious contempt.⁶¹ It seems that it will where there is no attempt to comply with the order of any sort. However, where there is compliance which is judged 'adequate', this can mean that a court will resist even making a finding of contempt.
102. The criminal standard of proof applies to proving that the alleged contempt was contumacious: *Z Bank v D1*⁶² at 667 and *Gulf Azov Shipping Co Ltd v Idis*⁶³. The court must be sure of any matters which would affect the appropriate penalty for a defendant.⁶⁴

Proportionality of the committal proceedings.

103. Committal proceedings should only be brought in appropriate circumstances, and where it is proportional to do so.
104. In *Adam Phones Ltd v Goldschmidt*⁶⁵ Jacob J stated:

'I think, therefore, that there are cases in which even if a technical breach is proved and the respondent had mens rea, the court will nonetheless dismiss the application with costs in favour of the respondent. Contempt proceedings seek the imprisonment of the respondent. For any such proceeding to be instituted there must be something more involved than a mere technicality. In another division of the high court, namely the Family Division, it has been well recognised that, in the words of Arlidge, Eady & Smith:

"The process of contempt should not be invoked in aid of a civil remedy where some other method of achieving the desired result is available."

And as Ormerod LJ said in *Ansah v Ansah*:

"Committal orders are remedies of last resort; in family cases they should be the very last resort."

57 Ibid

58 [2008] EWCA Civ 21

59 Ibid at paragraph 24 per Rix LJ

60 [2009] EWHC 2378 (Comm)

61 This can be seen in *Bhimji v Chatwani* [1991] 1 WLR 989 where Scott J held that a deliberate refusal to comply with an Anton Piller order was not contumacious.

62 [1994] 1 Lloyd's Rep. 656

63 [2001] EWCA Civ 21

64 See *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems & Others* [2009] EWHC 2378 (Comm) per Steel J at paragraph 64: 'Before exercising any such discretion I must be satisfied to the criminal standard that the failure to comply was contumacious in the sense that RM wilfully disobeyed the order.'

65 [1999] 4 All E.R. 486

It seems to me that in considering what to do about the costs when a technical but non-blameworthy contempt of court is proved, the court should consider whether the bringing of the application was at all appropriate. In particular, if the application is wholly a disproportionate response to a trivial or blameless breach of an order then the court should dismiss the application with costs.’⁶⁶

105. In coming to that conclusion Jacob J relied on *Bhimji v Chatwani*⁶⁷ in which Scott J had dismissed a contempt application with costs, and further stated:

*‘Since that judgment [*Bhimji v Chatwani*] the **CPR** have come into force. Their emphasis on proportionality and on looking at the overall conduct of the parties emphasises the point that applications for committal should not be seen as a way of causing costs when the defendant has honestly tried to obey the court’s order.’⁶⁸*

106. Therefore, committal proceedings are not to be brought inappropriately or disproportionately. Where that is the case the court should detect it and dismiss the application. In *Sectorguard plc v Dienne plc*⁶⁹ where Briggs J said:

‘Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court’s order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court’s attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them.’⁷⁰

Suspended Committal Order

107. When assets have been dissipated the court can impose a penalty which is shaped so as to encourage restitution of the position by imposing a requirement of restoration of the position as a condition of a serious penalty such as committal not applying: *ABC v CDE* [2010] EWCA Civ 533.
108. In imposing a penalty for contempt the court will take into account the need to coerce a defendant into compliance with an order which has not been performed as well as punishing the contemnor. In making a decision the court will take into account all the circumstances of the case including the culpability of the contemnor’s conduct and the seriousness of its consequences. At this stage the burden of proving matters said to aggravate the contempt is on the applicant and is to the criminal standard.

