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GIDRXSLME SHIPPING CO. LTD. v. TANTOMAR-TRANSPORTES MARITIMOS LDA.

[QUEEN'S BENCH DIVISION]

1994 April 28; May 5; 11

Colman J.

Injunction — Mareva injunction — Jurisdiction — Arbitration award — Mareva injunction applying only to assets within jurisdiction but disclosure of assets worldwide required — Whether court having power to grant injunction to enforce arbitration award — Whether power extending to order disclosure of assets abroad — Whether appropriate before award converted into judgment — Arbitration Act 1950 (14 Geo. 6, c. 27), ss. 12(6)(f), 26 — Supreme Court Act 1981 (c. 54), s. 37(1)

Ships' Names — Naftilos LS

On 19 April 1994 the owners of a chartered ship obtained a *Mareva* injunction under section 12(6)(*f*) of the *Arbitration Act 1950*[1] against the charterers to enable the enforcement of arbitration awards made on 24 February and 18 April 1994. The injunction was confined to assets within the jurisdiction but the court's order required the charterers to disclose information as to their assets worldwide.

On the charterers' application (1) to have the order varied so as to confine disclosure to assets within the jurisdiction:—

Held , dismissing the application, (1) that by virtue of section 12(6)(*f*) of the *Arbitration Act 1950* a court could grant a *Mareva* injunction in aid of enforcement of an arbitration award where there was a real risk that the party against whom the award had

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been made might dispose of his assets to avoid execution of the award; and that where a court granted a *Mareva* injunction in relation to an arbitration claim or award it had jurisdiction under section 37(1) of the *Supreme Court Act 1981* and section 12(6)(*f*) and (*h*) of the Act of 1950 to order disclosure of the respondent's assets, which extended in appropriate cases to assets outside the jurisdiction of the English courts even before the award had been converted into a judgment under section 26 of the Act of 1950 (post, pp. *304D–E*, *306F–G*, *309G–H*, *H–310B*).

The Rena K [1979] Q.B. 377, and *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097 applied.

(2) That although on the facts of a particular case it might be inappropriate to extend a *Mareva* injunction to assets outside the jurisdiction the court could nevertheless make a disclosure order in respect of worldwide assets; that it was unnecessary when applying for a *Mareva* injunction in aid of execution of an award or judgment for the originating summons to refer to disclosure even though the injunction might be confined to assets within the jurisdiction and disclosure extended to assets outside the jurisdiction; that information acquired from a worldwide disclosure order was capable of being used in an action in a foreign jurisdiction without the leave of the court but only for the purposes of

execution of an existing judgment or award and not to obtain attachment of assets overseas to secure a claim in a pending arbitration; and that, accordingly, the order made on 19 April 1994 was within the court's jurisdiction and would be upheld subject to any minor amendments made necessary by the passage of time (post, pp. *310E–G*, *311C–E*, *312C–H*).

Ashtiani v. Kashi [1987] Q.B. 888 and *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch. 65 distinguished.

The following cases are referred to in the judgment:

Ashtiani v. Kashi [1987] Q.B. 888; [1986] 3 W.L.R. 647; [1986] 2 All E.R. 970, C.A.

Babanaft International Co. S.A. v. Bassatne [1990] Ch. 13; [1989] 2 W.L.R. 232; [1989] 1 All E.R. 433, C.A.

Bekhor (A.J.) & Co. Ltd. v. Bilton [1981] Q.B. 923; [1981] 2 W.L.R. 601; [1981] 2 All E.R. 565, C.A.

C.B.S. United Kingdom Ltd. v. Lambert [1983] Ch. 37; [1982] 3 W.L.R. 746; [1982] 3 All E.R. 237, C.A.

Derby & Co. Ltd. v. Weldon [1990] Ch. 48; [1989] 2 W.L.R. 276; [1989] 1 All E.R. 469, C.A.

Derby & Co. Ltd. v. Weldon (Nos. 3 and 4) [1990] Ch. 65; [1989] 2 W.L.R. 412; [1989] 1 All E.R. 1002, C.A.

Interpool Ltd. v. Galani [1988] Q.B. 738; [1987] 3 W.L.R. 1042; [1987] 2 All E.R. 981, C.A.

Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2) [1987] 1 W.L.R. 1711; [1987] 3 All E.R. 886; [1989] Ch. 286; [1988] 3 W.L.R. 1190; [1988] 3 All E.R. 257, C.A.

Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd. [1984] 1 W.L.R. 1097; [1985] 3 All E.R. 747

PCW (Underwriting Agencies) Ltd. v. Dixon [1983] 2 All E.R. 158

Rena K, The [1979] Q.B. 377; [1978] 3 W.L.R. 431; [1979] 1 All E.R. 397

No additional cases were cited in argument.

