IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. P14 of 2015**
B E T W E E N:

PT BAYAN RESOURCES TBK
Appellant

AND

BCBC SINGAPORE PTE LTD
First Respondent

KANGAROO RESOURCES LIMITED
Second Respondent

ATTORNEY-GENERAL OF WESTERN AUSTRALIA
Third Respondent

WRITTEN SUBMISSIONS OF THE THIRD RESPONDENT

PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES PRESENTED BY THE APPEAL

2. The Third Respondent agrees that the issues expressed at [2] of the Appellant's submissions are those before the court.

PART III: NOTICE

3. Notice has sufficiently been given under s.78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS AND CHRONOLOGY

4. The Third Respondent accepts the Appellant's statement of material facts and chronology.

PART V: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

5. To the provisions referred to in Part VII of the Appellant's submissions are to be added; *Supreme Court of Western Australia Consolidated Practice Direction* 9.6.1.

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PART VI: SUBMISSIONS

6. The Attorney General of Western Australia submits that *Rules of the Supreme Court 1971* (WA) O52A is valid. If it is not, it is submitted that the Supreme Court of Western Australia has power, deriving from its inherent jurisdiction, to make the orders made by Pritchard J in Supreme Court of Western Australia matter CIV 1562 of 2012[1].

The contended for bases of invalidity of *RSC* O52A; and bases not contended for

7. The Appellant's submissions range widely, but make two contentions as to invalidity of O52A, limited to the extent to which the order empowers the Supreme Court to make a freezing order over property, within the forum, of a defendant over whom the court has jurisdiction, where there are no substantive proceedings in the forum, but only an anticipated judgment against the defendant of a non-forum, foreign court.

8. The *first* contention is that this aspect (or operation) of O52A is inconsistent with the *Foreign Judgments Act 1991* (Cth). The *second* contention is as follows; O52A was made pursuant to s.167(1)(a) of the *Supreme Court Act 1935* (WA); s.167(1)(a) is to be understood as only empowering or enabling the making of rules of court that correspond to, or do not exceed, the inherent jurisdiction of the Court; and, it is postulated, this aspect of O52A exceeds the inherent jurisdiction of the Court. Allied to this second contention is one to the effect that s.17 of the *Foreign Judgments Act 1991* (Cth) does not empower the making of O52A.

9. The Appellant's second contention precedes the first. If it is correct, the first issue does not arise. As will be demonstrated, the reasons why the second contention should be rejected compel a ready answer to the first contention; that it too should be rejected.

10. A contention not advanced by the Appellant needs to be noted. The first action and the second remitted action are both in federal jurisdiction. Even so, it is not contended that there is not, or that both proceedings are not, a matter or matters within the meaning of s.76(ii) of the *Constitution*. The remitted second action, in itself, is plainly a matter. Whether the first action is a matter or part of a matter is not contended; so nothing need be said of it, other than to note that there are many judicial processes, or things that courts do, that are ancillary to or precede or presuppose other judicial acts, and part of the same matter. This is so, even if the latter judicial act (or thing that courts do) does not occur. Pre-action discovery, where foreshadowed substantive proceedings do not eventuate, is one[2]. Examination orders in winding up and bankruptcy, where the purpose of

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[1] It assists if CIV 1562 of 2012, in which Pritchard J made the freezing order, is referred to as the first action, and the remitted action, considered by Le Miere J, which is Supreme Court of Western Australia matter CIV 2139 of 2012, referred to as the remitted second action. The two actions have not been consolidated.

[2] See *Hooper & Ors v Kirella Pty Ltd; Transfield Pty Ltd v Airservices Australia* [1999] FCA 1584; (1999) 96 FCR 1 at 16 [56] and 17 [60]-[61] (Wilcox, Sackville and Katz JJ). Special leave was refused: *Transfield Pty Ltd v Airservices Australia* (2000) 21(12) Leg Rep SL 1.

examination is to determine whether future proceedings can be brought, and where such proceedings are not[3], is another.

THE APPELLANT'S SECOND CONTENTION - JURISDICTION AND POWER TO MAKE THE ORDER

11. The circumstance of this matter requires precise statement. The Supreme Court of Western Australia had *in personam* jurisdiction in respect of the defendant. No question of service *ex juris* or the power of the Court to exercise *in personam* jurisdiction arises. The nomenclature of *in personam* jurisdiction over a defendant, on one hand, and substantive jurisdiction to exercise judicial power to make the order, on the other, assists some.

12. It is common ground that the validity of O52A - to the extent that it empowers the Supreme Court to make a freezing order over property, within the forum, of a defendant over whom the court has jurisdiction, where there are no substantive proceedings in the forum but only an anticipated judgment of a non-forum foreign court – is approached first by considering the inherent jurisdiction of the Court.

13. Even though common ground, why this is so is worth noting. There are two reasons. *First*, it is accepted that the rule making power in s.167(1)(a) of the *Supreme Court Act* includes a power to make rules with respect to the whole of the inherent jurisdiction of the Court[4]. *Second*, *RSC* O52A *r* 6 recognises the continued existence of the inherent jurisdiction of the Supreme Court, empowering the making of *Mareva* orders. So, even if *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3), invoked by Pritchard J in the first action, are invalid, it matters not if the Court has power by reason of the Court's (preserved) inherent jurisdiction.

14. Before dealing with this inherent jurisdiction, or this aspect of the inherent jurisdiction, it is well to traverse the path to O52A.

RSC O52A and its progenitors

15. *RSC* O52A is in the same terms as Rules of Court elsewhere in Australia[5]. The intended scope of these rules is stated in *Supreme Court of Western Australia Consolidated Practice Direction* 9.6.1, [15][6]. This explanation directs attention to *The Siskina*[7].

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[3] See, *inter alia*, *Saraceni v Jones* [2012] HCA 38; (2012) 246 CLR 251 at 256-257; *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* [2007] FCA 13; (2007) 156 FCR 501.

[4] Appellant's submissions [20].

[5] Appellant's submissions [19], fn.3.

[6] "15. The rules of court confirm that certain restrictions expressed in *The Siskina* [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a '*prospective*' cause of action). Secondly, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new 'long arm' service rule."