“Purging” Contempt

109. “Purging” a contempt concerns an application to the court to alter the penalty by reason of new circumstances such as belated compliance with the order. It has been

66 Ibid at p 495-6

67 [1991] 1 W.L.R. 989

68 [1999] 4 All E.R. 486 at p 496

69 [2009] EWHC 2693 (Ch)

70 Ibid at paragraph 47

suggested that the contemnor has the burden of proof to the balance of probabilities on such an application. In *JSC BTA Bank v Roman Vladimirovich Solodchenko* [2010] EWHC 2843 (Ch) a defendant had failed to comply with a disclosure order and then had belatedly after commencement of committal proceedings provided disclosure and it was suggested that he had to prove on a balance of probabilities that he had “purged” his contempt. This seems to be an incorrect approach. At that stage there was no finding of contempt and penalty. The contemnor was seeking to mitigate his contempt and the principle which applied was that the court sentences on the basis of facts of which it is sure (i.e criminal burden). After sentence the contemnor who seeks to “purge” his contempt (normally seeking early release from prison) has the burden of persuasion and has to prove something in support to satisfy the burden of persuasion. What that may be depends on the circumstances. If it is because he has provided belated disclosure he will need to show at a minimum that he has made a genuine bona fide attempt to comply with the order.

The Dadourian Guidelines

110. In *Derby & Co Limited v Weldon (No 1)* [1990] Ch 49 at p. 59, Nicholls LJ referred to the undertaking provided in that case by the plaintiff, the purpose being to retain control over enforcement of the Mareva injunction abroad. One concern is that the plaintiff might use the order to obtain an order abroad which gave him security for the claim which was not a purpose of Mareva relief, another is that the defendant should not be burdened with having to deal with foreign enforcement proceedings which might be oppressive or unfair because of the need to deal with multiple sets of proceedings instead of a single set of proceedings in England.
111. Undertaking (10) reads:
- [(10) The Applicant will not without the permission of the court seek to enforce this order in any country outside England and Wales [or seek an order of a similar nature including orders conferring a charge or other security against the Respondent or the Respondent's assets].]*
112. The words in brackets in undertaking (10) in the example freezing order go wider than controlling direct enforcement of the Mareva relief, because if adopted they preclude the claimant from seeking abroad an order of a similar nature including an order conferring a charge or other security. In practice before *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 the undertaking was adopted in worldwide freezing injunctions and leave to bring foreign proceedings was readily given usually on a without notice application, so as to avoid notifying the defendant of what was about to be done abroad in case he took steps to defeat it, at which the applicant set out what he wished to do, why and how the anticipated relief abroad might be expected to help him in the litigation. In *Dadourian Group International Inc v Simms* there were proceedings which included allegations of fraud in which worldwide freezing injunctions were granted, which incorporated undertaking (10) including the words in brackets. Permission had been granted to bring proceedings in Switzerland to enforce the injunction or to obtain an order of a similar nature including seeking a charge or other security. On appeal it was argued that permission should be set aside when the non-party alleged assets abroad could be brought before the English court. It was also argued that an applicant for permission must show at least a good arguable case that there were relevant assets in Switzerland. The Court of Appeal dismissed the appeal and the judgment at para 25 lays down the “*Dadourian* guidelines” for granting permission for the claimant to bring foreign proceedings within the undertaking.
113. These guidelines were laid down in a case where there was no proprietary claim, the freezing injunction was pre-judgment and based on the Mareva jurisdiction, and the

actual steps taken abroad, although not the permission under appeal, were limited to enforcement of the worldwide freezing injunctions.

“**Guideline 1:** The principle applying to the grant of permission to enforce a WFO abroad is that the grant of that permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO, and in addition that it is not oppressive to the parties to the English proceedings or to third parties who may be joined to the foreign proceedings.

Guideline 2: All the relevant circumstances and options need to be considered. In particular consideration should be given to granting relief on terms, for example terms as to the extension to third parties of the undertaking to compensate for costs incurred as a result of the WFO and as to the type of proceedings that may be commenced abroad. Consideration should also be given to the proportionality of the steps proposed to be taken abroad, and in addition to the form of any order.

Guideline 3: The interests of the applicant should be balanced against the interests of the other parties to the proceedings and any new party likely to be joined to the foreign proceedings.

Guideline 4: Permission should not normally be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO.