APPLICATION

On 24 February and 18 April 1994 the arbitrator, Mr. Bruce Harris, awarded the plaintiffs, Gidrxslme Shipping Co. Ltd., the owners of the

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m.v. *Naftilos LS* , their claims against the defendants, Tantomar-Transportes Maritimos Lda., made in two arbitrations for unpaid hire under the chartering of the vessel. By a third final arbitration, still undetermined at the time of judgment in the current matter, the owners claimed further unpaid hire and damages for wrongful repudiation of the charterparty. On 8 March 1994 Cresswell J. gave the owners liberty to enforce the award of 24 February 1994 as a judgment. On 19 April 1994, on the application of the owners, Colman J. made an ex parte order, inter alia, restraining the charterers from removing their assets from the

jurisdiction or dealing with their assets inside the jurisdiction until they had satisfied the award debt, save in so far as their unencumbered value exceeded U.S.$720,000 and ordering, without limiting its effect to within the jurisdiction, that the charterers disclose the identities of all vessels owned, chartered or operated by them and information relating to any bank accounts into which remuneration in relation to any such vessel was paid. On 27 April 1994 the charterers applied to have the order of Colman J. varied so as to limit its provisions as to disclosure to within the jurisdiction. At the conclusion of the hearing, which was in chambers Colman J. indicated that the order would be varied so as to confine the disclosure affidavit to assets within the jurisdiction, for reasons to be given later.

The facts are stated in the judgment, which was delivered in open court.

David Bailey for the owners.

Nigel Jacobs for the charterers.

Cur. adv. vult.

11 May. COLMAN J. handed down the following judgment.

Introduction

This is an application on behalf of the defendants ("the charterers") to restrict the ambit of a disclosure order made alongside a *Mareva* injunction. It raises an important point on the appropriate scope of such orders. That point shortly is whether when the scope of a *Mareva* injunction is confined to assets *within* the jurisdiction of the English courts (i) there is jurisdiction to order an affidavit of the defendant's assets *outside* the jurisdiction of the English courts and, if there is, (ii) in what circumstances that jurisdiction may appropriately be exercised.

The background to this application can be shortly stated. The plaintiffs are the owners of m.v. *Naftilos LS.* They let that vessel on time charter to the charterers for 24 months under a time charter dated 12 March 1993. The charterers carry on business in Lisbon. Various disputes arose. There was a London arbitration clause and the parties referred their disputes to Mr. Bruce Harris, the well known maritime arbitrator. By an interim final award dated 24 February 1994 ("the first award") he awarded that the charterers should forthwith pay to the owners $284,392.47 together with interest and costs. The claim had been in respect of unpaid charter hire. There was then another arbitration as a result of which, on 18 April 1994, Mr. Harris issued a further interim final award ("the second award") in which he awarded that the charterers should forthwith pay to the owners $72,957.00 in respect of more unpaid hire together with interest and costs. In the meantime on 2 March 1994 the owners had withdrawn the vessel

for non-payment of another instalment of hire. They immediately started yet another arbitration before Mr. Harris in which they claimed $253,396.91 on their hire statement and damages for wrongful repudiation of the time charter by the charterers. They put the damages at $350,000. The total claimed was therefore over $600,000. I refer to this arbitration as "the third arbitration."

On 19 April 1994 the owners' solicitors ascertained that a vessel thought to be owned by the charterers called m.v. *Almar* was currently under arrest at Manistry Wharf on the Manchester Ship Canal. They knew of no other tangible assets of the charterers within the jurisdiction. In view of their outstanding claims against the charterers, the owners' solicitors sought to lodge a caveat against release, but by the time their clerk got to the Admiralty Registry he found that he had missed the boat: it had been released from arrest a few minutes earlier. The next quickest course being to obtain a *Mareva* injunction against the charterers restraining them from moving from the jurisdiction or otherwise disposing of such assets as they had here, counsel appeared before me later that day and applied ex parte for such an order. There had not been time to prepare an affidavit but Mr. Bailey, who appeared on the application, explained the facts very fully and in the usual way undertook that they would be verified by affidavit forthwith.

In the event I made an order the substance of which was that the charterers were restrained until further order

> "from removing [their] assets from the jurisdiction or disposing of, assigning their rights to, charging, mortgaging, encumbering or otherwise howsoever dealing with any of their assets within the jurisdiction until the final award is satisfied, save in so far as the unencumbered value of those assets exceeded U.S.$720,000 …"

However, it also contained the following paragraph:

> 5. The [charterers] do, within seven days of notice of this order being given under undertaking (2) hereof make and file an affidavit and serve a copy upon the [owners'] solicitors, Messrs. Hewett & Co. of 8, Crosby Square, London EC3A 6AQ, disclosing: (a) full information concerning the nature and location of all of their assets within the jurisdiction; (b) an identification of all vessels owned by the [charterers] and of all charterparties of all vessels chartered out and/or operated by the [charterers]; (c) details of all bank accounts where freight, hire and other remuneration in relation to those vessels has been and/or is paid including the following details: (i) the name(s) in which each such account is held; (ii) the number of the account; (iii) the branch of the bank at which the account is held; (iv) the amount of the balance held in the account; (d) the name of the party (i) against whom an award has recently been published in London in favour of the [charterers] which is referred to in paragraph 1(b) and the amount of the award; (ii) against whom any other arbitration is presently being pursued in London by the charterers and the date of the hearing if one has been fixed; (e) the name of the solicitors acting on behalf of the [charterers] and the opposite party, in respect of each of the arbitrations referred to at (d) above.