[7] *Siskina v Distos Compania Naviera SA* [1979] AC 210.

The Siskina

16. *The Siskina* was handed down shortly after the unearthing of the *Mareva* jurisdiction[8]. The contemporary understanding of its effect was expressed in the 10th edition of Dicey and Morris, published in 1980[9]:

> The remedy [of a *Mareva* order] is available against foreign-based defendants, but it may not be exercised where the defendant is not amendable to the jurisdiction of the court independently of the claim for an injunction.

17. The formulation of a "remedy" being available that "may not be exercised" in a particular circumstance does not deny jurisdiction or power.

18. Not long after *The Siskina*, s.25 of the *Civil Jurisdiction and Judgments Act 1982* (UK) commenced in England, giving effect to provisions of the Brussels and (later) Lugano Conventions[10]. Lord Denning in the Court of Appeal in *The Siskina* had 'argued by analogy' from the accession by the United Kingdom government to the *Brussels Convention 1968* that English courts had power to make a *Mareva* order where proceedings were pending in other Convention countries[11].

19. In dealing with this submission Lord Diplock, in the House of Lords, observed[12]:

> ... there may be merits in Lord Denning M.R.'s alternative proposals for extending the jurisdiction of the High Court over foreign defendants but they cannot, in my view, be supported by considerations of comity or by the Common Market treaties. They would require at least subordinate legislation by the Rules Committee under section 99 of the *Supreme Court of Judicature (Consolidation) Act 1925*, if not primary legislation by Parliament itself. It is not for the Court of Appeal or for your Lordships to exercise these legislative functions, however tempting this may be.

20. Lord Hailsham, perhaps more forthrightly, observed[13]:

> The second point upon which I wish to comment is the argument of Lord Denning M.R., ... that the judges need not wait for the authority of the Rules Committee in order to sanction a change in practice, indeed an extension of jurisdiction, in matters of this kind. The jurisdiction of the Rules Committee is statutory, and for judges of first instance or on appeal to pre-empt its functions is, at least in my opinion, for the courts to usurp the function of the legislature. Quite apart from this and from

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[8] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

[9] J H C Morris (ed), *Dicey and Morris on the Conflict of Laws* (Stevens, 10th ed, 1980) vol 2 at 1198. It is notable that this was the last edition edited by Dr. Morris, who, it must be said, had a far greater interest in matters of choice of law than in those of jurisdiction and enforcement of foreign judgments. This is perhaps best illustrated by the fact that in the 10th edition, *The Siskina* was discussed only in the chapter dealing with Substance and Procedure. Lord Collins, who assumed the General Editorship with the 11th edition, was of course far more interested in such less prosaic matters, and s.25 of the *Civil Jurisdiction and Judgments Act* had been enacted between the 10th and 11th editions.

[10] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels)*, opened for signature 27 September 1968, 1262 UNTS 153 (entered into force 1 February 1973); *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano)*, opened for signature 16 September 1988, 28 ILM 620 (entered into force 1 January 1992).

[11] See, *The Siskina* [1979] AC 210 at 234-235 (Lord Denning MR).

[12] *The Siskina* [1979] AC 210 at 260.

[13] *The Siskina* [1979] AC 210 at 262. Lord Simon of Glaisdale agreed with Lords Diplock and Hailsham, though it is unclear form his Lordship's decision who was on the Woolsack at the time; see at 263. Lord Russell associated himself with the observation of Lord Hailsham; see 263.

technical arguments of any kind, I should point out that the Rules Committee is a far more suitable vehicle for discharging the function than a panel of three judges, however eminent, deciding an individual case after hearing arguments from advocates representing the interests of opposing litigants, however ably.

21. None of their Lordships doubted that the power to make a *Mareva* order in the relevant circumstances could have been conferred on the High Court by Rules of Court. Indeed, none doubted that the proposed "change in practice, indeed ... extension of jurisdiction" could have been effected by judicial decision. The relevant reasoning can be summarised as; notwithstanding this, change by Rule of Court in the usual course was preferable.

22. It is notable that s.99 of the *Supreme Court of Judicature (Consolidation) Act 1925*, being the rule making power to which Lord Diplock referred in the passage re-produced above, is identical to s.167(1)(a) of the *Supreme Court Act*[14]. On this understanding *The Siskina* is, as it happens, authority for the proposition that s.167(1)(a) of the *Supreme Court Act* empowers the making of O52A.

23. A further notable aspect of the judgment of Lord Diplock in *The Siskina* is that it was critical to his Lordship's reasoning that the order sought was an injunction. This limited or constrained power to make such an order to the circumstances in which statutory and other jurisdiction existed to order injunctions[15]. Hence, the discussion by his Lordship of *North London Railway Co v Great Northern Railway Co*[16].

24. As noted, shortly after *The Siskina,* certain of these matters became rather moot, or at least quiescent, in English courts due to the enactment of s.25 of the *Civil Jurisdiction and Judgments Act*. Initially, s.25(1) empowered the grant by a forum court of "interim relief" where proceedings had been commenced in a court of a country that was a party to the *Brussels Convention 1968*. Section 25(3) permitted extension (by Order in Council) of such power of the forum court in respect of proceedings of the courts of other States. Amendments in 1991 extended s.25(1) to States that were parties to the *Brussels Convention 1968* or the *Lugano Convention 1988*. The first Order in Council pursuant to s.25(3) was made in 1997[17]. It extended the power to proceedings of the courts of all other States.

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[14] Section 99 of the *Supreme Court of Judicature (Consolidation) Act 1925* is re-produced. The only difference between it and s.167 of the *Supreme Court Act* is that in the word "court" in square brackets, s.167 of the *Supreme Court Act* provides "Supreme Court".

(1) Rules of court may be made under this Act for the following purposes –

(a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the [court] in all causes and matters whatsoever in or with respect to which [the courts] have for the time being jurisdiction... and any matters incidental to or relating to any such procedure or practice.

[15] See, *The Siskina* [1979] AC 210 at 264 (Lord Diplock).

[16] *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30. Lord Collins in his 1991 lectures to the Hague Academy of International Law emphasised this and referred to s.37 of the *Supreme Court Act 1981* (UK) which reflected this. See 'The Territorial Reach of *Mareva* Injunctions' in Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, 1994) 189 at 191-192.