Guideline 5: The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to make the judge to reach an informed decision, including evidence as to the applicable law and practice in the foreign court, evidence as to the nature of the proposed proceedings to be commenced and evidence as to the assets believed to be located in the jurisdiction of the foreign court and the names of the parties by whom such assets are held.

Guideline 6: The standard of proof as to the existence of assets that are both within the WFO and within the jurisdiction of the foreign court is a real prospect, that is the applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question.

Guideline 7: There must be evidence of a risk of dissipation of the assets in question.

Guideline 8: Normally the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings but that party should have the earliest practicable opportunity of having the matter reconsidered by the court at a hearing of which he is given notice.”

114. This was followed by a commentary by the court on each guideline. In practice the granting of permission involves taking into account the particular facts, what the effects may be of granting permission including effects on non-parties, and considering what order would be just bearing in mind that the court can require further undertakings from the applicant as the price of giving permission. For example an undertaking might be required that the applicant will compensate a non-party foreign bank for its costs and expenses caused to it by the making of the contemplated foreign court order, alternatively the court might leave this aspect to be resolved under the rules applied by the foreign court. The guidelines are not a straight jacket, and need to be applied with common sense: *Freeze Framework* Legal Week Vol. 8 No 25 (Robert Hunter).
115. **Guideline 1:** Non-parties such as banks or other asset holders may be affected by a foreign order and their interests should be taken into account when exercising the discretion. There is no general principle that issues with foreign non-parties about ownership of foreign assets have to be resolved in England, or that where foreign

non-parties who hold assets could be joined to the English proceedings that is the route which must be taken in preference to permitting an application for a foreign preservative order.

115. **Guidelines 2 and 3:** Foreign proceedings may be essential when there is an alleged serious fraud involving large sums and when there is evidence that the defendants are unscrupulous and may hide assets. In other cases the need for foreign proceedings might be more questionable, for example where the defendant is living in England, the English order can readily be enforced against him, and there are substantial assets in England caught by a freezing injunction. Each case turns on its own facts.
116. **Guideline 4:** In *Dadourian Group International Inc v Simms* the permission given was not limited to enforcement of the worldwide freezing injunction; but it appears from paras 21-23 that the actual proceedings brought in Switzerland were to enforce the injunctions. Where the foreign proceedings are by way of enforcement only then as a general principle the applicant should obtain no more than is given to him by the English injunction. However, the evidence may disclose good reason for permitting application for a foreign order creating a charge or having other superior effect to the injunction (e.g this is the only form of remedy available in the foreign jurisdiction and the case requires foreign relief) and then permission may properly be granted for the application (*Dadourian Group International Inc v Simms* at para 56 (the words in brackets)).
117. Whilst the English injunction does not create security, it does not follow that it would be oppressive or unjust to permit an application for a free standing foreign provisional security remedy granted in support of the substantive claim, and not by way of direct enforcement of the English injunction. In certain cases foreign preservative relief will be superior to Mareva relief for example because it operates as a form of security for the claim or it will segregate the assets until judgment has been given on the merits, without the defendant having access to them for meeting living expenses or ordinary business expenses or legal costs. This is the consequence of the nature of the provisional remedy available abroad in support of the substantive claim, and the presence of an asset in that jurisdiction, which will often be as a result of the defendant's choice. In those circumstances the Mareva relief operates as additional relief to the foreign relief and should be viewed accordingly.
118. **Guideline 5:** In practice the required evidence will include evidence from a foreign lawyer about relevant law, practice and procedure in the foreign jurisdiction in which the relief is to be sought. The evidence should address any risk of inconsistent judgments: *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at para. 46.
119. **Guideline 6:** The applicant does not have to show on a balance of probabilities that assets exist in the foreign jurisdiction which are within the scope of the freezing injunction, nor a good arguable case that there are such assets, but according to the guideline there must be a "real prospect" that such assets exist in the foreign jurisdiction: *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at paras 47 and 52. The words "real prospect" are to be contrasted with no real prospect, or a trivial possibility. This guideline is directed to consideration of granting permission to apply to the foreign court for an asset preserving order by way of enforcement of the English injunction on the ground that the location of relevant assets within the scope of the freezing injunction is within its territorial jurisdiction. If there is no prospect of the application being well grounded permission should not be granted.
120. When the Mareva jurisdiction was emerging in 1975 there was a Court of Appeal case in which it was said that the applicant had to produce "clear evidence" that there were assets of the defendant within England and Wales. This was subsequently considered to be too inflexible and unduly restrictive and it was held that the existence of a bank