It will be observed, that although the order restraining the movement of assets was confined to assets within the jurisdiction and although paragraph 5(a) is similarly limited, paragraphs 5(b) and 5(c) are not so

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limited and paragraph 5(d) is not confined to parties domiciled within the jurisdiction. The order incorporated a provision giving liberty to the charterers to apply on five working hours' written notice to the owners' solicitors to set aside or vary the order. The owners subsequently applied, ex parte, to extend the injunction so that it applied on a worldwide basis. That application failed since there was no evidence that, if the charterers had any assets abroad, they would dispose of them otherwise than in the ordinary course of their business in order to avoid enforcement of the arbitration awards against them.

The charterers then availed themselves of the liberty to apply to vary the order. Mr. Nigel Jacobs, on their behalf, appeared on 28 April and submitted that paragraph 5 of the order was too wide in principle and that it ought to have been confined, coextensively with the restraining order, to vessels, bank accounts and arbitration respondents *within* the jurisdiction. He said that there was no jurisdiction to go wider than that or alternatively it was unduly oppressive to do so. He relied on what was said on such disclosure affidavits in the Court of Appeal in *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923, *Ashtiani v. Kashi* [1987] Q.B. 888 and *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch. 65. In the present case there were no exceptional circumstances to justify a worldwide *Mareva* injunction even if there

were assets abroad and accordingly it could not be said that an affidavit of assets abroad could be justified.

Mr. Bailey, on behalf of the owners, submitted that the court had unlimited jurisdiction to grant orders for disclosure of assets outside the jurisdiction for the purpose of facilitating the enforcement of judgments and therefore of arbitration awards which were convertible into judgments by the procedure under section 26 of the *Arbitration Act 1950* or section 3(1)(*a*) of the Arbitration Act 1975 and R.S.C., Ord. 73, r. 10. He further relied by way of analogy on the power of the courts under R.S.C., Ord. 48 to require a judgment debtor to attend for examination as to his assets, including foreign assets: see the judgment of the Court of Appeal in *Interpool Ltd. v. Galani* [1988] Q.B. 738. There having been an order of Cresswell J. on 8 March 1994 giving leave to enforce the first award as a judgment, he submitted that this was in substance as good as a judgment and therefore there should be an order for disclosure of overseas assets as if Order 48 applied. Mr. Bailey cited the judgment of Kerr L.J. in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, 27–28 in support of his submission that the court did have *jurisdiction* to order worldwide disclosure of assets and that the decision in *Ashtiani v. Kashi* [1987] Q.B. 888 did not go to jurisdiction.

Having heard these submissions, I indicated at the close of the hearing that my conclusion was that the order should be varied to the effect that the disclosure affidavit should be confined to assets within the jurisdiction and that I would give my reasons later. Another related matter, now no longer in issue between the parties, remained to be fully argued and it was thus sensible that I should give judgment on the scope of the affidavit issue at the same time as on the other matter. When the matter came back before the court for such further argument on 5 May it emerged that the parties had compromised the other matter but, in the meantime, on 8 March judgment had been entered on the first award, my order made on 28 April had not been drawn up and Mr. Bailey had since encountered the decisions of Millett J. and the Court of Appeal in *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)* [1987] 1 W.L.R. 1711; [1989] Ch. 286. He submitted that that authority was highly relevant to my

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decision and that as it had not previously been cited and as the owners had in the meantime turned the first award into a judgment debt, I ought to review my decision of 28 April to restrict the scope of the disclosure order. There was then further argument on the relevance of that authority, which was clearly relevant to the matter in issue, and on the effect of the owners having converted the award into a judgment.

The jurisdictional basis for Mareva relief

The application for the *Mareva* injunction in this case was made by originating summons, being an application for relief under section 12(6)(f) of the *Arbitration Act 1950*. That provides:

> "The High Court shall have, for the purposes of and in relation to a reference, the same power of making orders in respect of — … (*f*) securing the amount in dispute in the reference … as it has for the purpose of and in relation to an action or matter or in the High Court …"

As recognised by Brandon J. in *The Rena K* [1979] Q.B. 377, there is thus created a jurisdiction to grant *Mareva* injunctions in respect of pending or anticipated arbitrations. The court's jurisdiction in such cases is analogous to the jurisdiction which it has in relation to a pending or anticipated action: see *The Rena K,* at p. 408. In view of the fact that, as is now firmly established, the court has jurisdiction to grant a *Mareva* injunction in aid of execution upon application after judgment has been obtained (see *Orwell Steel (Erection and Fabrication) Ltd. v. Asphalt and Tarmac (U.K.) Ltd.* [1984] 1 W.L.R. 1097), there is, in my judgment, no reason in principal why the jurisdiction under section 12(6) of the Act of 1950 should not be exercised in aid of enforcement of English arbitration awards, provided that there are grounds for believing that there is a real risk that the party against whom the award has been made may dispose of his assets to avoid execution of the award.