[17] *Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997*, made on 12 February 1997, which came into force on 1 April 1997.

25. Notwithstanding the creation in England of relevant power deriving from statutory jurisdiction, the status of the reasoning in *The Siskina* was not ignored.

Further consideration of the inherent jurisdiction in Common Law jurisdictions after *The Siskina*

26. Section 25 of the *Civil Jurisdiction and Judgments Act* did not stifle other jurisdictions[18], or the consideration of similar issues in England itself.

27. In *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd*[19], Lord Browne-Wilkinson stated:

> ... the *Siskina* does not impose the third limit on the power to grant interlocutory injunctions which the respondents contend for [that the order must be ancillary to a claim for substantive relief to be granted in the forum][20]. Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

28. Even if it is reading too much into this passage to contend that it is completely inconsistent with *The Siskina*, the inherent or non-statutory jurisdiction of courts to make *Mareva* orders, ancillary only to a foreshadowed foreign judgment, was squarely considered by the Privy Council in an appeal from Hong Kong in *Mercedes Benz AG v Leiduck*[21]. The *ratio decidendi* of *Mercedes Benz* concerned the power to order service *ex juris* under Rules of Court of the Supreme Court of Hong Kong where the forum had no jurisdiction over the defendant other than as a result of the *Mareva* order itself[22].

29. Lord Nicholls, because in lone dissent on the issue of the power to order service *ex juris*, had to consider "the second question"; whether the forum court with jurisdiction over a defendant, had power to make a *Mareva* order where the anticipated judgment was not of a forum court but one which could be recognised and enforced in the forum[23].

30. Because all other members of the Judicial Committee found that the relevant Rules of Court did not empower service *ex juris*, they did not have to consider the second issue. That notwithstanding, Lord Mustill, speaking for the Committee, expressed,

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[18] Lord Collins had in his 1991 lectures to the Hague Academy of International Law outlined the invariable practice of courts in Civilian jurisdictions to make provisional or protective orders in aid of foreign proceedings. See 'Protective Measures in Aid of Proceedings in Foreign Countries' in Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, 1994) 1 at 27-29. See also *Pivovaroff v Chernabaeff* (1978) 16 SASR 329 at 336-338 and the discussion of the Civilian "saisie conservatoire".

[19] *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd* [1993] AC 334 at 343.

[20] This was described by Lord Browne-Wilkinson as, "...[the order] must be ancillary to a claim for substantive relief to be granted in this country by an order of the English court"; *Channel Tunnel Group Limited v Balfour Beatty Construction Ltd* [1993] AC 334 at 342.

[21] *Mercedes Benz AG v Leiduck* [1996] AC 284.

[22] *Mercedes Benz* [1996] AC 284 at 297. As noted above, *Consolidated Practice Direction* 9.6.1, [15] identifies this as the third change effected by *RSC* O52A (see annexure 1). This is effected by O52A *r* 7.

[23] The second question was stated as such; see *Mercedes Benz* [1996] AC 284 at 313 (Lord Nicholls); 298 (Lord Mustill).

what can only be understood to be, support for Lord Nicholls' conclusion on this second question[24].

31. Lord Nicholls dealt with the question as one of power deriving from inherent jurisdiction, and his Lordship, after noting that "there is nothing exorbitant" about such power, observed that[25]:

> The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.
>
> The first defendant contended that it would be an act of judicial anarchy for your Lordships' Board to decline to follow the decision of the House of Lords in *The Siskina* [1979] A.C. 2010, with the law of Hong Kong then differing from the law of England, although the former is based on the latter. This submission is not impressive. If this appeal were allowed, the inevitable result would be that an appropriate case would soon reach the House of Lords and harmony would be restored. The law took a wrong turning in *The Siskina*, and the sooner it returns to the proper path the better.

32. So; the "deeply regrettable" "alternative result" was the reasoned basis[26] for the recognition of the inherent jurisdiction of the Court to make such orders.

33. Having regard to these observations, and the *obiter* support for them by all other members of the Privy Council in *Mercedes Benz*, it cannot be doubted that, as a matter of the inherent jurisdiction of English and Hong Kong courts, they have power to make such orders. To the extent that *The Siskina* is authority otherwise, it does not represent the law of England or Hong Kong.

34. It must, however, be remembered that *The Siskina* was never authority for the proposition that a forum court with *in personam* jurisdiction over a defendant did not have power deriving from its inherent jurisdiction to make a *Mareva* order where the anticipated judgment was not to be of a forum court. As noted, the House of Lords in *The Siskina*, properly understood, simply preferred that any such "change in practice" or "extension of jurisdiction" be effected by Rule of Court rather than judicial decision.

35. The House of Lords also considered *The Siskina* in *Fourie v Le Roux*[27]. There a freezing order was made over assets in England of a defendant who was a party to proceedings in England and also pending proceedings in South Africa. Although the matter arose under s.25 of the *Civil Jurisdiction and Judgments Act*, Lord Scott (with Lords Bingham, Hope, Rodger and Carswell agreeing) observed that; "... the practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* was decided and is

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[24] *Mercedes Benz* [1996] AC 284 at 304. See also, *Black Swan Investments ISA v Harvest View Limited* (Eastern Caribbean Supreme Court, BVIHCV 2009/399, 18, 23 March 2010) at 5 [7].
[25] *Mercedes Benz* [1996] AC 284 at 313-314.
[26] Some might call it the 'policy consideration' (whatever that might mean).
[27] *Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320; [2007] 1 All E.R. 1087.

unrecognisable from the practice ... to which Lord Diplock referred in *The Siskina*"[28].

36. The rejection of the conventional view of the meaning of *The Siskina*, along with the reasoning of Lord Nicholls in *Mercedes Benz*, has been followed in other Common Law courts, in particular in those jurisdictions where assets are often secreted. In each jurisdiction, the power to make orders, where the anticipated judgment is not one of a forum, has been recognised as arising from implicit or inherent jurisdiction of superior courts. The judgment of the Jersey Court of Appeal in *Solvalub Ltd v Match Investments Ltd*[29] is to this effect, as is the judgment of Bannister J of the Eastern Caribbean Supreme Court (British Virgin Islands) in *Black Swan Investments ISA v Harvest View Limited*[30]. Likewise is the judgment of the Court of Appeal of the Cayman Islands in *VTB Capital PLC v Universal Telecom Management et al*[31].