account sufficed even if then in overdraft (see paras 12.042-12.043). It may be that a foreign order can be made which will only apply to assets as and when they come within the foreign jurisdiction. If there is a real prospect of such assets coming into the jurisdiction in the future this should suffice for satisfying this guideline, just as it suffices for a domestic Mareva injunction.

121. There can also be cases where it is likely that there are relevant foreign assets but there is a question about the particular jurisdiction where the assets might be found. In these circumstances it may be just to grant permission to proceed abroad in the various relevant jurisdictions particularly if there are no assets the foreign orders will produce no adverse consequences. This guideline was formulated as a rejection of the appellants argument that there had to be a good arguable case that there were assets of the defendant within the foreign jurisdiction, and it is thought that the Court of Appeal were not addressing cases in which there is clear evidence of foreign assets but those assets might be in one or more of certain jurisdictions.
122. **Guideline 7:** The formulation of the issue before it by the Court of Appeal in *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at para 1, and the short commentary on guideline 7 in para 47, show that the Court of Appeal was laying down in this guideline no more than that where permission is sought to enforce an English worldwide freezing order, which has been granted pre-judgment under the Mareva jurisdiction, the applicant should show a real risk of dissipation of the relevant foreign assets. This is a logical result of the need to show a real risk of dissipation of assets to justify the granting of Mareva relief. If what is sought abroad is free standing provisional relief available from the foreign court based on the substantive claim without a showing of risk of dissipation, the position would be different. It is suggested that the foreign proceedings can then be permitted provided that, and as long as, it is not unjust for this to happen, and the court can give the defendant express liberty to apply to exclude the foreign assets which are in fact caught by the foreign order, when it takes effect, from the scope of the Mareva order, and to reduce the Mareva relief financial limit by the value of the assets caught by the foreign order. This procedure allows the foreign court to grant free standing provisional relief in respect of assets within its territory according to its own rules without interference from the English court, and treats the Mareva relief granted in England as additional relief required as a matter of justice over and above that foreign relief.
123. With a proprietary claim an injunction might be granted to preserve the assets when there is an inadequate evidence to show a cogent case of likelihood of dissipation (see para. 3.029). *Dadourian Group International Inc v Simms* was not concerned with a proprietary claim.
124. **Guideline 8:** Permission can and normally will be given on a without notice application to avoid the defendant moving assets and so defeating any foreign order, and in addition permission can be granted for a short period deferring service of the order made on the without notice application for the same reason: *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 at para 49. The order giving permission has to be served immediately unless a deferral is granted, which will be for no longer than what is necessary.

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He sits as a commercial arbitrator (appointors include the President of the Law Society) and has acted in numerous commercial arbitrations in England, Bermuda, New York, Paris and Geneva (including ICC arbitrations in England, New York, Paris and Geneva), and as counsel in cases about the enforcement of arbitration agreements and awards. He has appeared as counsel in Bermuda, in the Supreme Court of the Republic of Ireland, the Cayman Islands, the Turks and Caicos Islands, and Antigua. He sits as a Recorder of the Crown Court for civil, criminal and family matters.

He is a member of the New York Bar and admitted to practice in the State and Federal Courts in New York, and is a member of the Antigua Bar.

He is recommended in the Legal 500 and/or Chambers & Partners as a specialist in International Arbitration, Commercial Litigation, Civil Fraud, Insurance and Reinsurance and Shipping & Commodities. Steven is also recommended as a leading barrister for dispute resolution in Chambers & Partners Global Edition 2012.