It is to be observed that in addition to the powers under section 12(6)(*f*) of the Act of 1950, there is also an express power to make an order for an interim injunction under section 12(6)(*h*). In *The Rena K* [1979] Q.B. 377 Brandon J. held, at p. 408, that there was power to grant *Mareva* injunctions under both paragraphs (*f*) and (*h*).

Disclosure orders where there is an arbitration

If there is jurisdiction to grant *Mareva* injunctions in relation to arbitrations, whether prior to the reference or pre-award in the course of the reference or, as I have held, post-award, is there also jurisdiction to order in aid of such a *Mareva* the disclosure of the respondents' assets? And is that jurisdiction also exercisable pre-reference, pre-award and post-award?

In order to answer that question it is first necessary to identify the jurisdictional basis of such orders. It is clear from the judgments of the majority in the Court of Appeal in *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923 that the power to order disclosure of assets by the defendant is a derivative of the express statutory power then expressed in section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925. That simply stated that the High Court "may grant … an injunction … by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do." At the time when that case was before the Court

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of Appeal the Supreme Court Bill including clause 37, now the *Supreme Court Act 1981, section 37(1)*, was before Parliament. Ackner L.J. said, at p. 940:

> "Having regard to the authorities referred to above it is now clearly established that the power of the High Court under section 45(1) includes the power to grant an interlocutory injunction to restrain a party to any proceedings from removing from the jurisdiction or otherwise dealing with assets located within the jurisdiction where that party is, as well as where he is not, domiciled, resident or present within that jurisdiction. Clause 37 of the Supreme Court Bill is obviously designed to give statutory effect to those authorities. To my mind there must be *inherent in that power,* the power to make all such ancillary orders as appear to the court to be just and convenient, to ensure that the exercise of the *Mareva* jurisdiction is effective to achieve its purpose."

He continued, at p. 942:

> "It is therefore clear that although the *Mareva* plaintiff, who has satisfied the guidelines set out by Lord Denning M.R. in *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] Q.B. 645, 668, and in particular has provided adequate grounds for believing that there is a risk of the defendant's assets being removed before the judgment or award is satisfied, is in as privileged position, this privilege must not be carried too far. The courts must be vigilant to ensure that the *Mareva* defendant is not treated like a judgment debtor. It was no doubt with this general principle in mind that Robert Goff J. in *A. v. C. (Note)* [1981] Q.B. 956 was at pains to point out that it would not be right to make general use of the power to enable the plaintiff to discover whether the defendant has any assets here. However, having established the existence of the assets it may, in a particular case, be necessary for the proper exercise of the jurisdiction, that the defendant should provide information about a particular asset. Where, as in *A. v. C.* there were several defendants, the ancillary order might well be designed to obtain information which would enable the court to restrict the injunction to a particular account, and thus enable the judge to decide on what the *Mareva* injunction should bite."

Griffiths L.J. expressed the need for such orders, at pp. 947–948:

> "The plaintiff must be able to satisfy the court that the defendant has assets within the jurisdiction in order to obtain the injunction and in most cases will probably be able to identify those assets with sufficient particularity to enable the court to make an effective order. In such cases there is no need for discovery, and it would be most oppressive to make an unnecessary order for discovery merely to

> harass the defendant. However, from time to time cases will arise when, although it seems highly probable that the defendant has assets within the jurisdiction, their precise form and whereabouts are in doubt, or in the case of a number of defendants they may collectively have sufficient assets but there may be doubt about their distribution among themselves. In such cases in order that the *Mareva* injunction should be effective both the court and the plaintiff require to know the particular assets upon which the order should bite. It must be remembered that the underlying reason for making the order is the
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> fear that the defendant may remove his assets and this is most effectively prevented by the plaintiff serving a copy of the injunction on whoever is holding the defendant's assets for the time being. Very often this will be the defendant's bankers, but assets can take many forms and be in the hands of many different persons to whom it is desirable to give notice of the court's order. To my mind the desirability of the power to order discovery is obvious and it is particularly needed in the case of a defendant who has demonstrated himself to be untrustworthy and evasive. But the question remains, does the power exist?"