37. In New Zealand, the decision which comes 'closest' to considering the question is *Hunt v BP Exploration Co (Libya) Ltd*[32]. There, the order was made over assets in New Zealand of a defendant against whom the English High Court had given judgment. An application for registration of the English judgment was made at the same time as a *Mareva* order was sought. The English judgment was registered and the next day a *Mareva* order made[33]. So the foreign judgment was not only not anticipated, it was already the subject of registration under the *Reciprocal Enforcement of Judgments Act 1934* (NZ). Barker J exercised power to make the order pursuant to an inherent jurisdiction which his Honour found existed, on the following reasoned basis[34]:

> I consider that this Court does have a Mareva jurisdiction. I do not accept the view that this jurisdiction is in the nature of legislating in an area forbidden to the Courts. I am not impressed by the "assumption of fearful authority" line of cases. There appears to have been an old English procedure of "foreign attachment" which provides a perfectly respectable ancestry for the procedure. The fact that this procedure accords with that in European countries is, for a New Zealand Court, a matter of coincidence.
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> The Court has to approach modern problems with the flexibility of modern business. In former times, as Lawton LJ pointed out[35], it would have been more difficult for a foreign debtor to take his assets out of the country. Today, vast sums of money can be transferred from one country to another in a matter of seconds as a result of a phone

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[28] *Fourie v Le Roux* [2007] UKHL 1 at [30]; [2007] 1 W.L.R. 320 at 332H-333A.
[29] *Solvalub Ltd v Match Investments Ltd* (1996) JLR 361.
[30] *Black Swan Investments ISA v Harvest View Limited* (Eastern Caribbean Supreme Court, BVIHCV 2009/399, 18, 23 March 2010).
[31] *VTB Capital PLC v Universal Telecom Management et al* 2013 (2) CILR 94.
[32] *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (*Hunt*). A *Mareva* order was first sought in New Zealand in *Systems & Programs (NZ) Ltd v PRC Public Management Services Inc* (Supreme Court, Wellington, A 4/78, 5 April 1978).
[33] See *Hunt* [1980] 1 NZLR 104 at 106 [20] and 107 [30].
[34] *Hunt* [1980] 1 NZLR 104 at 118 [5]-[15]. The first relevant New Zealand Rules of Court were made in 1989; *r* 236B of the High Court Rules. In February 2009, *r* 32 of the High Court Rules came into effect. It is the equivalent of O52A.
[35] Referring to Lawton LJ in *The Third Chandris Shipping Corp v Unimarine SA (The Angelic Wings, The Genie and The Pythia)* [1979] QB 645 at 670E.

> call or a telex message[36]. Reputable foreign debtors of course have nothing to fear; the facts of the reported Mareva cases indicate that the jurisdiction is wholesome; the sheer number of Mareva injunctions granted in London indicates that the jurisdiction is fulfilling a need.

38. Canadian law has relevantly developed largely along the same lines[37]. In *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd*[38], the Supreme Court of Canada considered *The Siskina* and *Channel Tunnel* and held that the British Columbia Supreme Court had the power to grant interim relief where the foreshadowed final relief was an arbitration award.

39. *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd* has been applied in numerous Canadian cases, including recently in *African Mixing Technologies (OTY) Limited v Canamix Processing Systems Ltd*[39] where the British Columbia Supreme Court, adopting *Channel Tunnel*, said[40]:

> Regardless of where the dispute will ultimately be resolved, the forum selected for the final resolution of the dispute, and the applicable law, it is clear that the court has jurisdiction to grant an interim injunction pending final resolution of the dispute.

A digression - the oddity of federal jurisdiction in the United States

40. Stark in its contrast, though not inconsistent with developments elsewhere, is the decision of the United States Supreme Court in *Grupo Mexicano*[41]. The majority determined that American Federal Courts[42], lacked power to make *Mareva* type orders at all. This was based upon construction of the relevant provision of the *Judiciary Act 1789* (ch. 20, 1 Stat. 73) conferring equitable jurisdiction on federal courts; construed to mean, only equitable jurisdiction administered by the English Courts of Chancery at the time of the American Revolution[43]. The majority considered that the power to make *Mareva* orders arose after this[44]. The majority judgment is rather a coalescing of what might be thought to be a peculiar American enthusiasm for original intent and hostility to foreign law or legal reasoning of non-American courts. Even so, although American Federal Courts do not have power to

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[36] Those were the days.

[37] Stephen Pitel and Andrew Valentine, 'The Evolution of the Extra-Territorial Mareva Injunction in Canada: Three Issues' (2006) 2 *Journal of Private International Law* 339 at 348.

[38] *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v Canadian Pacific Ltd* [1996] 2 SCR 495; 136 DLR (4th) 289.

[39] *African Mixing Technologies (OTY) Limited v Canamix Processing Systems Ltd* (BCSC 2130, 14 November 2014).

[40] *African Mixing Technologies (OTY) Limited v Canamix Processing Systems Ltd* (BCSC 2130, 14 November 2014) at [57].

[41] *Grupo Mexicano de Desarrollo SA et al v Alliance Biond Fund Inc et al* 527 US 308 (1999).

[42] As explained by the majority in *Grupo Mexicano* 527 US 308 (1999) at 318 fn 3, the parties sought unsuccessfully to invoke state jurisdiction before the Supreme Court. So, the decision is limited to federal jurisdiction.

[43] *Grupo Mexicano* 527 US 308 (1999) at 318 (Scalia J for Rehnquist CJ, O'Connor, Kennedy and Thomas JJ; Stevens, Ginsberg, Souter and Breyer JJ dissented).

[44] *Grupo Mexicano* 527 US 308 (1999) at 328. Of course, this does not address the difference between (equitable) *jurisdiction*, *power* and "*practice*".

make a *Mareva* order (whether the anticipated judgment is local or foreign) - this is because Federal Courts do not have power or jurisdiction to make *Mareva* orders at all; and this is because a (bare) majority of the United States Supreme Court considered that the power to make such orders was not an aspect of the equitable jurisdiction administered by the English Courts of Chancery at the time of the American Revolution. Such considerations and reasoning are unlikely to be persuasive, or relevant, in determining the extent of the inherent jurisdiction of Australian courts in the 21st century.

