

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

PAUL CARDILE & ORS

APPELLANTS

AND

LED BUILDERS PTY LIMITED

RESPONDENT

Cardile v LED Builders Pty Limited (S61-1998) [1999] HCA 18
6 May 1999

ORDER

1. *Appeal allowed.*
2. *Set aside Order 4 of the orders made by the Full Court of the Federal Court of Australia on 22 August 1997.*
3. *Set aside each Order 1 of the several orders made by Emmett J on 22 August 1997 and 26 August 1997.*
4. *Set aside that part of Order 2 of the orders made by the Full Court of the Federal Court of Australia on 22 August 1997 which disposes of the costs of the appeal to that court. In place thereof, order each party to bear its, his and her own costs of the appeal to that court.*
5. *Suspend the operation of Orders 1, 2, 3 and 4 of these Orders for 14 days from the date of the making of this Order.*
6. *Remit the matter to a judge of the Federal Court of Australia for the making, on application by LED Builders Pty Limited, and on provision of the necessary undertakings, of orders for interlocutory relief in or to the effect of the form set out in the joint majority judgment.*

On appeal from the Federal Court of Australia

Representation:

T M Jucovic QC with D J Hammerschlag for the appellants (instructed by Banki Haddock Fiora)

T E F Hughes QC with A J Grant for the respondent (instructed by Speed and Stracey)

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CATCHWORDS

Cardile & Ors v LED Builders Pty Limited

Federal court - Interlocutory relief - Asset preservation order - Juridical foundation - Whether capable of arising against property of a non-party - Whether order preventing disposal of assets by non-party necessary to protect the administration of justice - Undertakings as to damages - Discretionary considerations in granting relief.

Companies - Interlocutory relief - Asset preservation order - Whether relief available against recipients of dividend payments - Whether relief available to protect goodwill.

Words and phrases - "Mareva injunction" - "asset preservation order" - "injunction" - "intermingling" - "alienation".

Conveyancing Act 1919 (NSW), s 37A.

Federal Court of Australia Act 1976 (Cth), s 23.

- 1 GAUDRON, McHUGH, GUMMOW AND CALLINAN JJ. This appeal raises a question whether an order identified as a *Mareva* injunction or order may be granted against a third party to proceedings in circumstances in which that party has not been shown to have an interest in the assets or funds (with one possible exception) of the potential judgment debtor.

The proceedings in the Federal Court

- 2 It appears that, on 1 July 1993, Eagle Homes Pty Ltd ("Eagle Homes"), the business of which was housing construction, declared a dividend of \$400,000 in favour of Mr and Mrs Cardile and that the dividend was paid by book entry crediting their loan accounts. There is some dispute as to precisely when the dividend was declared and paid. Mr and Mrs Cardile were the only shareholders of Eagle Homes and controlled it in all relevant senses. In October 1993, the respondent, LED Builders Pty Ltd ("LED"), commenced proceedings in the Federal Court against Eagle Homes for infringement of LED's copyright in certain building plans. On 7 December 1994 LED commenced further Federal Court proceedings against Eagle Homes for copyright infringement.

- 3 On 22 May 1995, Ultra Modern Developments Pty Ltd ("Ultra Modern") was incorporated. Mr and Mrs Cardile also controlled that company. On 6 June 1995, Eagle Homes registered the name "Eagle Homes" under the *Business Names Act* 1962 (NSW) ("the Business Names Act"). On the same day, Ultra Modern became the registered proprietor of that name. In October 1995, Ultra Modern obtained a builder's licence. Ultra Modern has since that time carried on a business of building houses in accordance with new plans. Eagle Homes continues to construct houses but in accordance with earlier plans which are likely to become commercially obsolete. In the conduct of their respective businesses, both companies use the business name "Eagle Homes".

- 4 The infringement actions were heard together between 4-8 March 1996. In 1996, as appears from the balance sheet for the year ended 30 June 1996, a dividend of \$800,000 was declared by Eagle Homes and some \$658,977.12 of that dividend was actually paid to, or applied for the benefit of, Mr and Mrs Cardile.

- 5 On 29 July 1996, Davies J gave judgment in both infringement proceedings in favour of LED¹ and orders were made on 27 August 1996. His Honour gave declaratory and injunctive relief and made orders against Eagle Homes for delivery up and payment of LED's costs to date. Orders were also made for the taking of

1 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 35 IPR 215.

interlocutory steps before LED made its election between damages and an account of profits. On 13 November 1996, Lindgren J delivered reasons for judgment upon a dispute with respect to those interlocutory steps². LED elected for an account of profits and judgment upon the taking of the account is presently reserved in the Federal Court. The liability of Eagle Homes in money terms thus remains to be quantified. This is an important consideration for that branch of the litigation now before this Court.

6 On 23 December 1996, Whitlam J made certain interim orders against Eagle Homes which restricted dealings with its realty. Later, on 25 June 1997, Emmett J dealt with motions for what he identified as *Mareva* orders by LED against Eagle Homes and Ultra Modern and Mr and Mrs Cardile³. In the second motion, LED also sought an order for the joinder of Ultra Modern and Mr and Mrs Cardile as respondents in the action. Emmett J declined to make the orders sought by this second motion. His Honour referred to various prospective actions against those whose joinder was sought, including avoidance proceedings which might be brought under s 37A of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act"), on the footing that the declaration and payment of dividends by Eagle Homes, as well as the assumption of its business by Ultra Modern, were undertaken with the intention to defraud creditors and that an alienation of property was involved.

7 Emmett J drew the inferences that the declaration and payment of both dividends had been prompted by a desire to remove assets from Eagle Homes which otherwise would be available to satisfy a judgment in favour of LED. However, his Honour said that there was no evidence to suggest that Mr and Mrs Cardile might depart the jurisdiction or that they had made any attempt to dispose of assets out of the jurisdiction. Emmett J continued⁴:

"The most that can be said by LED is that, since Mr and Mrs Cardile have been prepared in the past to engage in transactions of the nature described above, there is reason to think that they may do the same in relation to the assets of Ultra Modern or may dispose of their own assets. It is said that they might be disposed to take such steps in order to avoid the prospective claims that might be made against them by a liquidator of Eagle Homes if judgment

2 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 70 FCR 436.

3 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107.

4 (1997) 38 IPR 107 at 117-118.

3.

is given in favour of LED or to avoid the consequences of an order under s 37A if proceedings were taken under that provision by LED.

If I were to conclude that those claims were in danger of being extinguished in some way or otherwise being jeopardised by non-action on the part of those in control of Eagle Homes, that might be a reason for granting additional relief against Eagle Homes. For example, that could be a justification for the appointment of a liquidator provisionally to Eagle Homes with power to commence proceedings for orders in the nature of Mareva injunctions against Mr and Mrs Cardile and Ultra Modern. Alternatively, a receiver might be appointed to the cause of action, with power to apply for Mareva orders, to ensure that it is preserved⁵. However, I am not satisfied at present that the claims, if they exist, are in jeopardy. Indeed, the causes of action, for the most part, have not even yet arisen."

8 Emmett J said that the authorities supported the making of *Mareva* orders directly against a third party where the claim against that party was in respect of specific property in which the defendant had asserted a proprietary interest. His Honour then stated⁶:

"The question is whether Eagle Homes has control over or access to the assets of Ultra Modern or Mr and Mrs Cardile such that the proceeds of the sale of those assets could be applied in discharge of any judgment against Eagle Homes. There must be evidence to support a conclusion that there is a danger that the assets of the prospective respondents, which might otherwise be available to satisfy a judgment in favour of LED against the Eagle Homes, will not be available.

The bases for suggesting that assets of the prospective respondents might be available to satisfy a judgment in favour of LED are those outlined above. There is no other basis for contending that Eagle Homes has any interest in the assets of the prospective respondents. As I have indicated, questions of whether their assets will be available to satisfy any judgment will depend upon the outcome of proceedings on causes of action as between Eagle Homes and the prospective respondents which, for the most part, have not yet arisen. It is inappropriate for those questions to be litigated in these

5 See, for example, *Garden Mews-St Leonards Pty Ltd v Butler Pollnow Pty Ltd* (1984) 9 ACLR 91.

6 (1997) 38 IPR 107 at 119.

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proceedings, particularly at the stage which these proceedings have now reached."

9 Emmett J expressed his conclusions in this way⁷:

"As I have indicated, I have concluded that an inference can be drawn that the declaration of the dividends and the run down of the business of Eagle Homes has been motivated by a desire to limit the funds available to meet a judgment in favour of LED. It may well be that, if an application such as that presently before me had been brought earlier, relief would have been granted which prevented the declaration of a dividend or the transfer of the business name. ...

...

If there were any evidence that the prospective causes of action which have been foreshadowed as being available to Eagle Homes are being prejudiced in any way, it would be appropriate for further relief to be given, eg the appointment of a receiver. That relief is not presently sought and, on the present evidence, I would not be disposed to make any further orders against Eagle Homes. However, I would be prepared to entertain, on short notice, any further application which LED wished to bring against Eagle Homes if there is evidence that any prospective cause of action is in jeopardy.

I do not consider that, on the material before me, LED has made out a case for Mareva orders against any of the prospective respondents. In those circumstances, it is pointless making orders, at this stage, that they be joined as parties to the proceedings. Accordingly, I propose to dismiss the notice of motion for joinder and for Mareva orders against them."

10 LED sought leave to appeal to the Full Court of the Federal Court. The Full Court (Beaumont, Branson and Tamberlin JJ) granted leave to appeal, allowed the appeal and set aside the orders of Emmett J dismissing the second motion⁸. The matter was remitted to a single judge for determination in accordance with the reasons for judgment of the Full Court.

7 (1997) 38 IPR 107 at 120.

8 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65.

5.

- 11 In the Full Court, LED relied upon a passage from a judgment of Hope JA (with whom Glass and Priestley JJA agreed) in *Coxton Pty Ltd v Milne*⁹:

"Without attempting to define or to limit the extent of the exception, the necessary circumstances [for the grant of a *Mareva* order] will exist when the affairs of a defendant sued by a creditor for an alleged debt and of the third party against whom the injunction is sought are intermingled, the alleged debtor and the disposition of its assets are effectively controlled, de jure or de facto, by the third party, the debtor's assets will be insufficient to meet the debt, the creditor, although having no vested or accrued cause of action against the third party, may become entitled to have recourse to the third party or his assets to meet his debt, and there is a danger that the third party will send his assets abroad or otherwise dispose of them."

- 12 In the course of their joint judgment, Beaumont and Branson JJ said¹⁰:

"On the undisputed facts, Mr and Mrs Cardile control both Eagle [Homes] and Ultra [Modern]. Having regard to his Honour's finding as to the earlier involvement of Mr and Mrs Cardile in the disposition of assets by Eagle [Homes], we do not consider that it was open to his Honour to conclude, if he did so conclude, that there is no risk that assets will be disposed of by Ultra [Modern], at the direction of Mr and Mrs Cardile, with a view to abusing or frustrating the Court's process. In those circumstances, the Court should intervene to prevent any such abuse or frustration. To that end, Ultra [Modern] should be temporarily restrained from disposing of its assets, subject to the usual exceptions so that, for example, it may make a disposition in the ordinary course of its ordinary business. Mr and Mrs Cardile should be similarly enjoined. LED will, of course, be required to give the usual undertaking as to damages.

We must add that, with all respect, we cannot accept, as the primary judge appears to suggest, that it is an ingredient of the *Mareva* jurisdiction that the debtor has a specific proprietary interest in the third party's assets (see, for example, *Mercedes Benz AG v Leiduck*¹¹ where ... Lord Mustill emphasises that *Mareva* relief takes effect in personam only and distinguishes tracing and other such remedies protecting proprietary rights). It is sufficient, for present

9 Unreported, Court of Appeal of New South Wales, 20 December 1985 at 13.

10 (1997) 78 FCR 65 at 78.

11 [1996] AC 284 at 300.

purposes, that the assets of the defendant and the third parties are 'mixed up' and 'controlled', in the sense explained by Kiefel J in *Tomlinson [v Cut Price Deli Pty Ltd]*¹².

It is true, as has been seen, that in the exercise of the Mareva injunction, the position of innocent third parties needs to be treated with caution and with due regard to their legitimate interests. But it could not be suggested, and is not suggested, that these third parties were innocent. Neither Mr nor Mrs Cardile gave evidence, and the findings of Davies J and of the primary judge that they, and their companies, had embarked upon a scheme aimed at frustrating the Court's process are not, and could not be, challenged.

We must further say that we cannot agree with the approach, apparently taken here by the primary judge, that the relevant question is to be looked at, in effect, in terms of the grant of final relief on a substantive cause of action. This is no more than interlocutory relief. At the jurisdictional level, the only real questions for the primary judge were first, whether there was a serious question to be tried as to whether assets presently under the control of Ultra [Modern] and Mr and Mrs Cardile could be available to satisfy a judgment against Eagle [Homes] in favour of [LED], and secondly, whether there was a danger of such assets being dealt with by Eagle [Homes], or the prospective respondents, so that the Court's process would be frustrated."

13 The third member of the Full Court, Tamberlin J, was also of the opinion that the relief sought by LED should be granted. His Honour held that the power to order a *Mareva* injunction is purposive, designed to prevent frustration of the court's processes, and is unconstrained by the submission advanced by the appellants that an injunctive order against a third party to the proceedings should not lie where the third party does not hold a proprietary interest in the assets¹³.