And he, too, identified the jurisdiction as ancillary to the power to grant injunction relief under section 45(1) of the Act of 1925, at p. 949:

> "However, in *A. v. C. (Note)* [1981] Q.B. 956, Robert Goff J. derived the power to order discovery not only from the rules, but also from the power to make the injunction under section 45 of the Act of 1925. Mr. Stamler relies upon this power to support the judge's order. If the court has power to make a *Mareva* injunction it must have power to make an effective *Mareva* injunction. If the injunction will not be effective it ought not be made. For the reasons I have already given it may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective. I therefore agree that a judge does have power to order discovery in aid of a *Mareva* injunction if it is necessary for the effective operation of the injunction."

Stephenson L.J. considered that the power to make a discovery order was based upon the inherent jurisdiction of the court: see pp. 953–954.

It is thus reasonably clear that, at least in origin, the jurisdiction to order disclosure of assets had the purpose of facilitating the administration of the injunction by identifying the assets upon which it operated and thereby (i) making it more difficult for the defendant surreptitiously to disobey the order restraining disposal or export abroad of his assets and (ii) enabling notice to be given to third parties who might have custody of the assets, such as banks or warehouses, so as to bind them to the injunction. The function was not to establish that the *Mareva* injunction defendant had assets within the jurisdiction, but to ascertain their precise whereabouts and extent. Consequently, if the jurisdiction to grant disclosure orders arises as a power ancillary to the statutory power under section 37(1) of the Act of 1981, to grant interlocutory injunctions, it must follow that, once the court orders a *Mareva* injunction in relation to an arbitration claim or award, it has exactly the same jurisidiction to make such a disclosure order against the *Mareva* respondent. If section 12(6)(*f*) and (*h*) of the *Arbitration Act 1950* make available the *Mareva* jurisdiction in relation to arbitrations, they must also make available the courts' ancillary power to order disclosure of assets.

The scope of disclosure orders

Following the decision in *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923 the practice developed of including in orders granting *Mareva* injunctions orders for affidavits disclosing the whereabouts of the defendant's assets not only inside, but also outside, the jurisdiction: see for example *C.B.S. United Kingdom Ltd. v. Lambert* [1983] Ch. 37 and

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PCW (Underwriting Agencies) Ltd. v. Dixon [1983] 2 All E.R. 158. But in no case was this practice challenged until *Ashianti v. Kashi* [1987] Q.B. 888, in which it was held by the Court of Appeal (i) that *Mareva* injunctions should be confined to assets within the jurisdiction and (ii) that any ancillary order for disclosure of assets should be similarly

confined. Dillon L.J. observed, at p. 902:

> "The disclosure of foreign assets cannot be regarded as ancillary to the making of a *Mareva* injunction limited to the English assets. It cannot stand on its own feet as a primary exercise of jurisdiction if the *Mareva* exercise is limited to English assets, and is only valid if so limited as an exception to the principle of *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1 on the practice of the courts."

Neill L.J. dealt with the point more fully, at p. 905:

> "In the present case we are concerned not only with a *Mareva* injunction but also with an order for discovery which was made ancillary to the injunction. The relevant part of the order for discovery was in these terms: 'that the defendant do disclose the full value of his assets within and without the jurisdiction identifying with full particularity the nature of all such assets their whereabouts and whether the same be held in his own name or jointly with some other person or persons or by nominees or otherwise howsoever on his behalf …' It is important to remember that this is not an action where any proprietary claim is made, nor is it a tracing action. It is an action founded on an alleged failure to pay moneys due under a contract. What basis is there, therefore, for an order for discovery of the defendant's assets? It is not an order for discovery under R.S.C., Ord. 24. It seems to me that in the present state of the law the only basis for such an order is that it is made in aid of and ancillary to an injunction in the *Mareva* form. The power to order discovery exists, but it is a power which exists to make the injunction effective. It seems to me to follow that, at any rate prima facie, discovery should be limited, first, to the ascertainment of assets which will be covered by the *Mareva* order (in other words, the ascertainment of assets within the jurisdiction), and, second, at a later stage, to enable the court to consider any application by the party enjoined to vary the *Mareva* injunction. Thus, if a party applies to make use of funds which are subject to the *Mareva* injunction, it may become relevant at that stage for the court to inquire whether there are other assets which are not so subject to which he can have recourse: cf. *A.J. Behkor & Co. Ltd. v. Bilton* [1981] Q.B. 923, 935 *per* Ackner L.J. There may be other cases where a wider discovery is appropriate, but, as the scope of a *Mareva* injunction is restricted to assets within the jurisdiction, it seems to me to follow that, certainly in the ordinary way, any discovery in aid of the *Mareva* should be similarly so restricted. Accordingly, in my judgment the order for discovery that was made in this case was not a proper order to make, and I consider that Sir Neil Lawson was right when he discharged the injunction on the basis of an undertaking and made the order which is the subject of this appeal."

It was against the background of that body of authority that Millett J. had to consider the somewhat unusual point which arose in *Maclaine Watson & Co. Ltd. v. International Tin Council (No. 2)* [1987] 1 W.L.R.