41. American non-federal jurisdiction is, of course, more complex. Tentative Draft No.1 of the proposed *Fourth Restatement of the Foreign Relations Law of the United States* (2014)[45], cites *Grupo Mexicano* and then states; "State courts also have given a narrow interpretation to their authority to provide pre-judgment relief", citing *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*[46]. In that decision the Court of Appeal of New York felt bound to follow the 1892 decision of *Campbell v Ernest*[47].

42. Although *Grupo Mexicano* was handed down several weeks after *Cardile*[48], no Australian decision following *Cardile* has relied upon the reasoning of the majority in *Grupo Mexicano*.

So - the relevant inherent jurisdiction of Australian courts

43. This case does not require an exegesis of the metes and bounds of the inherent jurisdiction of Australian superior courts. The issue is whether the inherent jurisdiction of Australian superior courts is different to the inherent jurisdiction of all other Common Law superior courts, in excluding or precluding the power of the Supreme Court of Western Australia to make a freezing order in respect of property within the forum of a defendant over whom the court has *in personam* jurisdiction, where there are no 'substantive' proceedings in the forum but only an anticipated judgment of a non-forum court.

44. The following are, with respect, reasons why the Supreme Court of Western Australia has inherent jurisdiction to make such orders.

45. *First*, if not then Supreme Courts of Australian States will be the only superior Courts in the Common Law world (outside of the United States) without such inherent jurisdiction.

46. This is reason enough to recognise such inherent jurisdiction.

47. *Second*, the existence and nature of such inherent jurisdiction is informed by the background to O52A and its equivalents in other Australian States and federal courts. Order 52A is a uniform national court rule developed by the Australian

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[45] Tentative Draft No.1 of the proposed *Fourth Restatement of the Foreign Relations Law of the United States* (2014) at § 408 Foreign Injunctions, Reporter's Note No. 2.
[46] *Credit Agricole Indosuez v Rossiyskiy Kredit Bank* 94 N.Y. 2d 541 (2000).
[47] *Campbell v Ernest* 64 Hun 188 (1892).
[48] *Cardile v Led Builders Pty Ltd* [1999] HCA 18; (1999) 198 CLR 380.

Council of Chief Justices Rules Harmonisation Committee[49], and, as noted, equivalents have been made in all Australian jurisdictions[50].

48. Being Rules of Court of Australian superior courts, created, in effect, by Australian superior courts, it would be surprising indeed if the inherent jurisdictions of such courts were misconceived.

49. *Third* are the reasons stated by Lord Nicholls in *Mercedes Benz*, mirrored in the reasoning of others, for recognising the existence of such inherent jurisdiction[51]:

> The alternative result would be deeply regrettable in its unfortunate impact on efforts being made by courts to prevent the legal process being defeated by the ease and speed with which money and other assets can now be moved from country to country. The law would be left sadly lagging behind the needs of the international community.

50. This reasoning applies to Australian superior courts to the same extent as it applies to the superior courts of (*inter alia*) England, Canada, New Zealand, Jersey, the British Virgin Islands and the Cayman Islands.

51. That which underlies developments elsewhere applies equally to Western Australia and Australia. If, as the Appellant contends, *Mareva* orders can only be made in respect of perfected foreign judgments, parties can, with the press of a mobile phone button, simply move assets to avoid judgments. Much has changed since 1979, when *The Siskina* was handed down. As Campbell J observed; "international commerce and international monetary transactions are a daily reality, and... money can be transferred overseas with sometimes as little as a click on a computer mouse"[52].

52. *Fourth*, unlike the early position in England, in Australian law, the jurisdiction to make *Mareva* orders has almost uniformly been recognised as being inherent and 'based upon' prevention of the abuse or frustration of the process of the Court. Unlike in *The Siskina*, Australian law has not considered the jurisdiction to be

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[49] Appellant's submissions [17] and noted in Division 7.4 of the *Federal Court Rules 2011* (Cth) and Division 2 of the *Uniform Civil Procedure Rules 2005* (NSW).

[50] Appellant's submissions [19]; *Federal Court Rules 2011* (Cth) (including Division 7.4) commenced on 1 August 2011; the *Uniform Civil Procedure Rules 2005* (NSW), Pt 25, Div 2 commenced on 9 June 2006; the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), Order 37A commenced on 31 August 2006; the *Uniform Civil Procedure Rules 1999* (Qld), Ch 8, Pt 2, Div 2 commenced on 1 June 2007; *Supreme Court Rules 2006* (SA), rule 247 commenced on 1 May 2007; *Supreme Court Rules* (NT), Order 37A commenced on 10 January 2007; *Supreme Court Rules 2000* (Tas), Part 36, Div 1A commenced 19 July 2006; *Court Procedure Rules 2006* (ACT) (including Sub-division 2.9.4.2) commenced 1 July 2006; *Rules of the Supreme Court 1971* (WA) Order 52A commenced on 21 February 2007.

[51] *Mercedes Benz* [1996] AC 284 at 313-314. See also *Hunt* at 118 [5]-[15]; *Black Swan Investments ISA v Harvest View Limited* (Eastern Caribbean Supreme Court, BVIHCV 2009/399, 18, 23 March 2010) at 9 [15]; *Solvalub Ltd v Match Investments Ltd* (1996) JLR 361 at 369-370; *VTB Capital PLC v Universal Telecom Management et al* 2013 (2) CILR 94 at 119-120 [43]; *Silver Standard Resources Inc v Joint Stock Company Geolog* [1998] 59 BCLR (3d) 196 (CA); (1998) DLR (4th) 309 (BC CA) at 320-321 [19]; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 270; *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742; (2005) 222 ALR 676 at 686 [35].

[52] *Davis v Turning Properties Pty Ltd* [2005] NSWSC 742; (2005) 222 ALR 676 at 686 [35].

truncated by limits on jurisdiction or power to order interlocutory injunctions[53]. The doctrinal basis of the inherent jurisdiction in Australia has not been protection of a plaintiff or the provision of security for a plaintiff or proof of a proprietary interest of a plaintiff in forum located property.