14 The matter was remitted to the primary judge and, as a result of orders made by Emmett J on 22 August 1997 and 26 August 1997, there is presently in force, until further order, an order, made upon LED giving the usual undertaking as to

12 Unreported, Federal Court of Australia, 23 June 1995.

13 (1997) 78 FCR 65 at 85.

7.

damages¹⁴ that Ultra Modern "by itself, its directors, officers, employees, agents or otherwise", and Mr and Mrs Cardile be restrained:

"from disposing of or dealing with any of their money, property or other assets, other than for the following purposes:

- (a) to enable them to pay and to continue to pay the reasonable legal expenses of defending these proceedings and any appeal therefrom;
- (b) to protect the copyright of [Eagle Homes'] housing plans (other than plans relating to these proceedings) by the commencement and prosecution of proceedings against infringement of the same;
- (c) to commence and prosecute any other proceedings which [Eagle Homes] may be advised to bring;
- (d) to defend any other proceedings that may be brought against [Eagle Homes];
- (e) to meet [Eagle Homes'] taxation liabilities;
- (f) to comply with the statutory requirements to which [Eagle Homes] is subject;
- (g) to meet [Eagle Homes'] normal accountancy fees;
- (h) to pay ordinary and proper business expenses bona fide incurred by [Ultra Modern]; and
- (i) to pay the ordinary living expenses of Paul Cardile and Lucy Cardile".

The appeal to this Court

15 In this Court, the appellants, Mr and Mrs Cardile and Ultra Modern, seek orders vacating those made by the Full Court and on remission by Emmett J on 22 and 26 August 1997, and an order reinstating the original order of Emmett J. To

14 In the Federal Court, the usual undertaking as to damages is an undertaking to pay such compensation (if any) as the Court thinks just "to any party adversely affected" by the order in question (Practice Note No 3 dated 8 April 1994).

the extent that an order is necessary, the appellants have special leave to appeal against the orders of Emmett J made on 22 and 26 August 1997.

16 The grounds of appeal, beyond which, it must be said, the argument ranged, are as follows:

- "1. The [Full Court of the Federal Court] did not have jurisdiction to grant Mareva injunctions against the [appellants] at the suit of [LED]:
 - a. where there was no cause of action maintainable by [LED] against them; and
 - b. in respect of property [in] the hands of the [appellants] not available to [LED] to satisfy a judgment which [LED] might in future obtain against Eagle Homes ('the debtor').
2. The [Full Court of the Federal Court] erred in interfering with the order made by Emmett J at first instance refusing Mareva relief and in granting Mareva relief at the suit of [LED] over the property of the [appellants] in respect of a prospective judgment against the debtor where:
 - a. there was no cause of action at the suit of [LED] against the [appellants];
 - b. the debtor had no proprietary interest in the property in the hands of any or all of the [appellants];
 - c. property of the [appellants] would not be available to [LED] to satisfy a judgment which [LED] might in the future obtain against the debtor;
 - d. there was no evidence that the [appellants] would or were likely to dispose of their property in circumstances that might constitute an abuse of process; and
 - e. a material matter erroneously taken into account by the [Full Court of the Federal Court] in exercising its discretion against the [appellants] was the declaration by the debtor of dividends out of its profits, the lawfulness of which declaration was not put in issue."

9.

- 17 The appellants' principal contentions are that they have not been shown to have been, or prospectively to be, a recipient of any property of Eagle Homes; even assuming a power to make an order against the corporate appellant, that order must be confined in operation to assets of Eagle Homes in the hands of Ultra Modern and subject to execution on a judgment in favour of LED; and that neither s 23 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act")¹⁵, s 115(2) of the *Copyright Act* 1968 (Cth)¹⁶, s 37A of the *Conveyancing Act*¹⁷, nor any of its analogues or similar provisions in the *Corporations*¹⁸ or *Bankruptcy*¹⁹ laws, provide a proper basis for the orders made by the Full Court of the Federal Court and then by Emmett J in favour of LED.
- 18 Subject to the view that we should take in relation to the business name "Eagle Homes" and the dividends paid to the personal appellants, we would accept what the appellants put in relation to the factual situation: that the appellants have not (with one exception) been shown to have come into possession of any of Eagle Homes' property and that there is no evidence that they are about to do so.

15 Section 23 provides:

"The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

16 Section 115(2) provides that the relief in an infringement action includes an injunction "subject to such terms, if any, as the court thinks fit".

17 Section 37A provides:

- "(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act* 1930, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors."

18 See *Corporations Law* (Cth), ss 486A, 588FA-588FF, 598.

19 See *Bankruptcy Act* 1966 (Cth), ss 120-122.

- 19 The heart of the reasoning of Beaumont and Branson JJ is to be found in part of the passage that we have already quoted where their Honours held it was not open to Emmett J:

"to conclude, if he did so conclude, that there is no risk that assets will be disposed of by Ultra [Modern], at the direction of Mr and Mrs Cardile, with a view to abusing or frustrating the Court's process".

- 20 Ultra Modern is entitled to dispose of assets that it owns or has lawfully acquired. To dispose of its own assets, without more and when no substantive proceedings have been taken against it, cannot be said to be an abuse or frustration of the court's process in respect of litigation between other parties.

- 21 The only assets that have been shown to be in contention here are the dividends declared and paid by Eagle Homes which served temporarily to reduce, but not entirely eliminate, a debt owed by Eagle Homes to Mr and Mrs Cardile, the business name "Eagle Homes" and possibly goodwill attached to the business name "Eagle Homes".

- 22 We will deal with the dividends first. There was no evidence that Mr and Mrs Cardile were mere conduits for the transmission to Ultra Modern of the funds, received by them by way of dividends, and accordingly no order on account of them should have been made in respect of Ultra Modern.

- 23 The next part of the reasoning of Beaumont and Branson JJ is that, there being a risk that Ultra Modern might dispose of its assets to abuse or frustrate the court's process because it has the same controllers (Mr and Mrs Cardile) as Eagle Homes, that risk must be eliminated by the grant of a *Mareva* order.

- 24 Ultra Modern has not been shown to own or hold, or have the power of disposition over, any property of Eagle Homes nor in any way at all to owe any obligations or debts to that company (save perhaps for the business name "Eagle Homes" which we set aside for separate consideration later). The evidence does not in our opinion go so far as to establish, even on a prima facie basis, that Ultra Modern is in possession of, or using, Eagle Homes' goodwill. It is not suggested that Eagle Homes, or a liquidator of it, or anyone else, would have any entitlement to set aside any transaction between Eagle Homes and Ultra Modern or to follow or trace any assets passing from the former to the latter. There have been no transactions between the companies and no assets have passed between them.

- 25 None of the authorities cited to this Court went so far as to support an order of the width of that made in the Full Court. As the argument proceeded upon the

grounds of appeal to which we have referred, several matters became apparent. One was that the English authorities appear to have developed to a stage where what is identified as the *Mareva* injunction or order lacks any firm doctrinal foundation and is best regarded as some special exception to the general law. Another was that, whilst it is undesirable that asset preservation orders of the *Mareva* variety be left as a *sui generis* remedy with no doctrinal roots, the term "injunction" is an inappropriate identification of that area of legal discourse within which the *Mareva* order is to be placed. The third was the point encapsulated in the joint judgment of this Court in *CSR Ltd v Cigna Insurance Australia Ltd*²⁰:

"The counterpart of a court's power to *prevent* its processes being abused is its power to *protect* the integrity of those processes once set in motion".

The integrity of those processes extends to preserving the efficacy of the execution which would lie against the actual or prospective judgment debtor²¹. The protection of the administration of justice which this involves may, in a proper case, extend to asset preservation orders against third parties to the principal litigation. This appeal concerns the identification of such proper cases.

26 In *Jackson v Sterling Industries Ltd*²², Deane J referred to the armoury of a court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction. By this means, the risk of the stultification of the administration of justice is diminished. Once the source of power is recognised, then, whatever may be the limitations with respect to inferior courts²³, in the case of the Federal Court the power will be seen to be comprehended by the express grant in s 23 of the Federal Court Act. In *National Australia Bank Ltd v Bond Brewing Holdings Ltd*²⁴, Mason CJ, Brennan and Deane JJ described as mistaken any proposition that *Mareva* relief could only be obtained against the defendant to an action if there were a positive intention to frustrate any judgment. However, the presence in s 23 of the expression "as the Court thinks appropriate" points to the requirement to develop principles governing the exercise of the power in such a fashion as to avoid abuse. This need,

20 (1997) 189 CLR 345 at 391 (original emphasis).

21 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 638.

22 (1987) 162 CLR 612 at 623.

23 See the remarks of Dawson J in *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 as to the powers of inferior courts enjoyed by implication.

24 (1990) 169 CLR 271 at 277.

as indicated above, is at the heart of the present appeal. Meeting that need is not facilitated, and may be impeded, by continued attempts to force what has become known as the *Mareva* order into the mould of interlocutory injunctive relief as administered under that description by courts of equity.

The remedy of injunction

27 In that regard, further reference should now be made to the development of the injunctive remedy, to the strain placed upon it by its use to identify new statutory remedies and to its misapplication to identify either the nature of or the juridical foundation for the *Mareva* order.

28 The term "injunction" is used in numerous statutes to identify a particular species of order, the making of which the law in question provides as part of a new regulatory or other regime, which may be supported by penal provisions. Notable examples in statutes presently in force nationally are found in s 80 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act"), s 114 of the *Family Law Act* 1975 (Cth), s 1324 of the Corporations Law (Cth) and s 170NG of the *Workplace Relations Act* 1996 (Cth). These provisions empower courts to give a remedy in many cases where none would have been available in a court of equity in the exercise of its jurisdiction, whether to protect the legal (including statutory²⁵) or equitable rights of the plaintiff, the administration of a trust for charitable purposes, or the observance of public law at the suit of the Attorney-General, with or without a relator, or at the suit of a person with a sufficient interest.

29 In these situations, the term "injunction" takes its content from the provisions of the particular statute in question²⁶. In other laws, for example Div 2 (ss 43-65) of Pt III of the *Proceeds of Crime Act* 1987 (Cth), where the term "restraining order" is used, remedies having some characteristics of injunctions as understood in courts of equity are given their own particular statutory designation²⁷.

25 See *Fejo v Northern Territory of Australia* (1998) 72 ALJR 1442 at 1450, 1459-1460; 156 ALR 721 at 733, 747.

26 See *ICI Australia Operations Pty Limited v Trade Practices Commission* (1992) 38 FCR 248 at 263-265; *Bristol City Council v Lovell* [1998] 1 WLR 446 at 452-454; [1998] 1 All ER 775 at 781-783.

27 See also the use of the term "order" in ss 80A and 87A of the Trade Practices Act to identify respectively the powers conferred upon courts to compel the disclosure of
(Footnote continues on next page)

- 30 With respect to the power of a court of equity²⁸, it is appropriate, for present purposes, to bear in mind several matters. First, not all mandatory orders are injunctive in nature. An order for the return of a specific chattel or the restoration of a fund to the party entitled to it is not an injunction as ordinarily understood²⁹. Nor is the injunction the only interlocutory remedy which should be supported by an undertaking as to damages³⁰. Secondly, the contempt power extends to third parties who, whilst not themselves bound by an order, so conduct themselves as to obstruct the course of justice³¹. Thirdly, the injunctive remedy is still the subject of development in courts exercising equitable jurisdiction. Thus, whilst once there may have been an absolute requirement that, negative covenants aside, before an injunction might be granted in aid of a legal or statutory right, the right must be proprietary in nature, in modern cases, including, in this Court, *Bradley v The Commonwealth*³², there has been no advertence to such a requirement. Again, in this Court, the view once taken that an injunction should issue to restrain breach of a negative stipulation, without weighing the usual discretionary considerations, has been discounted as an overstatement³³. The use of the anti-suit injunction, at least if granted in aid of contractual rights and obligations, is another example of development of traditional doctrine³⁴.

information or publication of advertisements, and to prohibit payment or transfer of moneys or other property.

- 28 Section 5(2) of the Federal Court Act provides that the Federal Court is a superior court of record and is a court of law and equity.
- 29 *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 596; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390.
- 30 See, as to receivers, *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271 at 277.
- 31 *Seaward v Paterson* [1897] 1 Ch 545 at 555; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 572, 578-579.
- 32 (1973) 128 CLR 557.
- 33 *Dalgety Wine Estates Pty Ltd v Rizzon* (1979) 141 CLR 552 at 560, 573-574.
- 34 See *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 392. The speech of Lord Browne-Wilkinson in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 342 suggests that that decision may rest upon such a contractual basis.

31 However, in England, it is now settled by several decisions of the House of Lords³⁵ that the power stated in Judicature legislation – that the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so – does not confer an unlimited power to grant injunctive relief. Regard must still be had to the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights³⁶. The situation thus confirmed by these authorities reflects the point made by Ashburner that "the power of the court to grant an injunction is limited by the nature of the act which it is sought to restrain"³⁷.

32 Further, the injunction remains a discretionary remedy in a particular sense of that term. In *Bristol City Council v Lovell*, Lord Hoffmann observed³⁸:

"The reason why an injunction is a discretionary remedy is because it formed part of the remedial jurisdiction of the Court of Chancery. If the Chancellor considered that the remedies available at law, such as damages, were inadequate, he could grant an injunction to give the plaintiff more effective relief. If he did not think that it was just or expedient to do so, he could leave the plaintiff to his rights at common law. The discretion is therefore as to the remedy which the court will provide for the invasion of the plaintiff's rights."