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1711. An arbitration award against the I.T.C. had not been satisfied. It had been converted into a judgment, but that, too, remained unsatisfied. Thereupon the plaintiffs had applied for an order under R.S.C., Ord. 48, r. 1 that a proper officer of I.T.C. should attend court to be orally examined as to the assets of I.T.C. within the United Kingdom. The master refused the order because the I.T.C. was not a body corporate as required by Order 48. Millett J. dismissed the appeal but heard a further motion for a similar order under the inherent jurisdiction of the court. That motion succeeded. Millett J. arrived at his conclusion by the following route, at pp. 1716–1717:

> "In this case the applicants rightly do not seek a *Mareva* injunction. There is no reason to believe that the I.T.C. will remove its assets from the jurisdiction in order to defeat execution. The applicants seek only an order for discovery in aid of execution, the procedure of Order 48 being unavailable. The I.T.C. contend that there is no jurisdiction to make such an order in the absence of a *Mareva* injunction. It is, however, fallacious to reason from the fact that an order for discovery can be made as ancillary to a *Mareva* injunction to the conclusion that it cannot be made except as ancillary to such an injunction. The source of the jurisdiction is the same, and so is the ground for exercising it, viz. that it appears to the

> court to be just and convenient to do so …. In the present case the order sought may properly be said to be sought in aid of or for the purpose of implementing of the judgment previously obtained by the applicants. It is, within proper limits, the policy of these courts to prevent a defendant from removing its assets from the jurisdiction or concealing them within it, so as to deny a successful plaintiff the fruits of his judgment. This is the policy which underlies the *Mareva* jurisdiction, before and after judgment, pre-trial discovery of assets in aid of the *Mareva* jurisdiction and Order 48. That policy can only be given effect if a defendant can be ordered when necessary to provide information about the nature and whereabouts of its assets. It can only be given effect in the present case if the court has power to make the order sought. Although Order 48 is not available, the underlying policy of that Order would be forwarded, not frustrated, by the order. There is no doubt that it is just and convenient to make it."

This conclusion was upheld in the Court of Appeal [1989] Ch. 286. The basis of the reasoning in that case was that I.T.C., having failed to pay the judgment debt, was in breach of an order of the court and, it being the policy of the law that judgments should be enforced and that the judgment debtor should assist by providing information as to the whereabouts of his assets, as shown by Order 48, there was jurisdiction under section 37(1) of the *Supreme Court Act 1981* to make an order for disclosure. Such an order would be in support of the execution of the judgment and it would be just and convenient to make such an order. In giving the judgment of the court Kerr L.J. said, at p. 303:

> "First, we do not accept Mr. Chambers's contention that an attitude of total passivity on the part of I.T.C. in relation to the plaintiffs' attempts to enforce their judgment involves no 'invasion … of a legal or equitable right' of the plaintiffs, to use the phrase of Lord Diplock in *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210, 256D, which he repeated in *British Airways Board v. Laker Airways Ltd.* [1985] A.C.
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> 58, 81B, and which was also used by Lord Brandon in *South Carolina Insurance Co. v. Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] A.C. 24, 40C. The plaintiffs have an order of the court against the I.T.C. to pay to the plaintiffs the amount of their judgment. The I.T.C.'s failure to do so is a failure to comply with an order of the court and a breach of an obligation owed to the plaintiffs. As Ralph Gibson L.J. pointed out in the course of the argument, it matters little whether one speaks of an invasion of a plaintiff's right or of a breach of an obligation owed to a plaintiff. The court's statutory power to grant an injunction if it appears just and convenient to do so, in this case in mandatory form, is not excluded by any authority. Secondly, there is the authority of this court in *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923 and other cases that there is an inherent power under what is now section 37(1) to make any ancillary order, including an order for discovery, to ensure the effectiveness of any other order made by the court. This applies in the unusual circumstances of the present case. Since the alternative means of appointing a receiver or of making an order under Order 48 are unavailable, the order for disclosure is necessary to render the plaintiffs' judgment against the I.T.C. effective."

The Court of Appeal thus approved the granting of a mandatory injunction for the purpose of assisting the enforcement of another order of the court, namely the judgment into which the arbitration award had already been converted. Although, therefore, there was no prior *Mareva* injunction in relation to which an order for disclosure of assets could be made as an ancillary power to the granting of the *Mareva* , as in *A.J. Bekhor & Co. Ltd. v. Bilton* [1981] Q.B. 923, there was an earlier judgment against I.T.C. which appeared to have assets overseas and in support of which the disclosure order could be made as a free-standing mandatory injunction. The Court of Appeal had already held in *Interpool Ltd. v. Galani* [1988] Q.B. 738 that R.S.C., Ord. 48 could extend to assets outside the jurisdiction. That being so and since the enforcement of the judgment was not confined to assets within the jurisdiction, there was no reason why the disclosure order should be so confined.