53. Both *Patrick Stevedores*[54] and *Cardile*[55] considered the basis of the power of the Federal Court to make a *Mareva* type order. The well-known passage from the joint judgment of Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ in *Patrick Stevedores*[56] is to the effect that the general plenary grant of jurisdiction to the Federal Court by s.23 of the *Federal Court of Australia Act 1976* (Cth) provides necessary jurisdiction and power to the Federal Court. This was endorsed in *Cardile*, and in doing so Gaudron, McHugh, Gummow and Callinan JJ further observed that where *Mareva* orders are to be made against parties to substantive forum proceedings, "the focus is the frustration of the court's process", but where a *Mareva* order is sought "against non-parties, the focus must be the administration of justice"[57].

54. Several things emerge from this passage. *First*, it confirms that it has been well understood in Australia, unlike in England following *The Siskina*, that questions of power and jurisdiction to make *Mareva* orders are not determined by the statutory jurisdiction of superior courts to order injunctions[58]. *Second*, whatever view is taken as to the existence or status of an inherent jurisdiction of the Federal Court (and federal courts)[59], it cannot be doubted that the inherent jurisdiction of State Supreme Courts in respect, at least, of the making of freezing orders, is no less

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[53] See *Cardile* [1999] HCA 18; (1999) 198 CLR 380 at 394 [26] and 400-401 [41]-[42] (Gaudron, McHugh, Gummow and Callinan JJ); the distinction between interlocutory injunctions and Mareva orders is drawn in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63; (2001) 208 CLR 199 at 216-217 [10]-[12] (Gleeson CJ); 231 [60] (Gaudron J); and 243 [94] (Gummow and Hayne JJ). It is also apt to note that this confusion likely explains the dogmatic insistence of successive authors of Meagher, Gummow and Lehane that, "In truth there is no jurisdiction at all to grant a Mareva injunction". See R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (Butterworths, 2nd ed, 1984) at 576 [2183]; R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (Butterworths, 3rd ed, 1992) at 607 [2186]; R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) at 798 [21-435]. This position was finally abandoned in the 5th edition. See J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2014) at 778 [21-430].

[54] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* [1998] HCA 30; (1998) 195 CLR 1.

[55] *Cardile* [1999] HCA 18; (1999) 198 CLR 380.

[56] *Patrick Stevedores* [1998] HCA 30; (1998) 195 CLR 1 at 32-33 [35]-[36]. Quoted in *Cardile* [1999] HCA 18; (1999) 198 CLR 380 at 400-401 [41].

[57] *Cardile* [1999] HCA 18; (1999) 198 CLR 380 at 401 [42].

[58] This aspect of *The Siskina* was criticised, *inter alia,* by Lord Collins in his 1991 lectures to the Hague Academy of International Law. See 'Protective Measures in Aid of Proceedings in Foreign Countries' in Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, 1994) 1 at 31-34. Of course, the authors of early editions of Meagher Gummow and Lehane thought otherwise, see fn 53.

[59] See *DJL v The Central Authority* [2000] HCA 17; (2000) 201 CLR 226 at 235-236 [10] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 307 [42] (McLure P); 318-319 [103]–[105] (Buss JA, Murphy JA agreeing).

extensive than the power conferred on the Federal Court by s.23 of the *Federal Court of Australia Act*.

55. In any event, the doctrinal basis of this inherent jurisdiction in Australia can now be understood to be expressed in *Consolidated Practice Direction* 9.6.1, [5]:

> The purpose of a freezing order is to prevent frustration or abuse of the process of the Court, not to provide security in respect of a judgment or order.

56. It follows that the only rational basis to deny power to make orders, such as that made in the first action here, is if, transposing the words of *Consolidated Practice Direction* 9.6.1, [5], "process[es] of the Court" excludes registration of a foreign judgment. If registration of a foreign judgment is not a process of a forum court – what is it?

57. This rhetorical question highlights that the only basis upon which it can be contended that an inherent jurisdiction does not exist to make such orders is if foreign judgments are considered differently to the judgments of local courts, and if Australian law adopts the following - it is an abuse of the process of an Australian forum court for a defendant to apply its assets in a deliberate attempt to frustrate local proceedings but it is not an abuse, and an Australian court will permit a defendant over whom it has jurisdiction, to apply its assets in a deliberate attempt to frustrate a registrable and enforceable foreign judgment.

The consequence of all of this

58. If Australian superior courts have an inherent jurisdiction to make freezing orders such as that made in the first action, then the Appellant accepts that s.167(1)(a) of the *Supreme Court Act* empowered the making of *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3).

59. As noted above, *RSC* O52A *r* 6, in any event, recognises the continued existence of the inherent jurisdiction of the Supreme Court, empowering the making of *Mareva* orders.

60. So, *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3) are valid and the Supreme Court of Western Australia, in any event, had power deriving from its inherent jurisdiction to make the orders made by Pritchard J in the first action.

A digression – Federal Court jurisdiction, State Supreme Courts exercising federal jurisdiction and an oddity in this matter

61. The first action is in federal jurisdiction because it is part of the matter which involves putative registration and enforcement of a judgment under the *Foreign Judgments Act*. The orders in the first action were made pursuant to *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3). This rule was picked up and applied to this matter by s.79(1) of the *Judiciary Act 1903* (Cth)[60]. Similarly, if, and to the extent that it does

[60] This is consistent with the reasoning below; see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 307 [45] (McLure P); 341 [224] (Buss JA, Murphy JA agreeing).

not, *RSC* O52A *r* 5(6) provides for power separate from that in *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3), it too is picked up by s.79(1).

62. *RSC* O52A *r* 6 recognises the continued existence of the inherent jurisdiction empowering the making of *Mareva* orders such as that made here. To the extent that power is exercised by a State court in exercise of its inherent jurisdiction, this law is picked up either by s.79 or s.80 of the *Judiciary Act*. The reference to s.80 is through caution only. Whether the inherent jurisdiction of Australian superior courts, described by the Honourable Keith Mason as an "unwritten source of power"[61], comprises part of the "common law in Australia", though interesting, does not need to be resolved.