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Supreme Court / House of Lords Cases:

- *The Alexandros T* [2013] UKSC 70 - the leading case in England on Article 27 of the Judgments Regulation (EU Regulation 44/2001).
- *Global Process Systems v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5 - the first marine insurance case to reach the new Supreme Court. The case turned on the scope of the inherent vice exclusion in the Institute Cargo Clauses.
- *The Starsin* [2003] 2 WLR 711 - identity of the contracting carrier on bills of lading, title to sue, the meaning and effect of the Himalaya clause, and interpretation of bills of lading.
- *Astro Exitto Navegacion SA v Southland Enterprise Co Ltd* - interim specific performance of a contract for sale.
- *The Sennar No 2* - issue estoppel / res judicata.
- *The Lips* - damages for late payment involving a currency loss.
- *DSV v Shell No 2* - banking, garnishee orders, and the risk of double payment for a garnishee out of the jurisdiction.
- *Dimskal Shipping v ITF* - economic duress, and conflicts of law.

Recent Cases and Cases of Interest:

- *THE BARITO Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd Commercial Court*: [2013] EWHC 1240 (Comm); [2013] 2 Lloyd’s Rep. 421: Significant decision concerning (i) extent to which non-parties to an arbitration are bound by the award as a privy of a party to the award; (ii) application of Section 9 of the Arbitration Act 1996 to claims for a declaration that there is no binding and effective arbitration agreement on grounds of mistake; (iii) service out of claims for declarations as to the existence of an arbitration agreement and as to the identity of the parties to that agreement where rival arbitral proceedings have been commenced in different jurisdictions and no award would be binding on all potential parties to the arbitration agreement; (iv) choice of law as a factor going to forum conveniens; and (v) the grant of interim anti-arbitration injunctions on American Cyanamid grounds. Instructed on behalf of the successful Claimant (with Tom Whitehead).
- *Great Eastern Shipping Co Ltd v Far East Chartering Ltd & Another (The “Jag Ravi”)* [2011] EWHC 1372 (Comm) [2011] Lloyd’s Rep Plus 65: contract – letter of indemnity – shipowners delivering cargo without production of bills of lading – whether shipowners entitled to enforce letter of indemnity issued by receivers – whether “delivery” under letter of indemnity – whether receivers entitled to rely on defence of public policy - Contracts (Rights of Third Parties) Act 1999.
- *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14; [2010] EWHC 3003 An anti-suit injunction should not have been granted to restrain the pursuit of Russian proceedings as vexatious where the foreign claimant had not agreed or submitted to English jurisdiction, had been the first to issue proceedings and had a legitimate juridical advantage in seeking to litigate in Russia, which was the forum of its domicile and its disputed obligation.
- *Phaethon International CO SA v Ispat Industries Ltd* [2010] EWHC 3446 (Comm) - arbitration clauses - foreign proceedings - injunctions interim measures. Acted on behalf of the London Underwriters in respect of a US\$65million insurance claim arising out of the alleged expropriation of an oil rig by the Government of Venezuela.