Accordingly, where an English arbitration award has been converted into an English judgment, there is jurisdiction to order in an appropriate case that the judgment debtor/arbitration respondent should disclose assets and, if it appears likely that there are assets abroad, that he should disclose his assets outside, as well as inside, the jurisdiction. Moreover, such an order can be made in aid of execution, even if there is no *Mareva* injunction in aid of execution. If the award has not yet been turned into a judgment — and in this case that is the position in relation to the second award — there is, in my judgment, no reason in principle why there should not also be jurisdiction under section 37(1)

of the Act of 1981, coupled with section 12(6)(*f*) and (*h*) of the *Arbitration Act 1950*, to grant a disclosure order and to extend it in an appropriate case to assets outside the jurisdiction of the English courts. The effect of section 12(6) is to enable the court to make in relation to a reference those orders which it could have made if the reference had been a High Court action. There is no reason, as a matter of construction of section 12(6), why the analogy of the High Court action should stop upon the making of the arbitration award. Just as there can, in an appropriate case, be a *Mareva* injunction in aid of execution of the award, supported by a disclosure order, before

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it has been turned into a judgment, there is no reason why there should not also in an appropriate case be a free-standing disclosure order in respect of the losing respondent's assets. The absence of a judgment, as distinct from an award, should make no difference, for it is the policy of the law that arbitration awards should be satisfied and executed. Hence the power to convert them into judgments under section 26 of the *Arbitration Act 1950* and R.S.C., Ord. 73, r. 10. If the award had been a judgment of the court, a free-standing mandatory injunction for disclosure of assets could have been made in support of that order. Accordingly, by reason of the statutory analogy provided by section 12(6)(*f*) and (*h*) of the Act of 1950, there must equally be jurisdiction to grant such an order in support of the enforcement of an arbitration award notwithstanding that it has *not* yet been coverted into a judgment.

The extension of the use of the *Mareva* jurisdiction to assets outside the jurisdiction of the English courts was examined in depth by the Court of Appeal in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13 and in *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* [1990] Ch. 65. While recognising the power of the English courts to grant *Mareva* injunctions even in respect of assets outside this jurisdiction in an appropriate case, it was unnecessary in either case to consider the scope of disclosure orders in relation to *Mareva* injunctions confined to assets within the jurisdiction. However, in *Derby & Co. Ltd. v. Weldon* Neill L.J., at pp. 94–95, reaffirmed, albeit obiter, his conviction expressed in *Ashtiani v. Kashi* [1987] Q.B. 888 that disclosure orders should be coextensive with the scope of the *Mareva* injunction to which they were ancillary. It is to be observed, however, that both in *Ashtiani v. Kashi* and in *Derby & Co. Ltd. v. Weldon (Nos. 3 and 4)* the courts were concerned with *pre-judgment* orders which included *Mareva* injunctions. The orders for disclosure were therefore orders ancillary to those injunctions. There was no question of there being any other order in support of which a disclosure order could be justified. Where, by contrast, one has the position that a judgment has been already obtained or an award made and where a *Mareva* injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and independently of the injunction as a power in support of the execution of the judgment or award. It follows that, whereas it may on the facts of the case in question be inappropriate to extend the *Mareva* injunction to assets outside the jurisdiction — and it is clear from the two authorities cited that such extensions are likely to be rarely justified — very different considerations may apply to disclosure orders in aid of execution. That being so, there is, in my judgment, a very firm jurisdictional basis for an order, made post-judgment or post-award, which includes both a *Mareva* injunction confined to assets within the jurisdiction and a disclosure order in respect of worldwide assets.

The appropriate order in the present case

In this case the first award has not been satisfied and has been turned into a judgment. The second award has not been satisfied either but leave to enforce it as a judgment has not yet been given. It may be the subject of proceedings to set it aside for misconduct. The third arbitration is pending. The evidence before me on the ex parte application encompassed all three references. The originating summons applied for and only for an injunction restraining the disposal of assets. It did not refer to an order

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for disclosure of assets. That would be the normal way of drafting a summons for a *Mareva* injunction. It is not the practice to refer in the summons, in addition, to the order for disclosure which is now commonly applied for. It is submitted by Mr. Jacobs that, inasmuch as the summons applied for a pre-award *Mareva* injunction in one reference, it is ineffective as a vehicle for an order for disclosure in aid of execution in a totally different reference.