63. The remitted second action was commenced in the original jurisdiction of this Court, and remitted to the Supreme Court of Western Australia, pursuant to s.44(1) of the *Judiciary Act*. It is necessarily in federal jurisdiction. It could not have been remitted to the Supreme Court of Western Australia if it did not have the same jurisdiction (or deficit of jurisdiction) as this Court[62].

64. Section 79 and 80 of the *Judiciary Act* operate, in respect of the second remitted action, in the same manner as in the first action, in respect of *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3), *RSC* O52A *r* 5(6), *RSC* O52A *r* 6 and the inherent jurisdiction of the Supreme Court of Western Australia empowering the making of *Mareva* orders.

65. There is an oddity arising from the Appellant's contention about inconsistency, if it is correct, which arises from the jurisdiction being exercised by the Supreme Court in this matter.

66. Let it be assumed that the Supreme Court of Western Australia has power to make the order made in the first action; that this power derives from *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3); and that these rules are valid. That is, the Appellant's second contention fails. The Appellant's further contention is that, even so, such law is invalid because it is inconsistent with the *Foreign Judgments Act*.

67. As discussed in further detail below[63], the Federal Court has the precise equivalent of *RSC* O52A[64]. If *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3) are validly made pursuant to s.167(1)(a) of the *Supreme Court Act*, then necessarily the Federal Court equivalent rules were also validly made pursuant to applicable enabling Commonwealth legislation. But if, as the Appellant contends, *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3) are inconsistent with the *Foreign Judgments Act* and invalid, this would not affect the validity of the equivalent Federal Court rules.

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[61] Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449 at 449.
[62] *Johnstone v Commonwealth* (1979) 143 CLR 398 at 408 (Aickin J); approved in *MZXOY v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 625 [48] (Gleeson CJ, Gummow and Hayne JJ) and 659 [187] (Heydon, Crennan and Kiefel JJ).
[63] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 313 [82] (Buss JA, Murphy JA agreeing).
[64] *Federal Court Rules 2011* (Cth) Ch 2, Pt 7, Div 7.4.

68. This would result in this jurisdiction existing, and power being available, where a *Mareva* order was made by the Federal Court but not by any State Supreme Court. Not only would this be an odd result, it would mean that the remitter to the Supreme Court of Western Australia, instead of to the Federal court, was erroneous.

Section 17 of the *Foreign Judgments Act 1991*

69. Section 17 of the *Foreign Judgments Act* incorporates the well-trod formulation of regulations "necessary or convenient" to carrying out or give effect to enabling legislation.

70. *Shanahan v Scott*[65] and *Carbines v Powell*[66] authoritatively explain this formulation. Plainly enough, the *Foreign Judgments Act* leaves open a broad expanse. The power to make regulations is of a "very wide ambit"[67]. The reasoning below discloses, in this respect, no error[68].

THE APPELLANT'S FIRST CONTENTION - INCONSISTENCY

71. When the inherent jurisdiction to make these types of orders is properly understood, any notion of inconsistency of such jurisdiction (and provisions such as *RSC* O52A *r* 5(1)(b)(ii), *r* 5(2) and *r* 5(3)) with the *Foreign Judgments Act* is readily disposed of. With respect, there is nothing more to it than was stated by McLure P below; that is, once the basis of the inherent jurisdiction of the court is understood, the contention is, in effect, misconceived[69].

72. The Appellant criticises the reference in the judgment of Buss JA to the jurisdiction being "conducive to, and does not detract from"[70] the *Foreign Judgments Act*. It is unlikely that Buss JA in this passage is positing a test of inconsistency for the purpose of s.109. His Honour is simply, and with respect accurately, describing the effect of the jurisdiction upon the *Foreign Judgments Act*. In any event, even if his Honour was suggesting a test for the application of s.109 in this context, a test of whether a State law is "conducive to, and does not detract from" the *Foreign Judgments Act*, is likely not much less helpful than the postulation of the Appellant that "such a jurisdiction would cut away the policy of the *Foreign Judgments Act*"[71].

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[65] *Shanahan v Scott* (1957) 96 CLR 245 at 250; cited with approval in *Willocks v Anderson* (1970) 124 CLR 293 at 298 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 380.

[66] *Carbines v Powell* (1925) 26 CLR 88 at 92.

[67] *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410 (Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

[68] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 307 [46]-[47] (McLure P); 336-338 [194]-[204] (Buss JA, Murphy JA agreeing).

[69] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 308 [49] (McLure P).

[70] *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2014] WASCA 178; (2014) FLR 299 at 338 [204] (Buss JA, Murphy JA agreeing).

[71] Appellant's submissions [24].

73. Similarly, the Appellant's contention, deriving from *Telstra v Worthing*[72] that O52A "impairs, negates or detracts from" the *Foreign Judgments Act*[73] should be rejected. Order 52A does not *impair* or *detract from* enforcement of foreign judgments, within any sensible meaning of these words. Order 52A's object is the opposite of this. For the same reason, O52A does not *negate* enforcement of foreign judgments. Indeed, with or without O52A, foreign judgments can be enforced under the Act.

74. Simply, the inherent jurisdiction and *RSC* O52A empowering the making of *Mareva* orders ancillary only to a foreshadowed foreign judgment is not inconsistent with a Commonwealth statue that provides for the enforcement of foreign judgments, within any meaningful understanding of the word 'inconsistent'.

75. This is illustrated by considering a necessary corollary of the Appellant's contention. If the Appellant is correct, then the jurisdiction of a State Supreme Court to make a *Mareva* order in anticipation of a forum judgment is logically 'inconsistent' with the municipal law regime for enforcement of such a judgment. A meaning of the word 'inconsistent' that would accommodate such a contention is unimaginable.

76. A further necessary corollary of the Appellant's contention concerns the Federal Court. It must be supposed that even though the Federal Court equivalent of O52A is inconsistent with the *Foreign Judgments Act*, it is not invalid. It follows that the Federal Court, but only the Federal Court, has power to make a *Mareva* order that is ancillary only to a foreshadowed foreign judgment.

PART VII: LENGTH OF ORAL ARGUMENT

77. It is estimated that the oral argument for the Attorney General for Western Australia will take no more than 30 minutes.