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- *National Ability SA v Tinna Oils and Chemicals Ltd* [2009] EWCA Civ 1330 - Steven acted on behalf of charterers in the Commercial Court and Court of Appeal. It is the leading case on the limitation period for enforcing arbitration awards.
- *ACE Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm) - Political risk insurance dispute (concerning insured risks in South America), Steven acted for Lloyd's underwriters in this matter which is now the leading case on the interaction between an arbitration agreement and a US service of suit clause (a standard provision in US insurance policies).
- Provided expert evidence for the South African courts in a case concerning Himalaya clauses and the interpretation of bills of lading.
- *ACE Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm) - Political risk insurance dispute (concerning insured risks in South America), Steven acted for Lloyd's underwriters in this matter which is now the leading case on the interaction between an arbitration agreement and a US service of suit clause (a standard provision in US insurance policies).
- *Hospira UK Ltd v Eli Lilly & Co* [2008] EWHC 1862 - anti-suit injunctions - intellectual property - infringement.
- *The Noga litigation* which lasted over 65 days in front of Rix LJ and concerned freezing relief for \$800 million and a dispute over a settlement for US\$100 million, and see [2001] 3 AER 513 on the jurisdiction to reconsider, and in the Court of Appeal upon the effect of the declaratory remedy on the need to obtain permission to appeal: *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.3)* [2002] CLC 207 (declaration) affirmed [2003] 1 WLR 307, and interpretation of contracts : *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.4)* [2003] EWCA Civ 1100 [2003] 2 All ER (Comm) 915. For the judgment at first instance see: *Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.1)* (Reserved Judgment) 2001 WL 542308.
- *Arkin v Borchard Lines* [2003] 2 Ll Rep 225 - a 40-day trial in the Commercial Court instructed by P&O - the first case to go to trial seeking damages under articles 81 and 82 of the EU treaty, concerning the effect of these articles in the context of liner shipping conferences and the EU Block Exemption on liner conferences, and *Arkin v Borchard Lines No 2* [2004] 1 Ll Rep. 88 concerning section 51 of the Supreme Court Act 1981 and professional funders, see also *Arkin v Borchard Lines Ltd (Costs)* [2001] CP Rep. 108 (costs and set off) *Arkin v Borchard Lines Ltd (Costs: Third Party Proceedings)* [2003] EWHC 3088 (2004) 154 NLJ 22. *Arkin v Borchard Lines Ltd (No.3)* [2004] 1 Ll Rep 636.
- *Petromec Inc. v Petroleo Brasileiro S.A Petrobras & Ors case* [2004] 1 Ll Rep 629 - concerning the total loss of production platform "P 36", which at one time was one of the largest offshore production platforms in the world, and the interpretation of contracts.
- *Glencore v Metro No 1* [2001] 1 Ll Rep 283 - phase 1 of the Metro litigation which is one of the largest case managed cases in the Commercial Court and related to title to oil/bunkers in a floating oil terminal following the insolvency of the storage company, The Metro litigation phase 2 (judgment 1st August 2001).
- *The Fjord Wind* [1999] 1 Ll Rep 307 and [2000] 2 Ll Rep.191 - a leading case on Article III rule 1 of the Hague Rules and the obligation of due diligence.
- *Hamble Fisheries v L Gardener & Sons* [1999] 1 Ll Rep 1- on claims for economic loss in tort for loss caused by defective ship's engine manufacture.
- *Re Pinstripe Farming Co Limited* [1996] 2 BCLC 295 - insolvency
- *Chiron v Murex* intellectual property litigation
- *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (The Rialto)* (Injunctive Relief) [2001] 2 Lloyd's Rep 113
- *Refco v Eastern Trading* [1998] 1 Ll Rep 159 - injunction in support of federal proceedings.
- *Yukong v Rendsburg No 2* [1998] 1 WLR 294 - claim on a cross-undertaking in damages and the court's jurisdiction to award damages for losses caused by a freezing order.
- *Re A Solicitor* [1997] Ch 1 - injunction to protect confidential information.



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- *Union Bank v Lelakis* [1997] 1 WLR 590 - service out of the jurisdiction of an order for examination about assets.
- *Allied Irish Bank Plc v Ashford Hotels Ltd* [1997] 3 All ER 309 - interim receiver.
- *The Choko Star* [1996] 1 WLR 774 - limitation of actions and corporate changes.
- *Flettamentos v Effjohn* [1996] 2 Ll Rep 304 - arbitration/jurisdiction.
- *Balkanbank v Taher Nos 1 and 2* [1995] 1 WLR 1056 and 1067 - litigation relating to the enforcement of a cross-undertaking in damages, and an appeal before the Irish Supreme Court.
- *Trade Indemnity v Njord* [1995] 1 AER 796 - Brussels Convention.
- *Cheltenham & Gloucester Building Society v Ricketts* [1993] 1 WLR 1545 - enforcement of cross-undertaking in damages.
- *Mercantile Group v Aiyela* [1993] FSR 745 - injunction ancillary to enforcement of judgment.
- *Standard Chartered Bank v Walker* [1992] 1 WLR. 561
- *Republic of Haiti v Duvalier* [1990] 1 QB 202

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