33 Whilst s 23 of the Federal Court Act empowers the Federal Court to make "orders of such kinds, including interlocutory orders ... as the Court thinks appropriate", the Federal Court is not thereby authorised to grant injunctive relief where jurisdiction is acquired under another statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an

35 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909 at 979-980, 992; *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provinciën" NV* [1987] AC 24 at 40; *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 420-421. See also *Mercedes Benz AG v Leiduck* [1996] AC 284 at 298, 300-301.

36 The common injunction, whereby the Court of Chancery manifested its primacy, in some respects, over the courts of common law, was directed to maintaining what was then the structure of the English legal system and, thus, to the administration of justice in a broad sense having some affinity to the ends furthered by asset preservation orders of the *Mareva* variety.

37 *Principles of Equity*, 2nd ed (1933) at 335.

38 [1998] 1 WLR 446 at 453; [1998] 1 All ER 775 at 782.

injunction³⁹. Nor does s 23 provide authority for the granting of an injunction where, whether under the general law or by statute, otherwise there is no case for injunctive relief⁴⁰. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]*⁴¹, the Federal Court entertained the common law claims in conspiracy either in the accrued jurisdiction or as an associated matter within the meaning of s 32 of the Federal Court Act.

34 In delivering the advice of the majority of their Lordships in *Mercedes Benz AG v Leiduck*⁴², Lord Mustill outlined the development over 20 years of the remedy associated with the orders made in *Mareva Compania Naviera SA v International Bulkcarriers SA*⁴³. His Lordship observed that⁴⁴:

"[a]midst all the burdensome practicalities theory has been left behind."

Lord Mustill went on to outline three rationalisations which could be found in the English authorities, all of them unsatisfactory. One, later discredited by the House of Lords' decisions to which reference has already been made, was that the statutory power in Judicature systems to grant injunctive relief where just or convenient was relatively unlimited. Another was that, although framed as an injunction, the relief was a species of attachment, giving the claimant some rights of a proprietary nature in the assets in question and some advantage over other creditors of the defendant. Whilst not going that far in legal form, *Mareva* orders restricting dealings with assets do have characteristics of injunctive relief to enforce what are known in commerce as negative pledge agreements. However, the rationale of the *Mareva* order as a species of pre-judgment attachment has been

39 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 425-426, 456; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 883; 153 ALR 643 at 655-656.

40 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 883; 153 ALR 643 at 656.

41 (1998) 72 ALJR 873 at 883; 153 ALR 643 at 656; *PCS Operations Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 863 at 866; 153 ALR 520 at 524-525.

42 [1996] AC 284.

43 [1975] 2 Lloyd's Rep 509.

44 [1996] AC 284 at 299.

discredited by authorities which Lord Mustill collected⁴⁵. That left, in his Lordship's view, the *Mareva* injunction as "a special exception to the general law"⁴⁶.

- 35 In the *Mareva* case itself, Lord Denning MR had classified relief as injunctive on the footing that it went in aid of a legal right, namely the right of the plaintiff to be paid the debt owing, even before the establishment of that right by the getting of judgment for it⁴⁷. However, as Bray CJ observed in *Pivovarov v Chernabaeff*⁴⁸, such a position was foreclosed by the long-standing decision of Lord Hatherley LC in *Mills v Northern Railway of Buenos Ayres Company*⁴⁹. That decision had been taken as settled authority for the proposition, expressed by Joyce⁵⁰:

"A simple contract creditor of a company (having no mortgage or other security, and not having taken out execution) cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt".

The remedies sought in *Mills* had included an injunction to restrain the payment of any dividend to shareholders until provision had been made for paying the creditor's debt. There had been prima facie evidence that the plaintiff was a creditor and had been unpaid for years⁵¹. Thus, the plaintiff had made out, at least at the interlocutory level, the existence of his legal right. However, there being no security for the debt, the right was not, as then was considered important, proprietary in nature. Moreover, the contractual right itself would, on recovery of judgment, merge in the judgment. The substance of the relief sought by the

45 [1996] AC 284 at 300.

46 [1996] AC 284 at 301.

47 [1975] 2 Lloyd's Rep 509 at 510.

48 (1978) 16 SASR 329 at 338-339.

49 (1870) LR 5 Ch App 621.

50 *The Law and Practice of Injunctions in Equity and at Common Law*, (1872), vol 2 at 923.

51 (1870) LR 5 Ch App 621 at 625n.

plaintiff was anticipatory relief in aid of those rights that would at that later stage attach to the judgment debt.

36 However, to deny injunctive relief in those circumstances did not mean that in comparable situations the court was powerless. In Australia, it has since been determined by the Appeal Division of the Supreme Court of Victoria⁵² and assumed by this Court⁵³ that circumstances may arise in which the appointment of a receiver of the assets of a company which is not expressly alleged to be insolvent may be justified in pending litigation even on the application of a plaintiff who claims to be an unsecured creditor. Other examples were given by Emmett J in a passage of his judgment set out earlier in these reasons.

37 Further, there may be an equity which supports the appointment of a receiver (or the retention of a receiver appointed at an interlocutory stage) as part of the machinery for effecting final relief⁵⁴. Such a receiver is not appointed merely because, in the circumstances of the case, this would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution provided by the common law or by statute⁵⁵.

38 Nevertheless, in speaking for the Court of Appeal in *Harris v Beauchamp Brothers*⁵⁶, Davey LJ emphasised that, in a suit by a judgment creditor "to impeach an assignment or conveyance as fraudulent upon creditors", the court would, as ancillary to the principal relief sought in a proper case, appoint a receiver to preserve the property until the hearing of that impeachment suit. Davey LJ also indicated that, if a defendant threatened and intended fraudulently to make away with assets which otherwise might be taken in execution, the court would

52 *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 543-546.

53 *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271 at 276.

54 *Chitty's Archbold's Practice of the Queen's Bench Division of the High Court of Justice*, 14th ed (1885), vol 2 at 914; *Ashburner's Principles of Equity*, 2nd ed (1933) at 353-354.

55 *Harris v Beauchamp Brothers* [1894] 1 QB 801; cf *Soinco SACI v Novokuznetsk Aluminium Plant* [1998] QB 406 at 420-422.

56 [1894] 1 QB 801 at 808.

interfere⁵⁷. On the other hand, execution of a judgment might be enjoined on equitable grounds which could not have been entertained as a defence to the action in which the judgment was recovered⁵⁸.

- 39 Finally, before judgment and in cases of an equitable debt or demand, courts of equity (and this Court in aid of its diversity jurisdiction⁵⁹) may, by order in the nature of a writ of *ne exeat colonia*, prevent a defendant quitting the country without giving adequate bail or security. Dixon J in *Glover v Walters* said that the order is made where⁶⁰:

"real ground appears for believing that the defendant is seeking to avoid the jurisdiction or for apprehending that if the defendant is allowed to depart the plaintiff will lose his debt or be prejudiced in his remedy".⁶¹

- 40 In these various ways, the courts developed doctrines and remedies, outside the injunction as understood in courts of equity, to protect the integrity of its processes once set in motion. The *Mareva* order for the preservation of assets should be seen as a further development⁶². There is no harm in the use of the term *Mareva* to identify that development, provided the source of the remedy is kept in view when considering the form of the remedy in each particular case. An anterior

57 [1894] 1 QB 801 at 810-811.

58 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (equitable estoppel); *High v Bengal Brass Co and Bank of NSW* (1921) 21 SR (NSW) 232 (equitable set-off).

59 *Glover v Walters* (1950) 80 CLR 172.

60 (1950) 80 CLR 172 at 176.

61 For a legal debt or demand, plaintiffs seeking to compel an appearance by the defendant in one of the common law courts were obliged to rely upon mesne process including statutory provisions such as those with respect to writs of *capias ad respondendum* made by the *Arrest on Mesne Process Act* 1902 (NSW). See *Warringah Transport Co Pty Ltd v AM Kapral* (1957) 57 SR (NSW) 586 at 594-596; *Chitty's Archbold's Practice of the Queen's Bench Division of the High Court of Justice*, 14th ed (1885), vol 2 at 1449-1454; Dine and McEvoy, "Are Mareva Injunctions Becoming Attachment Orders?", (1989) 8 *Civil Justice Quarterly* 236; Wasserman, "Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments", (1992) 67 *Washington Law Review* 257 at 271-274.

62 Wasserman, "Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments", (1992) 67 *Washington Law Review* 257 at 299-305.

question will be whether there is another interlocutory remedy among those considered above which will be suitable to meet the case in hand but be less extensive in scope.

The doctrinal basis of the *Mareva* order

41 In Australia, that view of the matter has been urged for many years⁶³. It is seen in the most recent statement of principle in this Court concerning the jurisdiction of the Federal Court to grant a *Mareva* order. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]*, in their joint judgment, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said⁶⁴:

"Interlocutory relief"

The powers of the Federal Court under s 23 of its Act are powers 'to make orders of such kinds, including interlocutory orders, as it "thinks appropriate"', as Deane J noted in *Jackson v Sterling Industries Ltd*⁶⁵. He added:

'Wide though that power is, it is subject to both jurisdictional and other limits. It exists only "in relation to matters" in respect of which jurisdiction has been conferred upon the Federal Court. Even in relation to such matters, the power is restricted to the making of the "kinds" of order, whether final or interlocutory, which are capable of properly being seen as "appropriate" to be made by the Federal Court in the exercise of its jurisdiction.'

One limitation on the powers of the Federal Court to grant interlocutory injunctions is that those powers must be exercised for the purpose for which they are conferred. In a later passage of the judgment of Deane J in *Jackson v Sterling Industries Ltd*⁶⁶, his Honour said a power to prevent the abuse or frustration of a court's process should be accepted 'as an established part of the armoury of a court of law and equity' and that 'the power to grant such

63 See Hetherington, "Inherent Powers and the Mareva Jurisdiction", (1983) 10 *Sydney Law Review* 76 at 83-86.

64 (1998) 72 ALJR 873 at 885; 153 ALR 643 at 658-659.

65 (1987) 162 CLR 612 at 622.

66 (1987) 162 CLR 612 at 623. See also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 74 per Gaudron J.

relief in relation to a matter in which the Federal Court has jurisdiction is comprehended by the express grant to that Court by s 23 of the *Federal Court of Australia Act*'. But, his Honour observed⁶⁷, orders must be framed 'so as to come within the limits set by the purpose which [the order] can properly be intended to serve'. The Mareva injunction is the paradigm example of an order to prevent the frustration of a court's process⁶⁸ but other examples may be found⁶⁹. The moulding of an interlocutory injunction must depend upon the circumstances of each case. As Brennan J observed in *Jackson v Sterling Industries Ltd*⁷⁰:

'A judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case and, the schemes which a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order.'

The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked⁷¹. The Federal Court had jurisdiction to make interlocutory orders to prevent frustration of its process in the present proceeding."

- 42 Subject to two matters to which we shall come, this passage should be accepted as a correct statement of principle. The first matter is that, in that passage, the attention of the Court was directed to orders against parties to the proceedings and against whom final relief was sought. In that situation, the focus is the frustration of the court's process. If relief is available against non-parties, the focus must be the administration of justice. The second matter is that, to avoid confusion

67 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

68 *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268 at 1272; [1980] 3 All ER 409 at 411; *Mercedes Benz AG v Leiduck* [1996] AC 284 at 299, 306-307.

69 *Gibbs v David* (1875) LR 20 Eq 373 at 377-378; *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch 621 at 624-625; *Heavener v Loomes* (1924) 34 CLR 306 at 326; *Hannam v Lamney* (1926) 43 WN (NSW) 68; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276.

70 (1987) 162 CLR 612 at 621.

71 See *Tait v The Queen* (1962) 108 CLR 620.

as to its doctrinal basis, it is preferable that references to "*Mareva* orders" be substituted for "injunctions".

43 In Australia, for many years, *Mareva* orders have been made in aid of the exercise of the specific remedies provided for execution against judgment debtors. Such orders are not interlocutory as they may operate after the recovery of final judgment, yet they are impermanent in the sense that they preserve assets and assist and protect the use of methods of execution and do not substitute for them⁷². In respect of their operation after, as well as before, the making of orders for final relief, the *Mareva* order should, in general, be supported by an undertaking as to damages.

44 Here, Ultra Modern and Mr and Mrs Cardile are third parties in respect of LED's action against Eagle Homes. The effective exercise of the jurisdiction in such litigation may call for asset preservation orders against third parties who may hold or otherwise be interested in (in the sense we explain further in these reasons) assets of the judgment debtor or potential judgment debtor or who may be obliged to contribute to the property of such a judgment debtor to help satisfy the judgment.

Third parties

45 In this litigation, as has been mentioned, final judgment on LED's claim against Eagle Homes for a money sum is still pending. The appellants correctly submit that the statement of principle in *Patrick Stevedores* provides no basis for the making of an order against a non-party such as Ultra Modern which is not answerable or liable in some way to a party (plaintiff or defendant) in a proceeding where judgment has not been obtained or execution recovered, or not holding, controlling or capable of disposing of the property of a party in that proceeding. This proposition, negative in character, should be accepted.

46 In its response here and in the Full Court of the Federal Court, LED relies on a decision of Kiefel J in *Tomlinson v Cut Price Deli Pty Ltd*⁷³. There, her Honour referred to the making of orders in aid of an injunction "where the third party has become mixed up in the [challenged] transaction"⁷⁴. In using that language, her Honour was no doubt conscious of the reference to the intermingling of affairs by

72 See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 626, 633, 637; *Deputy Commissioner of Taxation v Winter* (1988) 92 FLR 327 at 328-331.