Dated: 29 April 2015

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[72] *Telstra v Worthing* [1999] HCA 12; (1999) 197 CLR 61.
[73] Appellant's submissions [35].

9.6 Order 52A - Freezing Orders & Order 52B - Search Orders

9.6.1 Freezing Orders (*Mareva* Orders)

1. This Practice Direction supplements O 52A of the *Rules of the Supreme Court 1971* relating to freezing orders (also known as '*Mareva* orders' after ***Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)*** [1975] 2 Lloyd's Rep 509; [1980] 1 All ER 213, or 'asset preservation orders').

2. This Practice Direction addresses (among other things) the Court's usual practice relating to the making of a freezing order and the usual terms of such an order. While a standard practice has benefits, this Practice Direction and the example form of order annexed to it at 9.6.1.1 do not, and cannot, limit the judicial discretion to make such order as is appropriate in the circumstances of the particular case.

3. Words and expressions in this Practice Direction that are defined in O 52A have the meanings given to them in that Order.

4. An example form of freezing order which can be granted without notice being given to the respondent (ex parte) is annexed to this Practice Direction at 9.6.1.1. The example form may be adapted to meet the circumstances of the particular case. It may be adapted for a freezing order granted with notice being given to all parties (inter partes) as indicated in the footnotes to the example form (the footnotes and references to footnotes should not form part of the order as made). The example form contains provisions aimed at achieving the permissible objectives of the order consistently with the proper protection of the respondent and third parties.

5. The purpose of a freezing order is to prevent frustration or abuse of the process of the Court, not to provide security in respect of a judgment or order.

6. A freezing order should be viewed as an extraordinary interim remedy because it can restrict the right to deal with assets even before judgment, and is commonly granted without notice being given to the respondent.

7. The respondent is often the person said to be liable on a substantive cause of action of the applicant. However, the respondent may also be a third party, in the sense of a person who has possession, custody or control, or even ownership, of assets which he or she may be obliged ultimately to use to help satisfy a judgment against another person. Order 52A, r 5(5) addresses the minimum requirements that must ordinarily be satisfied on an application for a freezing order against such a third party before the discretion is exercised. The third party will not necessarily be a party to the substantive proceeding, (see ***Cardile v LED Builders Pty Ltd*** (1999) 198 CLR 380) but will be a respondent to the application for the freezing or ancillary order. Where a freezing order against a third party seeks only to freeze the assets of another person in the third party's possession, custody or control (but not ownership), the example form at 9.6.1.1 will require adaptation. In particular, the references to '*your assets*' and '*in your name*' should be changed to refer to the other person's assets or name (e.g. '*John Smith's assets*', '*in John Smith's name*').

8. A freezing or ancillary order may be limited to assets in Australia or in a defined part of Australia, or may extend to assets anywhere in the world, and may cover all assets without limitation, assets of a particular class, or specific assets (such as the amounts standing to the credit of identified bank accounts).

9. The duration of a freezing order granted without notice being given to the respondent should be limited to a period terminating on the return date of the motion, which should be as early as practicable (usually not more than a day or two) after the order is made, when the respondent will have the opportunity to be heard. The applicant will then bear the onus of satisfying the Court that the order should be continued or renewed.

10. A freezing order should reserve liberty for the respondent to apply on short notice. An application by the respondent to discharge or vary a freezing order will normally be treated by the Court as urgent.

11. The value of the assets covered by a freezing order should not exceed the likely maximum amount of the applicant's claim, including interest and costs. Sometimes it may not be possible to satisfy this principle (for example, an employer may discover that an employee has been making

fraudulent misappropriations, but does not know how much has been misappropriated at the time of the discovery and at the time of the approach to the Court).

12. The order should exclude dealings by the respondent with its assets for legitimate purposes, in particular:

    (a) payment of ordinary living expenses;

    (b) payment of reasonable legal expenses;

    (c) dealings and dispositions in the ordinary and proper course of the respondent's business, including paying business expenses bona fide and properly incurred; and

    (e) dealings and dispositions in the discharge of good faith obligations and properly incurred under a contract entered into before the order was made.

13. Where a freezing order extends to assets outside Australia, the order should provide for the protection of persons outside Australia and third parties. Such provisions are included in the example form of freezing order.

14. The Court may make ancillary orders. The most common example of an ancillary order is an order for disclosure of assets. The annexed example form at 9.6.1.1 provides for such an order and for the privilege against self-incrimination.

15. The rules of court confirm that certain restrictions expressed in ***The Siskina*** [1979] AC 210 do not apply in this jurisdiction. First, the Court may make a freezing order before a cause of action has accrued (a '*prospective*' cause of action). Secondly, the Court may make a free-standing freezing order in aid of foreign proceedings in prescribed circumstances. Thirdly, where there are assets in Australia, service out of Australia is permitted under a new 'long arm' service rule.

16. As a condition of the making of a freezing order, the Court will normally require appropriate undertakings by the applicant to the Court, including the usual undertaking as to damages.

17. If it is demonstrated that the applicant has or may have insufficient assets within the jurisdiction of the Court to provide substance for the usual undertaking as to damages, the applicant may be required to support the undertaking by providing security. There is provision for such security in the example form of freezing order at 9.6.1.1.

18. The order to be served should be endorsed with a notice in the form of the penal notice on the example form of freezing order attached to this Practice Direction.

19. An applicant seeking a freezing order without notice being given to the respondent is under a duty to make full and frank disclosure of all material facts to the Court. This includes disclosure of possible defences known to the applicant and of any information which may cast doubt on the applicant's ability to meet the usual undertaking as to damages from assets within Australia.

20. The affidavits relied on in support of an application for a freezing or ancillary order should, if possible, address the following:

    (a) information about the judgment that has been obtained, or, if no judgment has been obtained, the following information about the cause of action:

        (i) the basis of the claim for substantive relief;

        (ii) the amount of the claim; and

        (iii) if the application is made without notice to the respondent, the applicant's knowledge of any possible defence;

    (b) the nature and value of the respondent's assets, so far as they are known to the applicant, within and outside Australia;

    (c) the matters referred to in r 5 of the freezing orders rules of court (O 52A); and

    (d) the identity of any person, other than the respondent, who, the applicant believes, may be affected by the order, and how that person may be affected by it.