The originating summons was supported by an affidavit which referred to all three arbitrations, indicating how much had been awarded to be paid forthwith under the first award and how much was claimed in the second and third arbitrations. The second award was produced during the hearing. It was thus reasonably clear that the *Mareva* injunction was applied for both in aid of execution of the first and second awards and as a pre-award injunction in respect of the third arbitration. It did not refer to an order for dislosure of assets. The same application therefore applied for a *Mareva* injunction having those two distinct functions. In relation to both such functions it was, as a matter of practice, unnecessary for the originating summons to refer to a disclosure order. Does it make any difference that the disclosure order applied for was for worldwide disclosure and might therefore be available only if the court exercised its jurisdiction to make a free-standing order for disclosure in aid of execution? In my judgment, it does not. Any defendant served with an originating summons for a *Mareva* injunction can be expected to assume that coupled with the application there may be an application for disclosure of assets. In a case where *Mareva* relief is applied for in aid of execution there is likely to be an ancillary order for disclosure of assets. The fact that the court might base such an order on its jurisdiction to grant a free-standing mandatory order for disclosure of assets worldwide in aid of execution as distinct from its jurisdiction to grant a disclosure order confined to assets within the jurisdiction and ancillary to the *Mareva* injunction cannot require that the originating summons has to be drafted so as to make express

reference to that wider jurisdiction. The application is necessarily made ex parte and the first thing the defendant knows of the application is when he is served with the order. It is then open to him to set it aside or vary it by reducing its scope. There can be no conceivable prejudice to him from the form of the originating summons. It was thus open to the court in the present case to accede to the ex parte application for a worldwide disclosure order. The originating summons was in any event issued after the making of the order. There is, for these reasons, nothing in this point.

In the present case the charterers who have failed to honour the first award, and who have subsequently failed to honour the second award, appear to carry on business in Lisbon and are incorporated in Portugal. They claim to have no assets within the jurisdiction except funds held on account of costs by their solicitors and claims in a London arbitration against an English company in relation to which an award is apparently imminent. There are other pending London arbitrations in which the charterers are claimants, but at least some of the respondents are overseas corporations not within the jurisdiction. The charterers have no bank accounts here. Nothing is known of what assets they have abroad beyond those arbitration claims or the whereabouts of those assets.

In view of the outstanding and unsatisfied awards against the defendants amounting in aggregate to U.S.$357,349.47 plus interest and costs, the first award having been converted into a judgment for

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U.S.$284,392.47, it is, in my judgment, entirely just and convenient in aid of execution of those awards that the charterers should be required to tell the owners where their assets are, whether inside or outside the jurisdiction of the English courts. It is true that the charterers have asserted that they have counterclaims in respect of disbursements and bunkers and that they have since the beginning of March 1994 paid a further U.S.$211,512 in respect of further outstanding hire. Although there may be substance in these counterclaims, the fact is that the two awards remain unsatisfied in full and required payment forthwith. They should therefore be enforced unless the court before which enforcement may be sought considers that enforcement is inappropriate by reason of the counterclaims and the general state of account between the parties. If the plaintiffs now have a disclosure order they will be able to take such steps as may be available in the countries where the assets are disclosed to exist to enforce the awards or the judgment on the first award. It is right that they should be able to do so. As I have already indicated a worldwide *Mareva* injunction is not justified in this case, although one confined to assets within the jurisdiction is. As I have already explained in this judgment, the disparity of scope between the *Mareva* injunction and the disclosure order is justifiable where the disclosure order is in aid of execution, as it is in this case.

Mr. Jacobs submitted that if there were to be a worldwide disclosure order, the court should make it on terms that the plaintiffs could not use the information thus acquired to enforce against assets outside the jurisdiction without the leave of this court. He relied on a passage in the judgment of May L.J. in *Derby & Co. Ltd. v. Weldon* [1990] Ch. 48, 55 to the effect that there ought to be as a condition of a worldwide disclosure order an undertaking by the plaintiff not to take action in any foreign jurisdiction by using the information as to assets thus disclosed without the leave of the English courts. That case was concerned with a pre-trial worldwide *Mareva* injunction coupled with a worldwide disclosure order. In my judgment, quite different considerations apply in the case of a post-judgment or post-award disclosure order. In such cases it is just and convenient that the judgment or award creditor should normally have all the information he needs to execute the judgment or award anywhere in the world. It does not need the supervision of these courts to ensure that double execution is not achieved or that the information is not otherwise abused.

There is, however, an area of protection to which the defendants are certainly entitled. That arises from the purpose for which the worldwide disclosure order is granted. It may only be used for the purposes of execution of the existing judgment or award. It cannot be used to obtain the attachment of assets overseas to secure the claim in the third arbitration.

In the event, the order which I made on 28 April having been reviewed, I have come to the conclusion that my original order of 19 April was within my jurisdiction and entirely appropriate on the facts of this case, subject to the qualification that the information disclosed cannot be used to attach assets to secure the claim in the third arbitration, and therefore an undertaking must be given to that effect. The original order will therefore be restored subject to that undertaking and such minor amendments if any as the passage of time and the events which have occurred since I first made it now require.

Application dismissed.

Solicitors: Hewett & Co.; Holmes Hardingham.

[Reported by DURAND MALET. ESQ., Barrister]

1 *Arbitration Act 1950, s. 12(6)(f)*: see post, p. *304B–C*.

S. 26: “An award of an arbitration agreement may, by leave of the High Court or judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.”