73 Unreported, Federal Court of Australia, 23 June 1995.

74 Unreported, Federal Court of Australia, 23 June 1995 at 11.

Hope JA in *Coxton Pty Ltd v Milne*⁷⁵ and by Hoffmann LJ in *Mercantile Group (Europe) AG v Aiyela*⁷⁶ to the wife of the judgment debtor becoming "mixed up" in the arrangements of the judgment debtor. But in the application before her Honour there was a large body of evidence to support a strongly arguable case that the third party had used, and was using, the property and business of the potential judgment debtor in order to prevent access to them by the applicant. And again, in *Aiglon Ltd v Gau Shan Co Ltd*⁷⁷, there was evidence of a quite different kind and quality as to asset stripping in favour of a non-party from that which has been adduced here.

47 These cases were not mere cases of a mixing or intermingling of affairs and are distinguishable from this case. In using expressions such as "mixing" or "intermingling", their Honours and his Lordship were doing no more than describing the deliberate blurring, and attempts at the transferring, of property rights and interests that the evidence in those cases established on a sufficient basis for the grant of the relief. There was nothing novel in that approach to determination of the appropriate remedy⁷⁸.

48 LED's stance in this appeal is that it is not essential that the court's processes in support of which the *Mareva* relief is sought be confined to those set in motion upon a cause of action. That followed, it is submitted, from a passage in the speech of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*⁷⁹, to which Hoffmann LJ referred in *Mercantile Group (Europe) AG v Aiyela*⁸⁰ in holding that the wife of the judgment debtor should be restrained from disposing of assets although no action had been brought against her. Lord Mustill said that the right to an interlocutory injunction which is incidental to, and dependent on, the enforcement of a substantive right usually, although not invariably, takes the shape of a cause of action. However, we do not think that his Lordship was suggesting that an order might be made against a non-party not amenable in some

75 Unreported, Court of Appeal of New South Wales, 20 December 1985.

76 [1994] QB 366 at 375.

77 [1993] 1 Lloyd's Rep 164.

78 See, for example, *Gilford Motor Co v Horne* [1933] Ch 935 at 961-962, 965, 969; *Jones v Lipman* [1962] 1 WLR 832 at 836-837; [1962] 1 All ER 442 at 444-445.

79 [1993] AC 334 at 362.

80 [1994] QB 366 at 375-376.

way ultimately to some coercive process requiring it to disgorge, or in some other way to participate in the satisfaction of, a judgment against a party.

49 LED argues that its substantive rights are the final injunctive orders already made by Davies J against Eagle Homes following the determination of the issue of liability upon LED's actions for copyright infringement. Even if this be accepted for present purposes, LED still has the problem, which in our opinion the evidence does not resolve in its favour, of showing that recourse may be had to the appellants to satisfy LED's prospective money judgment against Eagle Homes.

50 As LED submits, the development of this ancillary jurisdiction to grant *Mareva* orders has been an evolving process and the courts have approached the different factual situations as they have arisen "flexibly". There is a temptation to use the term "flexible" to cloak a lack of analytical rigour and to escape the need to find a doctrinal and principled basis for orders that are made. There are significant differences between an order protective of the court's process set in train against a party to an action, including the efficacy of execution available to a judgment creditor, and an order extending to the property of persons who are not parties and who cannot be shown to have frustrated, actually or prospectively, the administration of justice. It has been truly said that a *Mareva* order does not deprive the party subject to its restraint either of title to or possession of the assets to which the order extends⁸¹. Nor does the order improve the position of claimants in an insolvency of the judgment debtor⁸². It operates *in personam*⁸³ and not as an attachment. Nevertheless, those statements should not obscure the reality that the granting of a *Mareva* order is bound to have a significant impact on the property of the person against whom it is made: in a practical sense it operates as a very tight "negative pledge" species of security over property, to which the contempt sanction is attached. It requires a high degree of caution on the part of a court invited to make an order of that kind. An order lightly or wrongly granted may have a capacity to impair or restrict commerce just as much as one appropriately granted may facilitate and ensure its due conduct.

81 *Re Ling; Ex parte Enrobook Pty Ltd* (1996) 142 ALR 87 at 92; affd (1997) 74 FCR 19 at 29.

82 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618, 639.

83 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 300.

- 51 We agree with the tenor of what was said with particular respect to *Mareva* relief before judgment by the Court of Appeal of New South Wales (Mason P, Sheller JA, Sheppard AJA) in *Frigo v Culhaci*⁸⁴:

"[A *Mareva* order] is a drastic remedy which should not be granted lightly.
...

A [*Mareva* order] is an interlocutory order which, if granted, imposes a severe restriction upon a defendant's right to deal with his or her assets. It is granted at the suit of a plaintiff whose status as a creditor is in dispute and who need not be a secured creditor. Its purpose is to preserve the status quo, not to change it in favour of the plaintiff. The function of the order is not to⁸⁵

'provide a plaintiff with security in advance for a judgment that he hopes to obtain and that he fears might not be satisfied; nor is it to improve the position of the plaintiff in the event of the defendant's insolvency'.
...

Many authorities attest to the care with which courts are required to scrutinise applications for [*Mareva* orders]. The leading decision in this State is *Patterson v BTR Engineering (Aust) Ltd*⁸⁶."

- 52 Another reason, unfortunately rarely adverted to in the cases, for care in exercising the power to grant a *Mareva* order is that there may be difficulties associated with the quantification and recovery of damages pursuant to the undertaking if it should turn out that the order should not have been granted. These matters were the subject of discussion by Aickin J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd*⁸⁷. A further question to which a *Mareva* order gives rise is the identification of the events to trigger its dissolution or an entitlement to damages. So far as this is possible, some attention to that question should be given at the time that the order is framed in the first instance.

84 Unreported, 17 July 1998 at 10-11. See also the observations as to the need for care by Dixon J, with respect to the writ of *ne exeat colonia* in *Glover v Walters* (1950) 80 CLR 172 at 175-176.

85 *Abella v Anderson* [1987] 2 Qd R 1 at 2-3 per McPherson J.

86 (1989) 18 NSWLR 319.

87 (1979) 146 CLR 249 at 260 et seq; affd (1981) 146 CLR 306.

53 Discretionary considerations generally also should carefully be weighed before an order is made. Has the applicant proceeded diligently and expeditiously? Has a money judgment been recovered in the proceedings? Are proceedings (for example civil conspiracy proceedings) available against the third party? Why, if some proceedings are available, have they not been taken? Why, if proceedings are available against the third party and have not been taken and the court is still minded to make a *Mareva* order, should not the grant of the relief be conditioned upon an undertaking by the applicant to commence, and ensure so far as is possible the expedition of, such proceedings? It is difficult to conceive of cases where such an undertaking would not be required. Questions of this kind may be just as relevant to the decision to grant *Mareva* relief as they are to a decision to dissolve it. These are matters to which courts should be alive. As will appear, they are matters which should have been considered by the Full Court in this case.

54 We have indicated our acceptance of a negative proposition put by the appellants. However, we consider that the general proposition for which the appellants contend – that the grant of *Mareva* relief against the third party should be limited to cases in which the third party holds or is about to hold or dissipate or further dissipate property beneficially owned by the defendant in the substantive proceedings – is too narrowly expressed. Nevertheless, it will be a rare case in which *Mareva* relief will be granted if such a situation does not exist.

55 We do not accept an example suggested by LED as an answer to the appellants' general proposition. LED contends that, if the appellants' proposition be correct, a third party to whom a defendant makes a fraudulent gift to render useless the judgment against him would be immune from *Mareva* relief, whereas a third party trustee would not, because the third party taking the fraudulent gift would have no right in law or in equity to retain it. The former would be amenable to a claim pursuant to s 37A of the Conveyancing Act, or process by a trustee in bankruptcy, or a liquidator, and susceptibility to that process may in our opinion be sufficient to support the grant of *Mareva* relief. The fact that such relief takes effect *in personam*, and may be distinguished from an equitable or other proprietary remedy such as tracing, does not mean that the availability of such remedies is irrelevant to a consideration whether that relief should be granted. Indeed the contrary is the case. The availability of a proprietary remedy may, in our opinion, in some cases be sufficient to constitute a substantive right in aid of which *Mareva* relief *in personam* might go.

56 The matters referred to above show that the general power of superior courts which is comprehended by the express grant in s 23 of the Federal Court Act is a

broad one. But, as the statements of Deane J in *Jackson v Sterling Industries Ltd*⁸⁸ make clear, orders made pursuant to that section (and under the general power) must be capable of properly being seen as appropriate to the case in hand.

57 What then is the principle to guide the courts in determining whether to grant *Mareva* relief in a case such as the present where the activities of third parties are the object sought to be restrained? In our opinion such an order may, and we emphasise the word "may", be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:

- (i) the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including "claims and expectancies"⁸⁹, of the judgment debtor or potential judgment debtor; or
- (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

58 It is that principle which we would apply to this case. Its application is a matter of law, although discretionary elements are involved.

The present case

59 We return to the facts to make some observations about the only item of property which, it can safely be said, was found by the primary judge to have been made available to Ultra Modern by Eagle Homes. That is the business name "Eagle Homes". There can be no real doubt that Ultra Modern is using that name in the conduct of its business of building homes. However the fact that Ultra Modern may have obtained access to and may be using that name for the purpose of its business, without any payment to Eagle Homes, does not make it accountable or liable to Eagle Homes or any liquidator of it for all of its profits. Plainly the business name does have value. However, just how much value it has, and the extent to which it is a factor in the making of profits by Ultra Modern, can be no

⁸⁸ (1987) 162 CLR 612 at 622, 625.

⁸⁹ The phrase used by Deane J in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

more, at this stage, than a matter of conjecture and hardly can be a basis for the making of a *Mareva* order in respect of all of the property of Ultra Modern. It occurred to us during argument that some limited form of *Mareva* relief against Ultra Modern in respect of the business name might be appropriate and LED submits in the alternative that it was entitled to that relief.

60 LED submits that the evidence, supported by concurrent findings, showed that the business of Eagle Homes was acquired by Ultra Modern without any consideration or as part of an exercise in asset stripping by Eagle Homes in favour of Ultra Modern. We do not read the judgments at first instance or in the Full Court in this way and, indeed, we do not regard the evidence as being capable, even on a *prima facie* basis, of showing this to be so. The evidence is that Eagle Homes is continuing to construct homes on the basis of older or pre-existing plans which it is entitled to use and that Ultra Modern is, in effect, carrying on a new business using plans which have been prepared more recently. The evidence does not show, save to the extent that the use of the business name "Eagle Homes" may attract goodwill away from Eagle Homes, that Ultra Modern is actually utilising goodwill which in reality belongs to Eagle Homes nor that it is carrying on the business of Eagle Homes by using the name in such a way as to pass off its business as that of Eagle Homes.

61 Registration of the name in compliance with the Business Names Act does not confer any right to do so⁹⁰. Registration satisfies the statutory obligation (under penalty) upon those who do not carry on business under their own name to provide a means whereby their identity and whereabouts readily may be ascertained⁹¹. Registration itself does not provide a basis for, or a defence to, a passing-off action or a claim of contravention of s 52 of the Trade Practices Act⁹². The goodwill built up by Ultra Modern using Eagle Homes would be an asset of Ultra Modern⁹³. That

90 *BM Auto Sales Pty Ltd v Budget Rent A Car System Pty Ltd* (1976) 51 ALJR 254 at 257; 12 ALR 363 at 369.

91 *Corporate Affairs Commission v Bradley* [1973] 1 NSWLR 382 at 389; *Australian Marketing Development Pty Ltd v Australian Interstate Marketing Pty Ltd* [1972] VR 219 at 225-226.

92 Shanahan, *Australian Law of Trade Marks and Passing Off*, 2nd ed (1990) at 427-428.

93 *Commissioner of Taxation v Murry* (1998) 72 ALJR 1065 at 1067-1070; 155 ALR 67 at 70-73.

goodwill may be "shared" with the other company⁹⁴ but there is no evidence here of any sharing agreement to compensate Eagle Homes for the use of the name "Eagle Homes" and any goodwill associated with it.

62 For the reasons we have given, there was an error in principle⁹⁵ in the grant of *Mareva* relief against Ultra Modern in the form ordered after the Full Court decision.

63 Any orders in substitution of those made by Emmett J on remission by the Full Court of the Federal Court should focus upon the use by Ultra Modern of the name "Eagle Homes" in its business. There is no case at this stage for an order which would have the effect of bringing its use of the business name to an end or otherwise limiting its use, as if Eagle Homes had obtained injunctive relief in a passing-off action against Ultra Modern. However, Ultra Modern should be restrained from attempted dispositions by it of the goodwill attached to that name. The value of the goodwill of Ultra Modern which is attached to its use of the business name may affect the value of the concurrent goodwill of Eagle Homes. That status quo would be affected by any supervening disposition from Ultra Modern into other hands.

64 We come now to the personal appellants. There is, we think, a *prima facie* case that the payment to them of, or the crediting of them with, the dividends was a non-commercial exercise and was, as Emmett J found, done with a view to limiting the funds available to meet a judgment in favour of LED.

65 LED submits that it has a reasonably arguable case that the declaration and payment of the dividends in that situation are caught by s 37A of the Conveyancing Act and that such a case provides a substantive right to support *Mareva* relief against the personal appellants. The expression "alienation of property" which is used in the section does not immediately strike one as apt to apply to the declaration and payment of a dividend. However, it has been held that, for the

94 Shanahan, *Australian Law of Trade Marks and Passing Off*, 2nd ed (1990) at 383-387.

95 The phrase used in similar circumstances by Mason CJ in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616.

purpose of s 37A and its equivalents, "alienation" is a parting with property and includes a parting with some interest in the property⁹⁶.

- 66 Mayo J in *In re Symon: Public Trustee v Symon* said of the meaning to be given to the word "alienation" as used in the *Crown Lands Act 1929* (SA)⁹⁷:

"'Alienation' denotes the act, or series of acts, of alienating, and takes place whenever the owner of land, or of an interest therein, so acts as to divest himself of his interest or some lesser interest, and to vest the same in another person (*Lang v Castle*⁹⁸). Not every agreement that relates to property is necessarily an alienation or an undertaking to alienate. If all that is to be made over is a mere personal right, and not in the nature of property, there will, I apprehend, be no alienation".

- 67 Alienation is the transfer of value from one person to another⁹⁹. It is usually understood as applying only to a transfer of property effected by the action of the transferor, as distinct from a transfer by involuntary operation of law¹⁰⁰.

- 68 Money, as property, is clearly susceptible of transfer or alienation as is any other property. The declarations of the dividends (which appear to have been final not interim dividends) gave rise to debts payable by the company to the shareholders¹⁰¹. The alienation of property was made by the company in discharging its indebtedness to the shareholders. Here, LED has to show a reasonably arguable case on legal as well as factual matters. This we think it does with respect to the application of s 37A to the dividends. This is subject to some qualifications as to amount, which we will consider shortly.

96 *Re Cummins; Richardson v Cummins* (1951) 15 ABC 185; *In re Symon: Public Trustee v Symon* [1944] SASR 102.

97 [1944] SASR 102 at 108.

98 [1924] SASR 255 at 263-264.

99 *Ord Forrest Pty Ltd v Federal Commissioner of Taxation* (1974) 130 CLR 124 at 142.

100 *Australian Trade Commission v Film Funding & Management Pty Ltd* (1989) 24 FCR 595 at 613.

101 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 at 572.

69 But, in any event, the principle which we think appropriate has application here on another basis. The balance sheet of Eagle Homes discloses that, at the time of declaration of dividends, and as a result of the payment or crediting of the dividends (the occurrence of which counsel for the appellants did not and could not seriously dispute), the company appeared to have insufficient funds to meet the likely judgment debt. A liquidator, probably appointed on the initiative of LED but acting on behalf of all creditors, would be entitled to pursue and recover those funds¹⁰².

70 It is appropriate therefore that some order be made with respect to the personal appellants requiring them effectively to hold and to keep unencumbered assets up to a value which is at least reasonable in all of the circumstances. A court, in granting interlocutory relief, should generally grant the minimum relief necessary to do justice between the parties¹⁰³. And it should specify the circumstances in which the order will cease to operate. Moreover, where, as here, the rights and obligations of Mr and Mrs Cardile with respect to their property can only be finally determined in proceedings under s 37A of the Conveyancing Act, consideration should have been given to the order being made subject to an undertaking that those proceedings would be commenced. In these respects, the Full Court erred.

71 The amount appropriate to provide that minimum relief is not clear. Various possible judgment debts were referred to in argument but none approached \$1.2 million, the sum of the two dividends. It should be remembered that this relief is incidental to the presently incomplete exercise by the Federal Court of its jurisdiction to determine the balance of the remedies sought by LED against Eagle Homes, namely that for payment of a money sum. Difficult questions often arise in the determination of an account of profits derived from copyright infringement¹⁰⁴. Further, no attention was paid to the possible incidence of income

102 See Corporations Law, Pt 5.7B, Div 2.

103 See *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 411; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 72 ALJR 1470 at 1479; 157 ALR 414 at 425-426; see also *Giumelli v Giumelli* [1999] HCA 10 at [10]; *Frigo v Culhaci*, unreported, Court of Appeal of New South Wales, 17 July 1998 at 12.

104 See the discussion of *Sheldon v Metro-Goldwyn Pictures Corp* 309 US 390 (1940) by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 45; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 565; *Nimmer on Copyright*, Release 46, (September 1998) vol 4, §14.03[C].

tax payable by Eagle Homes or the personal appellants on the dividends in their hands.

- 72 On any view, \$1.2 million or any similar sum seems an excessive amount for Mr and Mrs Cardile to be bound to hold under a *Mareva* order. However, this Court has no means of knowing precisely what sum should be substituted. Judgment on the taking of the accounts is likely to be given soon, at which time perhaps the sum could be adjusted. Alternatively, on proper evidence, the personal appellants may apply to the Federal Court for a dissolution of the injunction to the extent that the amount which it secures is excessive. Presently, this Court should not vary the amount except to reduce it to \$1,058,977.12 to accord with the sum of the amounts demonstrably actually received by Mr and Mrs Cardile.

Orders

- 73 The appeal should be allowed.

- 74 Order 4 of the orders made by the Full Court on 22 August 1997 and each order 1 of the several orders made by Emmett J on 22 and 26 August 1997 should be set aside. However, the operation of the orders of this Court should be suspended for 14 days to allow for the making of orders by a judge of the Federal Court to come into operation at the end of that period of suspension. The reason for this procedure appears below.

- 75 The draft form of order, propounded for this contingency by LED, is, with some significant adaptations, the form of order that should be made on application by LED to a judge of the Federal Court. The order should be made by the Federal Court, upon remitter by this Court and provision of the necessary undertakings. Any variation or enforcement of the order will then be a matter for the Federal Court. The order is as follows:

1. Upon the applicant [LED Builders Pty Ltd] by its counsel giving to the Court the usual undertakings as to damages order that:

- (a) Ultra Modern Developments Pty Ltd ["Ultra Modern"] by itself, its directors, officers, employees, agents or otherwise be restrained until further order from disposing of, encumbering or otherwise dealing with in any way the business name "Eagle Homes";
- (b) Paul Cardile and Lucy Cardile each be restrained until further order from disposing of or dealing with in any way any of their money, property or other assets whether in their own names or not and whether solely or jointly owned up to the value of \$1,058,977.12, other than for the following purposes:

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- (i) to enable them to pay and to continue to pay the reasonable legal expenses of defending these proceedings and any appeal therefrom;
- (ii) to protect the copyright of Eagle Homes Pty Ltd ["Eagle Homes"] or Ultra Modern in their housing plans (other than plans relating to these proceedings) by the commencement and prosecution of proceedings against infringement of the same;
- (iii) to commence and prosecute any other *bona fide* proceedings which Eagle Homes or Ultra Modern may be advised to bring;
- (iv) to defend any other proceedings that may be brought against Eagle Homes or Ultra Modern;
- (v) to meet their taxation liabilities and those of Eagle Homes or Ultra Modern;
- (vi) to comply with the statutory requirements to which they, Eagle Homes or Ultra Modern are subject;
- (vii) to meet their normal accountancy fees and those of Eagle Homes or Ultra Modern;
- (viii) to pay ordinary and proper business expenses *bona fide* incurred by them or by Ultra Modern or Eagle Homes; and
- (ix) to pay their ordinary living expenses.

2. Leave be granted to the parties to re-list the proceedings on two days' notice.

76 The relief given by the above order would be interlocutory, not final, in nature. As we have indicated, if not earlier then certainly upon delivery of judgment upon the account of profits and depending upon the outcome and tenor of the judgment, the appellants may move the Federal Court to dissolve or to vary the interlocutory relief by provisions including the imposition of a time constraint upon the institution in a court of competent jurisdiction of an action under s 37A of the Conveyancing Act against the personal appellants and specifying the circumstances in which the order will cease to operate. The liberty to apply might subsequently be utilised in the Federal Court to seek the variation or release of the asset preservation order in circumstances which by then have appeared. These circumstances would include the determination of the s 37A application by the court seized of the matter, or the reaching by that court at an interlocutory stage of the conclusion that the s 37A application had prospects of success which were so

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weak as to merit the personal appellants moving the Federal Court to vary or discharge the asset preservation order.

77 Both parties have had a measure of success in this appeal. We would therefore make no order for costs in the proceedings in this Court. But we would substitute for the costs order made in the Full Court an order that each party bear its, his and her own costs of the proceedings on appeal in the Full Court.

- 78 KIRBY J. This appeal was argued as one about the jurisdiction and power of the Federal Court of Australia to grant a Mareva injunction against third parties.

Three defective descriptions

- 79 As Voltaire said in another context¹⁰⁵, none of the three elements of the foregoing description of the appeal is wholly accurate. First, we should expel Mareva to the books of legal history. The case from which the name of the judicial order derives¹⁰⁶ was not even the first in which such relief had been provided. That honour belongs to *Nippon Yusen Kaisha v Karageorgis*¹⁰⁷, decided four weeks before *Mareva*¹⁰⁸. English lawyers soon settled for Mareva. The word stuck. It soon spread. Yet such have been the changes in the conception of the circumstances in which such orders will be made, and so many and varied are the jurisdictional foundations for the exercise of the power to make such orders¹⁰⁹, that a continued use of the Mareva label has a potential to mislead¹¹⁰. A preferable

105 Of the Holy Roman Empire, Voltaire said that it was neither Holy, nor Roman, nor an Empire. *Essai sur les mœurs et l'esprit des nations* at 70. In England a government committee has proposed that the name "Mareva injunction" be replaced by "freezing injunction". See *The Times*, 29 January 1999 at 1.

106 *Mareva Compania Naviera SA v International Bulkcarriers SA* ("The Mareva") [1975] 2 Lloyd's Rep 509.

107 [1975] 1 WLR 1093; [1975] 3 All ER 282.

108 Kunc, "Mareva Injunctions" in Parkinson (ed), *The Principles of Equity* (1996) 671 at 672.

109 The continued evolution of this "flexible remedy" is described by Kunc in "Mareva Injunctions" in Parkinson (ed), *The Principles of Equity* (1996) 671 at 674, where it is declared that "[p]rincipled adaptability is at the core of Mareva relief"; cf Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) at 594-604. See *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 164 per Glass JA; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264.

110 In England the *Supreme Court Act* 1981 (UK), s 37 replaced the *Supreme Court of Judicature (Consolidation) Act* 1925 (UK), s 45(1) as the basis of jurisdiction. In Australia, the statutory foundations for such orders include in the case of the Federal Court of Australia, the *Federal Court of Australia Act* 1976 (Cth), s 23; in the case of New South Wales: *Supreme Court Act* 1970 (NSW), s 23 and the *District Court Act* 1973 (NSW), s 46; Victoria: *Supreme Court Act* 1958 (Vic), s 62(2) - see now *Supreme Court Act* 1986 (Vic), s 37(3); Queensland: *Judicature Act* 1876 (Q), s 5(8); South Australia: *Supreme Court Act* 1935 (SA), s 29(1); Western Australia: *Supreme Court Act* 1935 (WA), s 25(9); Tasmania: *Supreme Court Civil Procedure Act* 1932 (Tas), s 11(12); Australian Capital Territory: *Supreme Court Act* 1933 (Footnote continues on next page)

generic description for the order, called Mareva, would be an "asset preservation order". Henceforth, that is how I shall describe it.

80 Secondly, the word "injunction" may involve an imprecise use of technical language. It is one thing for the Parliament to use that word in a statute providing specific orders which do not bear all of the characteristics of an injunction as understood by equity¹¹¹. But courts should be careful not to gloss over the differences. Not every mandatory or imperative order is an injunction¹¹². The "anti-suit injunction", when not in aid of a contractual stipulation, may be granted to protect the court's processes¹¹³. The so-called "Mareva injunction" shares similar characteristics which may not exist in an "injunction" in the strict sense¹¹⁴.

81 Thirdly, it is traditional to speak of persons such as the appellants as "third parties". Courts¹¹⁵ and text-writers¹¹⁶ so describe them. The reason is clear enough. They are neither the plaintiff nor the defendant in the "main proceedings", in defence of the utility of the judgment in which the orders are sought. However, they are not "third parties" in the sense normally used to describe litigants joined as parties to proceedings in a court because they have a legal liability or entitlement

(ACT), s 34 and Northern Territory: *Supreme Court Act* 1979 (NT), s 69. See Kunc, "Mareva Injunctions" in Parkinson (ed), *The Principles of Equity* (1996) 671 at 674-677. In addition to statutory sources of jurisdiction and power, Australian courts have variously relied upon their inherent powers (*Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264) or implied and incidental powers (*Jackson v Sterling Industries Ltd*) (1986) 12 FCR 267 at 272 per Bowen CJ. In New Zealand, the *Judicature Act* 1908 (NZ) s 16 has been held to empower the making of such orders: *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104.

111 As in *Trade Practices Act* 1974 (Cth), s 80 which provides for "injunction" although there is no requirement of a threat of conduct contrary to law; cf *Walter Developments Pty Ltd v Roberts* (1995) 16 ACSR 280 at 282-283.

112 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 390.

113 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391-392.

114 cf Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd ed (1992) at 607-609.

115 See eg *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539; [1982] 1 All ER 796; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575-578 per Lord Denning MR.

116 Kunc, "Mareva Injunctions" in Parkinson (ed), *The Principles of Equity* (1996) 671 at 681; Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) at 599.

common to the principal litigants. It is the essence of the complaint which persons in the position of the appellants make that they are "non-parties" to the main proceedings so that their property and interests should not be interfered with separately from any substantive claim brought directly against them.

- 82 I shall therefore avoid the descriptions used by the parties during argument. For me, the basic issue is whether the Full Court of the Federal Court¹¹⁷ erred in setting aside the initial order of the primary judge¹¹⁸. The latter refused the request of the respondent to make an asset preservation order against the appellants, non-parties to the proceedings in defence of which such orders were said to be "appropriate"¹¹⁹. Initially, the appeal to this Court was limited to one from the orders of the Full Court upholding the appeal. However, during argument, at the suggestion of the Court, the appellants sought leave to expand their notice of appeal to include a challenge to the orders made by the primary judge when, at the conclusion of the appeal, the proceedings were remitted to him by the Full Court¹²⁰. Whilst I agree with this enlargement of the appeal, it must not deflect our attention either from the issues which were debated and decided by the Full Court or from those which were raised by the appellants in the original appeal to this Court. Not only do those issues affect questions of costs. They also affect the orders which it is proper for this Court to make in the circumstances.

The facts

- 83 It is essential to see the "asset stripping" which the Full Court considered to warrant the making of asset preservation orders in this case, in its context. The litigation which culminated in those orders may be traced to proceedings commenced in the Federal Court as long ago as October 1993. By those proceedings, LED Builders Pty Ltd ("LED"), the respondent to this appeal, sued Eagle Homes Pty Ltd ("Eagle Homes") for infringement of LED's copyright in certain home plans. A second action was commenced in December 1994 with respect to additional plans. The two actions were consolidated. They are "the copyright proceedings".
- 84 The hearing of the issues of liability in the copyright proceedings was separated from the other issues. That hearing took place in March 1996. In

¹¹⁷ *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65.

¹¹⁸ *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107.

¹¹⁹ *Federal Court of Australia Act 1976* (Cth), s 23.

¹²⁰ By remitter from the Full Court, Emmett J initially made orders on 22 August 1997 and subsequently varied and extended their operation on 26 August 1997.

July 1996, judgment was delivered. It was in favour of LED¹²¹. Orders were duly made. Being interlocutory, leave would have been required for Eagle Homes to appeal. No application for leave to appeal was brought. Because of the way in which the trial judge expressed his conclusions, founded significantly on his impression of the credibility of Eagle Homes' only director (Mr Paul Cardile), the prospects of a successful appeal looked somewhat bleak. Despite Mr Cardile's protestations to the contrary, the trial judge concluded that Eagle Homes had intentionally and substantially reproduced LED's home designs¹²². The judge expressed himself as not satisfied, by the end of Mr Cardile's cross-examination, that Mr Cardile's evidence was truthful¹²³.

85 Mr Cardile and his wife were the only shareholders of Eagle Homes. What happened to the property and assets of Eagle Homes can only be understood in the light of what was happening contemporaneously in the copyright proceedings. Many questions were directed during the hearing of the latter to elucidate precisely the movement of the assets and property of Eagle Homes. Ultimately, there is not much dispute about what occurred. Relevant findings were made by the primary judge. Concessions were also made in this Court by counsel for the appellants. With the prospect of the loss of the copyright proceedings looming before them, Mr and Mrs Cardile had to face the likelihood of an order against Eagle Homes for damages or an order for an account of profits. In the event, LED elected for the latter. At the time of the hearing of the appeal before this Court, the trial on the account of profits had been concluded but judgment was awaited¹²⁴.

86 Meanwhile, the Cardiles (effectively Mr Cardile) had set in train steps which, the primary judge concluded, gave rise to an inference that the Cardiles were adopting devices "to remove assets from Eagle Homes which would otherwise be available to satisfy a judgment in favour of LED"¹²⁵. The means adopted were not particularly "sophisticated". Indeed, the primary judge held that the evidence did not suggest that the Cardiles were sophisticated at all¹²⁶. On the contrary, what they did amply warranted the description given by Tamberlin J in the Full Court.

121 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1996) 35 IPR 215.

122 (1996) 35 IPR 215 at 225 per Davies J.

123 (1996) 35 IPR 215 at 223 per Davies J.

124 Judgment was reserved on these proceedings by Lindgren J and had not been delivered at the time of this decision.

125 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 112 per Emmett J. See also at 113.

126 (1997) 38 IPR 107 at 117 per Emmett J.

It was a "blatant"¹²⁷ effort by the Cardiles (whom the primary judge found controlled Eagle Homes¹²⁸) to alienate that company's assets to themselves and to a new corporate entity which they had created, Ultra Modern Developments Pty Ltd ("Ultra Modern"). The latter was incorporated in May 1995. Like Eagle Homes it was controlled by the Cardiles.

87 On 6 June 1995 another step occurred. Eagle Homes registered the name "Eagle Homes". Ultra Modern quickly became registered as the proprietor of that name. It appeared as a logo on Ultra Modern's stationery. Although Eagle Homes did not cease trading altogether, it was wound down on the initiative of the Cardiles. The business which it formerly enjoyed was substantially redirected to Ultra Modern. And not just future business. Whilst the proceedings in the Federal Court were on foot, measures were taken to subtract from the funds available to Eagle Homes two large dividend payments declared by that company for the years ended 30 June 1994 and 30 June 1996 respectively.

88 The profit and loss appropriation statement of Eagle Homes for the year ended 30 June 1994 shows an item "dividend paid \$400,000". By a comparison of this item with the financial statement of the company for the year in question, it is clear that Eagle Homes made actual payments to the Cardiles amounting, at least, to the sum of the \$400,000 dividend. A similar, but larger, dividend payment was made for the year ended 30 June 1996. I remind myself that this was shortly before judgment was delivered in the copyright proceedings but after the hearing in which cross-examination had exposed the inconsistencies in Mr Cardile's evidence upon which the trial judge commented so critically. According to the profit and loss appropriation statement for that year, Eagle Homes paid the Cardiles a dividend of \$800,000. This was done by crediting the shareholders' loan accounts. By a comparison of the relevant items in the balance sheet and profit and loss appropriation statements for the year in question, it is clear that Eagle Homes made actual payments to the Cardiles. These amounted, at least, to the difference between the \$800,000 dividend referred to and the increase otherwise recorded during the period in the company's indebtedness to the shareholders. So analysed, the actual payment to the Cardiles must have been, at least, something just short of \$660,000. The total dividends paid out of the assets of Eagle Homes to the Cardiles, whilst the copyright proceedings were pending, were therefore more than \$1 million.

89 Taking into account the nature of the civil wrong alleged (and found to exist) in the copyright proceedings, the strong terms in which the reasons of the judge in

127 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65 at 86 per Tamberlin J.

128 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 109 per Emmett J.

those proceedings were expressed and the undisguised manoeuvres with the business name and dividend payments, it is hardly surprising that the primary judge should have concluded, as he did for the purposes of the application before him, in favour of the making of asset preservation orders. The primary judge's conclusion was that the Cardiles (and the companies which they controlled) were at least in part motivated by the desire to ensure that the assets of Eagle Homes would not be available to meet any judgment in the copyright proceedings in favour of LED¹²⁹.

90 It was in these circumstances (which are further elaborated in the reasons of Gaudron, McHugh, Gummow and Callinan JJ) that the application was made by LED to obtain asset preservation orders directed not only at Eagle Homes, but also at the Cardiles and Ultra Modern, non-parties to the copyright proceedings. Uninformed by legal authority, the application would seem on its face to be perfectly reasonable. Pursuit of an asset preservation order against Eagle Homes alone would invite a response expressed in equine terms about stable doors and horses which had bolted. The primary judge found that there was no evidence that either Mr or Mrs Cardile was planning to depart the jurisdiction or to dispose of his or her assets out of the jurisdiction¹³⁰. This finding, however, was by no means an assurance that the Cardiles would not otherwise dispose of the funds and other assets of which Eagle Homes had been denuded, if they retained uninhibited control over them. If they had engaged in asset stripping once, for the purpose of frustrating or preventing the recovery of the judgment ultimately obtained in the copyright proceedings, they might (unless restrained) do so again.

91 The primary judge made many findings, and drew several inferences, adverse to the Cardiles and Ultra Modern who together with Eagle Homes comprised the defendants before him. He accepted¹³¹ that, if an application had been made by LED earlier, it "may well" be that relief would have been granted which would have prevented the declaration (and payment) of the dividends and the transfer of the business name by Eagle Homes. Yet, in the end, he was not persuaded that LED had made out a case for "Mareva orders" against the Cardiles or Ultra

129 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 112 per Emmett J.

130 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 117 per Emmett J.

131 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 120 per Emmett J.

Modern. He made such orders as asked against Eagle Homes. However, he dismissed the proceedings against the Cardiles and Ultra Modern¹³².

92 No appeal was taken to the Full Court against the order made against Eagle Homes. Given that the liquid funds of that company available to meet an ultimate judgment in favour of LED had already been depleted, there may have been no practical point in seeking to challenge the order addressed to it. However, LED sought leave to appeal to the Full Court of the Federal Court against the dismissal of the application for orders against the Cardiles and Ultra Modern. The Full Court unanimously upheld LED's application. It granted leave. It allowed the appeal. It set aside the order of dismissal. And it remitted the matter to a single judge to make orders in accordance with its reasons¹³³.

93 When the matter was returned, it was heard by the same primary judge. He proceeded to make orders against the Cardiles and Ultra Modern restraining them from disposing of, or dealing with, any of their money, property or other assets other than for specified purposes¹³⁴. In May 1998, this Court granted special leave to the Cardiles and Ultra Modern (the appellants) to appeal from the judgment and orders of the Full Court. Neither the Full Court, nor this Court, would ordinarily become involved in reassessing the purely discretionary considerations which informed the making, or refusal, of interlocutory orders of the kind in issue here. The feature of the matter which was said to warrant the attention of both courts was the scope of the jurisdiction and power of the Federal Court of Australia to make asset preservation orders in the circumstances described, and in particular against non-parties to the main proceedings (such as the appellants) and especially where (as was said to be the case here) LED had no other cause of action against the appellants and the appellants were not shown to hold property belonging to Eagle Homes. This was the issue of principle dealt with by the Full Court. It was the question addressed in the special leave hearing. It was the point raised in the original notice of appeal to this Court¹³⁵.

Decision of the primary judge

94 The primary judge nominated two reasons for refusing orders against the appellants. First, he pointed out that LED had established no independent cause

132 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 120 per Emmett J.

133 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 64 at 90.

134 Orders initially made on 22 August 1997 to have effect until 24 August 1997. On 26 August 1997 the orders were varied and continued "until further order".

135 The original notice of appeal challenged only the judgment and orders of the Full Court of the Federal Court. It contained two grounds. These are detailed below.

of action against them¹³⁶. In so far as LED claimed protection of the funds derived from stripping the assets of Eagle Homes, it was to protect possible future proceedings by LED¹³⁷ which might otherwise be rendered futile or worthless. However, the judge said that he was unsatisfied that any such claims (assuming them to exist) were in jeopardy without the making of an order, whether of the kind sought or of some other kind, for example, the appointment of a receiver¹³⁸.

- 95 Secondly, whilst accepting that, in the past, relief of the kind claimed had been given against non-parties ("third parties") the primary judge pointed out that such relief had only been available where the latter held assets in which the potential judgment debtor had a "proprietary interest"¹³⁹. In support of this approach, the primary judge cited early and local authority¹⁴⁰ rather than later authority in the Federal Court¹⁴¹ and elsewhere¹⁴² suggesting the availability of a broader power. In particular, there was no analysis in his reasons of the language of, and implications to be derived from, the *Federal Court of Australia Act 1976* (Cth)¹⁴³ ("the Act"). In this way, the primary judge concluded that LED's application was an inappropriate forum for determining the respective rights of

136 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 110 per Emmett J.

137 For example under the *Conveyancing Act 1919* (NSW), s 37A or under Div 2 of Pt 5.7B of the *Corporations Law* (Cth).

138 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 120 per Emmett J.

139 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 118 per Emmett J.

140 *Winter v Marac Australia Ltd* (1986) 6 NSWLR 11 at 12 and *Coxton Pty Ltd v Milne*, unreported, New South Wales Court of Appeal, 20 December 1985 at 13. Similar views were expressed in the speech of Lord Diplock in *Siskina v Distos Compania Naviera SA* [1979] AC 210 at 254-256 and Lord Hailsham at 260, 261. The remarks of Lord Hailsham were followed by Clarke J in *Bank of Queensland Ltd v Grant* [1984] 1 NSWLR 409 at 411.

141 *Tomlinson v Cut Price Deli Pty Ltd*, unreported, Federal Court of Australia, 23 June 1995.

142 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 362 per Lord Mustill; cf *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366.

143 See in particular s 23.

Eagle Homes and of the appellants relating to the funds and assets in question¹⁴⁴. Because neither a "proprietary interest" nor "control over or access to the assets and funds" had been demonstrated, no relief of the kind sought could, in law, be granted¹⁴⁵.

Decision of the Full Court

96 In the Full Court, it appears from the record of arguments advanced for the respective parties that the issue was neither a complaint that the relief sought by LED was impermissibly wide¹⁴⁶ nor that discretionary considerations favoured, or militated against, the provision of the orders claimed. As recorded in the reasons of the Full Court, argument proceeded on the claim by LED that the primary judge had adopted too narrow a view of the availability of "Mareva relief".

97 All members of the Full Court concluded that the primary judge's approach to the Court's jurisdiction and power had been unduly restrictive. Beaumont and Branson JJ, in joint reasons, approved the approach earlier adopted by Kiefel J in *Tomlinson v Cut Price Deli Pty Ltd*¹⁴⁷, where her Honour determined that an asset preservation order might be made against a non-party where it had become "mixed up in the transaction ... and ... where [it had] actively participated in the deliberate removal of assets"¹⁴⁸. Where the defendant, and potential judgment debtor, controls the non-party, it was held to be within the jurisdiction of the Federal Court to make orders which would render it plain that the defendant was not to act through that non-party, so as to endanger assets which might be called upon to help discharge an eventual judgment. Beaumont and Branson JJ held that the "only real questions" affecting the jurisdiction of the primary judge were¹⁴⁹:

"[F]irst, whether there was a serious question to be tried as to whether assets presently under the control of [Ultra Modern] and Mr and Mrs Cardile could be available to satisfy a judgment against [Eagle Homes] in favour of [LED], and secondly, whether there was a danger of such assets being dealt with by

144 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 119 per Emmett J.

145 *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 4)* (1997) 38 IPR 107 at 118-120 per Emmett J.

146 As offending the principle that relief should conform to the minimum disturbance of legal rights necessary to do equity.

147 Unreported, Federal Court of Australia, 23 June 1995.

148 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65 at 77.

149 See *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65 at 78.

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[Eagle Homes], or [the non-parties], so that the Court's process would be frustrated."

On the undisputed facts, their Honours decided that "suitable Mareva relief" should have been granted against the appellants.¹⁵⁰

98 The other judge in the Full Court (Tamberlin J) returned to the principles stated by this Court concerning the basis of the jurisdiction and power of the Federal Court to make orders of the kind in question¹⁵¹. Asking whether such relief was to be granted "to preserve funds in the hands of non-innocent third parties in circumstances where there is a significant prospect of an action to set aside the alienation of property from the respondent to those third parties"¹⁵², Tamberlin J stated¹⁵³:

"There is no reason in principle ... why it is necessary to impose a limitation on the grant of Mareva relief against a third party to the effect that a [plaintiff] must have a proprietary 'interest' in the divested assets. The power is purposive. Its aim is to prevent frustration of the Court's process".

99 Although expressed in different terms, the essential reasoning of all members of the Full Court was the same¹⁵⁴. Where there is culpable behaviour by a non-party which may endanger the recovery of the fruits of judgment in proceedings before a court with the requisite powers (and which would thereby frustrate that court's process) the party in peril of that outcome may seek an asset preservation order. The nature of such an order would be to preserve assets shifted from an opposing party to a non-party so as to permit the later exploration of a question whether those assets, although under the control of the non-party, could yet be rendered available to satisfy a judgment and thus to uphold the utility of the court's orders.

100 All judges in the Full Court agreed to the remittal of the proceedings to a single judge so that, in the words of Beaumont and Branson JJ, "outstanding adjectival questions"¹⁵⁵ could be sorted out. In accordance with the way in which

150 (1997) 78 FCR 65 at 78.

151 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.

152 (1997) 78 FCR 65 at 85.

153 (1997) 78 FCR 65 at 85.

154 cf Chan, "*LED Builders v Eagle Homes* - Continuing the Development of Mareva Relief in Australia" (1998) 20 *Sydney Law Review* 487 at 491.

155 (1997) 78 FCR 65 at 78.

the appeal had been mounted and argued, the Full Court confined itself to the issues of principle. It did not concern itself with discretionary considerations at all. Nor did it deal with the refinement of the orders sought in order to confine the relief given to the minimum necessary to achieve the stated purposes. Those matters were not in contest in the Full Court. If they were in contest at all, the proper place to have raised them would have been when the proceedings were returned before the primary judge following the remittal. As no such objections were then advanced, it is unsurprising that the final form of the order was essentially that which LED had originally sought. The notice of appeal to this Court, and the issues argued on the special leave application, were confined (as the debate in the Full Court had been) to the issues of general legal principle. I shall return to this consideration.

Common ground

101 Before turning to the elucidation of the questions of legal principle, it is useful, in order to confine the issues for decision by this Court, to record a number of points upon which there was common ground.

102 First, no constitutional argument was advanced to challenge either the suggested foundation of the Federal Court's jurisdiction to make orders of the kind made here or to question the orders made as being outside the judicial power of the Commonwealth. Although it was contended that the Constitution puts a brake on the expansion of orders of this kind, at least in federal courts, no specific constitutional limitation was argued.

103 Secondly, the appellants accepted, as LED asserted, that the equitable principles to which they appealed were not set in stone and could be extended incrementally. The debate of principle which they brought to this Court was thus about the increments proper to the present circumstances. LED conceded that there were some limits on the power to make such orders. In particular, LED agreed that such orders could not be "free standing" but had to be incidental, as here, to a "pre-existing cause of action" upon which the Court had power to enter judgment¹⁵⁶. In this case, the suggested problem did not arise from the absence of a "pre-existing cause of action" in the "main proceedings" (for that had been established by the decision of the trial judge in the copyright suit). What was in issue was the significance of the suggested absence of a "pre-existing cause of action" on the part of LED or Eagle Homes against the Cardiles and Ultra Modern. For the appellants that was a fatal omission. According to LED it was not.

¹⁵⁶ cf *Siskina v Distos Compania Naviera SA* [1979] AC 210; *Mercedes Benz AG v Leiduck* [1996] AC 284; Andrews, "Mareva Relief Cannot Stand Alone: Further Judicial Reflections Upon The Siskina Doctrine" (1996) *Cambridge Law Journal* 12.

104 Thirdly, it was accepted by both sides that the orders made did not, as such,
 put any assets back in the control of Eagle Homes. All they did was to prevent
 further dissipation of the assets which had been transferred to the appellants.

Asset preservation orders: principles

105 I take the principles applicable to the provision of asset preservation orders
 of the Mareva type to include the following elements.

106 *Constitutional context:* In respect of orders made by a federal court in
 Australia, the Australian Constitution takes effect. One source of the jurisdiction
 of the Federal Court in the present case was said to be the Act¹⁵⁷ and the expressly
 stated and implied powers of the Federal Court under that Act. As the ultimate
 source of such powers derives from the Constitution¹⁵⁸, the grant of power should
 be read to conform to one which was proper to a federal court exercising the
 judicial power of the Commonwealth. Relevantly, that means a court applying
 legal norms. It does not mean a court wholly at liberty to invent, and then apply,
 rules according to whim or uncontrolled perceptions of "justice" or "fairness"¹⁵⁹.
 In the United States of America, the closest equivalent to interlocutory asset
 preservation orders is the "preliminary injunction"¹⁶⁰. This is defined as an order
 "issued to protect [the] plaintiff from irreparable injury and to preserve the court's
 power to render a meaningful decision after a trial on the merits"¹⁶¹. To some
 extent, the operation of such orders is both sustained and controlled by the
 constitutional requirement of due process¹⁶². No specific arguments were
 advanced as to the application of the Australian Constitution in this case.
 However, clearly enough the word "matter", referred to in s 23 of the Act, carries
 the same meaning as that word bears in the Constitution¹⁶³. The jurisdiction so

157 s 23.

158 s 71.

159 *The Queen v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957)
 100 CLR 277 at 287-289; cf at 291 "it must be a judicial discretion proceeding upon
 grounds that are defined or definable, ascertained or ascertainable, and governed
 accordingly".

160 Wright, Miller & Kane, *Federal Practice and Procedure: Civil*, 2d ¶2947.

161 See eg *Evans v Buchanan* 555 F 2d 373 at 387 (1977).

162 See eg *United States v Village of Airmont* 839 F Supp 1054 (1993).

163 See eg ss 75, 76 and 77; cf *In re Judiciary and Navigation Acts* (1921) 29 CLR 257
 at 266-267; *Re East, Ex parte Nguyen* (1998) 73 ALJR 140 at 158; 159 ALR 108 at
 132.

conferred on, and powers granted to, the Federal Court are accordingly those proper to a court created within Ch III of the Constitution. The boundaries of the implications to be derived from these powers must await future cases. For the present, it is enough to note this starting point for the elucidation which follows.

- 107 *Federal statute:* The power of the Federal Court of Australia to make orders to preserve assets affected by litigation is principally found in s 23 of the Act¹⁶⁴. That section reads:

"The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

- 108 Section 5(2) of the Act is also relevant. It provides that the Federal Court "is a superior court of record and is a court of law and equity". These two provisions afford express powers to the Federal Court. But they also give rise to implied powers, for example to prevent abuse of the process of the Court¹⁶⁵. Occasionally, it has been suggested that the Federal Court (and the Family Court of Australia) enjoy "inherent" powers¹⁶⁶. However, because such courts are created by statute (and not, for example, out of the royal prerogative) the better view is that their powers must be found in the express language of enabling statutes or in implications necessarily derived from such provisions. When regard is had to s 23 of the Act, its great breadth is immediately obvious. The power is granted "in relation to" matters. Those are words of the widest connection¹⁶⁷. The power is not confined to the making of orders "in" matters. It is sufficient that there be a relevant connection between the matter and the order in question. When the scope of the orders and their "kinds" are considered, it is left to the Federal Court to make orders of such "kinds" as it thinks "appropriate". The word "appropriate" has outer boundaries. It suggests a limitation derived from legal authority, principle and policy. However, the scope of those boundaries is not narrow. Its breadth is addressed not simply to the "orders" appropriate to the particular case but to the "kinds" of orders, ie the variety and classes of orders which the Court may devise.

164 As was remarked in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 and in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 883-884; 153 ALR 643 at 655-656.

165 See *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267 at 272 per Bowen CJ; approved *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624; cf *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 at 391.

166 See eg *Tait v The Queen* (1962) 108 CLR 620 at 623.

167 *Morgan v DPP* [1970] 3 All ER 1053; cf *Radio Corporation of America v Rauland Corporation* [1956] 1 QB 618.

109 The English legislation out of which Mareva injunctions were originally fashioned¹⁶⁸, reversing earlier authority¹⁶⁹, was not as broad as that conferred on the Federal Court in Australia¹⁷⁰. In addition to the express power in s 23 (and I would add s 5(2)) the Federal Court is cloaked with implied powers simply because it is a court of the kind stated.¹⁷¹ Many of the problems which are said to have arisen in the development of curial orders for the preservation of property in connection with litigation might have been avoided if courts in Australia had taken the ordinary and, in my view proper, course. This would have involved beginning their consideration with the actual sources of their power rather than endeavouring (as they generally have) to follow, a few years later, the developing jurisprudence of the English courts as they were producing their Mareva progeny.

110 *Powers of courts:* There is a further consideration which extends even more widely the powers of the Federal Court to make orders "appropriate" in relation to matters before it. This is the general principle that statutory provisions, conferring jurisdiction or power on a court, are not construed as subject to any limitation which is not strictly required by their language and purpose¹⁷². Where a court is endowed with a particular jurisdiction, it enjoys the powers necessary to enable it to act effectively within that jurisdiction. Its powers are not ordinarily construed as restricted to defined and closed categories¹⁷³. This is because of the infinite variety of circumstances which may come before a court and require "appropriate"

168 *Supreme Court of Judicature (Consolidation) Act 1925* (UK), s 45(1).

169 See eg *Lister & Co v Stubbs* (1890) 45 Ch D 1 at 13 per Cotton LJ. See also *Mills v Northern Railway of Buenos Ayres Co* (1870) LR 5 Ch App 621 at 627-628 per Lord Hatherley LC; *National Provincial Bank of England v Thomas* (1876) 24 WR 1013. The former rule in equity was summed up by James LJ in *Robinson v Pickering* (1881) 16 Ch D 660 at 661: "You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property". For an explanation of the rule before the practice of granting Mareva orders became more common see *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65 at 72 per Robert Goff J; discussed Tilbury, *Civil Remedies* (1990), vol 1 at 327-329.

170 cf *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 631-632 per Toohey J.

171 As stated above, the Federal Court is a court created by statute. As such its powers are found both in the express language of enabling statutes and in implications necessarily derived from the provisions of such statutes.

172 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 191, 205; cf *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 900 per Gaudron J; 153 ALR 643 at 678-679.

173 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 per Gaudron J.

orders¹⁷⁴. This well established general principle provides a warning against attempts by judges to state closed categories derived from the history of Chancery courts or from recent court decisions in their jurisdiction. To do this would amount to an impermissible gloss on the broad language by which the Parliament of Australia has conferred the power. It would, moreover, shackle the implications which follow from the very nature of the body receiving that power.

111 The attempts of courts and text-writers to fashion immutable "principles" to harness broad statutory powers, such as those conferred by s 23 of the Act, may be understandable from an historical perspective considered from pre-Mareva days. It may be explicable as an attempt to afford useful rules of thumb. But statutory courts should never stray far from their statutory mandate. Nor should they forget the general principles which repeatedly emphasise the broad scope of the power conferred on a court and the need to avoid rigid, restrictive categories. In a particular case, such rigidities could prevent the proper exercise of the court's powers, as the Parliament has provided.

112 *Avoiding rigid rules:* Courts exercising equitable jurisdiction - or statutory jurisdiction analogous to that of courts of equity - need to be especially cautious before adopting rigid rules. In the English case *Soinco SACI v Novokuznetsk Aluminium Plant*, Colman J expressed this thought in terms which I would adopt. Faced with submissions akin to those advanced by the appellants in this case, his Honour said¹⁷⁵:

"Such ... would involve treating the rules of the Court of Chancery before the Judicature Acts as carved in stone and as expressing immutable principles incapable of development beyond 1873 unless changed by Parliament. This must be wrong in principle. English law has traditionally developed by means of identifying broad but established juridical principles which have been extended incrementally to new factual situations when the interests of justice required such extension. The development of the law relating to *Mareva* injunctions amply demonstrates that this developing process applies to equitable remedies as to any other."

113 There are many statements to similar effect. Several such statements have been made in the course of English decisions on *Mareva* injunctions as they followed their discernible trend away from the strictures expressed in *Siskina v Distos Compania Naviera SA*¹⁷⁶ in respect of orders affecting non-parties. Thus

174 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 308 per Lord Nicholls of Birkenhead (diss).

175 [1998] QB 406 at 420.

176 [1979] AC 210.

in *Mercantile Group (Europe) AG v Aiyela*, Sir Thomas Bingham MR remarked, in response to a suggestion that the English Court had no jurisdiction to make a Mareva order in that case, that if it were so¹⁷⁷:

"the armoury of powers available to the court to ensure the effective enforcement of its orders would ... be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties."

Such words apply with even greater force where the "third parties" do not appear "innocent".

114 The particular reasons given in disposing of one claim for an asset preservation order should not be converted into universal principles of invariable application. The case law on this topic is a field of single instances, cultivated in a garden of interlocutory orders, nurtured in a wilderness of broad discretions. Unlike many English gardens, this one has a measure of order stamped upon it, brought by analogy from the equitable rules developed for general injunctive relief. But excessive order and rigid rules would endanger the relief in question and be alien to its essential character.

115 *Rationale for relief:* In considering the "appropriateness" of an asset preservation order, of the kind in question here, it is proper to remember the explanations given by the courts for the development of such orders. The reasons have involved two basic and interrelated concepts. The first arises from the facts of modern commercial life, of which courts are not ignorant and to which they are not indifferent. Today it is much easier than was previously the case to transfer assets quickly both nationally and internationally. Electronic networks facilitate a dishonest party's frustration of the enforcement of a court's judgment once entered¹⁷⁸. The courts need to adapt their remedies to this reality. As Brennan J observed in *Jackson v Sterling Industries Ltd*¹⁷⁹, the schemes which debtors may devise for divesting themselves of assets are legion. The novelty of such schemes is no objection to the validity of an order seeking to arrest the process.

116 Secondly, such orders have been developed as much to protect and defend the court's process from abuse as to protect and defend the interests of the potential

177 [1994] QB 366 at 377.

178 Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) at 396 referring to *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 at 117-118.

179 (1987) 162 CLR 612 at 621.

judgment creditor. This point was made in Canada in *Grenzservice Speditions Ges.m.b.H. v Jans* where Huddart J observed¹⁸⁰:

"The Mareva and Anton Piller orders were conceived not so much to protect plaintiffs as to protect the court's jurisdiction against defendants bent on dissipating or secreting their assets or evidence in order to render inconsequential the judicial process against them."

117 To the extent that rules, devised in earlier times, were invoked to require the result that a litigant was powerless to protect itself from being out-manoeuvred by its opponent, they would be liable to derision. To suggest that such rules may deprive a court of power "in relation to" a "matter" before it, because the order contemplated was not capable of being "appropriate", would seem most unconvincing. At least it would be so when the second purpose of such orders is kept in mind, namely to "prevent a defendant from frustrating enforcement of a judgment when obtained"¹⁸¹.

118 *Limits on orders:* Although the powers of a court, such as the Federal Court, under provisions such as s 23 of its Act, are very wide, there are "jurisdictional and other limits"¹⁸². So much is inherent in the source of the power. In a society such as ours, people are ordinarily entitled to use their property as they see fit. This is a civil right with which the courts will interfere only when the law authorises them to do so, and then for good reason. Those who are non-parties to litigation between others are entitled to expect justification for the making of orders as "appropriate" as against them. The interests of non-parties must be given weight according to the circumstances of the case¹⁸³. The interposition of an innocent non-party presents a serious complication to the making of an asset preservation order which affects the use by that party of what, in law, is its property¹⁸⁴. It is in this context that courts have propounded principles designed to defend "the business rights of

180 (1995) 129 DLR (4th) 733 at 755.

181 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 307.

182 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 per Deane J; cf McDermott, "Equitable Jurisdiction of Magistrates' Courts: An Australian Development" (1988) 62 *Australian Law Journal* 533 at 536.

183 See eg *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354-355; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873 at 903; 153 ALR 643 at 683; *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539 at 542-543; [1982] 1 All ER 796 at 799-800.

184 *Gilfoyle Shipping Services Ltd v Binosi Pty Ltd* [1984] 2 NZLR 742 at 746.

an innocent third party ..."¹⁸⁵. Many such cases involve the position of banks with whom are deposited the funds stripped from an actual or potential judgment debtor¹⁸⁶.

119 Different considerations apply where the non-party is not innocent, is either the controller or under the control of the judgment debtor, or where it has "mixed up" its assets and property with those of the judgment debtor¹⁸⁷. In such cases, where the non-party has actively participated in a deliberate removal of assets or property and is still in possession of the same, it is much more likely that a court, asked to make an asset preservation order, will do so. Certainly, it is more likely than if the non-party were a complete stranger to the asset stripping and wholly "innocent" of involvement in it.

120 The suggestion that there is a universal rule that asset preservation orders of the Mareva type may not, or will not, be made against non-parties in the absence of proof that the party seeking such relief has a subsisting cause of action against that party (or that the judgment debtor has a proprietary or beneficial interest in the property held by the non-party), must be rejected. Judicial dicta which propose such strict rules¹⁸⁸ are too broadly stated. At least this is so where such rules are intended to suggest a categorical requirement¹⁸⁹.

121 To secure an asset preservation order in a case such as the present, it will be necessary for the party seeking it to show, in addition to the conditions ordinary to the grant of relief injunctive in nature that (1) there is a danger that the non-party

185 *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539 at 542 per Kerr LJ; [1982] 1 All ER 796 at 799; *Gilfoyle Shipping Services Ltd v Binosi Pty Ltd* [1984] 2 NZLR 742 at 745.

186 See eg Dal Pont and Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) at 599-600; Kunc, "Mareva Injunctions" in Parkinson (ed), *The Principles of Equity* (1996) 671 at 679-685.

187 *Mercantile Group (Europe) AG v Aiyela* [1994] QB 366 at 374 per Hoffmann LJ; *Tomlinson v Cut Price Deli Pty Ltd*, unreported, Federal Court of Australia, 23 June 1995; cf *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231 at 239-240; [1992] 2 All ER 245 at 253-254; *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155 at 164; *Coxton Pty Ltd v Milne*, unreported, New South Wales Court of Appeal, 20 December 1985.

188 cf *Siskina v Distos Compania Naviera SA* [1979] AC 210 at 254-256; *Bank of Queensland Ltd v Grant* [1984] 1 NSWLR 409; *Winter v Marac Australia Ltd* (1986) 6 NSWLR 11.

189 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 327 per Rogers AJA.

will dispose of relevant assets or property in its possession or under its control; and (2) that the affairs of the actual or potential judgment debtor and the non-party are closely intermingled, and that the actual or potential judgment creditor has a vested or accrued cause of action against the non-party or may otherwise become entitled to have recourse to the non-party, its property and assets to meet the claim. Clearly, on the preliminary findings made by the primary judge, these preconditions were established in the present case.

- 122 *Form of orders:* In framing asset preservation orders, certain features must be observed¹⁹⁰. They take effect *in personam*. They are thus distinguished from remedies, such as tracing, which affect proprietary rights¹⁹¹. They are interlocutory orders, subservient to the main proceedings but potentially vital to their utility. The grant of such relief is discretionary. They must often be provided (or withheld) in urgent circumstances where a propensity to shift assets, apparently to defeat a judgment, has already been manifested. The plaintiff must establish a real risk of assets being disposed of¹⁹². No such relief should be contemplated without the provision of an undertaking as to damages¹⁹³. This is protective both of the defendant and of non-parties made subject to such orders. It acts as a sanction against ill-considered applications or unjustified orders. It is the duty of the lawyers of the parties to remind the judge of this prerequisite¹⁹⁴. Various qualifications to the operation of such asset preservation orders are now settled¹⁹⁵.

190 Rogers, "The Scope of the Mareva Jurisdiction" in Hetherington (ed), *Mareva Injunctions*, (1983) at 26.

191 *Mercedes Benz AG v Leiduck* [1996] AC 284 at 300 per Lord Mustill, delivering the majority judgment. See also *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1997) 78 FCR 65 at 78 per Beaumont and Branson JJ.

192 *Third Chandris Shipping Corporation v Unimarine SA* [1979] 3 WLR 122 at 137-138; [1979] 2 All ER 972 at 984-985.

193 *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (1990) 169 CLR 271 at 277.

194 *Frigo v Culhaci*, unreported, New South Wales Court of Appeal, 17 July 1998 at 9; cf Ipp, "Lawyers' Duties to the Court" (1998) 114 *Law Quarterly Review* 63. In the present case the original orders had attached to them a sealed document, apparently in the form required by the Federal Court affording an explanation and elaboration of the expression "the usual undertaking as to damages". This made it plain that such an undertaking represented an undertaking to "pay to any party adversely affected by the interlocutory injunction or undertaking such compensation (if any) as the Court thinks just, in such manner as the Court directs".

195 *Frigo v Culhaci*, unreported, New South Wales Court of Appeal, 17 July 1998 at 10-11 referring to exceptions for legal fees, living expenses and payment of debts.

Thus, provision should be made for liberty to apply to vary the orders on short notice should it emerge that something has been overlooked in the exigencies. Or should some inconvenience arise, proof of which would warrant a variation of, or further exceptions to, the orders as initially framed.

123 The fact that applications for asset preservation orders must often be decided in urgent circumstances cannot, of course, excuse the making of orders of a kind that are not, in law, "appropriate". The fact that the orders are interlocutory does not relieve the court asked to make them of the obligation to consider their utility and the ultimate right of the judgment creditor to gain access to the assets and property made the subject of them. However these considerations require that a very large measure of latitude be allowed to judges as to when they consider it "appropriate" to provide such relief, with the aim of protecting the position of an actual or potential judgment creditor and the process of the court itself. Few judges, asked for such orders, have the luxury of the extended reflection availed of by appellate courts. In expressing the applicable principles, we should not overlook the practical exigencies in which orders of this kind are typically made.

124 *Minimum disturbance*: The restraint against the disposal of assets pursuant to an asset preservation order is usually expressed so that it does not tie up assets and property beyond the extent that the party seeking the orders may be thought likely to recover¹⁹⁶. This rule is a reflection of considerations involved in the "minimum equity" principle, namely that relief should be confined to the "limits set by the purpose which it can properly be intended to serve"¹⁹⁷. In the case of orders affecting non-parties, the practice tends to minimise the inconvenience which an asset preservation order may otherwise occasion¹⁹⁸. A bank or other innocent non-party could not ordinarily be expected to know details of the judgment debtor's assets¹⁹⁹. Further the rule is, in part, a consequence of an entirely proper desire to limit the ambit of the orders made to that which is truly necessary, given that breach renders the party bound by the orders liable to

196 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 576, 589.

197 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625.

198 *A J Bekhor & Co Ltd v Bilton* [1981] 2 WLR 601 at 621-622; [1981] 2 All ER 565 at 581; *Vereker v Choi* (1985) 4 NSWLR 277; *SCF Co Finance Ltd v Masri* [1985] 1 WLR 876; [1985] 2 All ER 747; Tyree, "Mareva Injunctions: The Third Party Problem" (1982) 10 *Australian Business Law Review* 375 at 385-386; Zuckerman, "Mareva and Interlocutory Injunctions Disentangled" (1992) 108 *Law Quarterly Review* 559; Willoughby and Connell, "The Mareva Injunction: A Cruel Tyranny?" (1997) 8 *European Intellectual Property Review* 479.

199 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 575-576.

prosecution for contempt²⁰⁰. To the extent that orders for the preservation of property impede the use by a party of its assets beyond that which is essential to the purposes of the preservation, it oppresses the party bound, exposes it needlessly to risk of punishment for contempt, ties up its affairs and finds no justification in either of the reasons which have given birth to this remedy²⁰¹.

Application of the principles to the case

125 When these principles are applied to the facts of this case, it will be seen immediately that the arguments which the appellants sought to advance before this Court, and upon which they failed in the Full Court, cannot be sustained. The Federal Court was not deprived of jurisdiction to grant orders of the kind sought against the appellants either because, in this matter, there was no established cause of action maintainable on behalf of LED against them or because property in their hands was not available to LED to satisfy a judgment which it might in future obtain against Eagle Homes. To secure such orders, the applicant does not need to prove affirmatively the existence of such a cause of action or right to the property. To so assert mistakes the jurisdiction of the Federal Court which extends, in such cases, to the making of "appropriate" orders designed to respond immediately to conduct apparently taken to defeat the Court's own process.

126 In saying this, I do not accept that, in the present case, LED had no causes of action available to it by which it might ultimately gain access to the assets and property moved from Eagle Homes to the private accounts of the Cardiles and to Ultra Modern. Where, as here, Eagle Homes had arguably "mixed up" or "intermingled" its property with that of the Cardiles and Ultra Modern, those parties scarcely qualified as "innocent", particularly because it was found that the Cardiles controlled them all. Upon the basis of that finding, and given the purposes of the orders, it was unnecessary for LED to establish conclusively that, in later proceedings it would be able to secure the effective reversal of the asset stripping conduct, whether under the *Conveyancing Act* 1919 (NSW) s 37A, under provisions of the Corporations Law (Cth)²⁰² or in proceedings for breach of fiduciary duty or civil conspiracy.

127 In many cases of disputed entitlement and contentious legal claims, it would be wholly unreasonable to impose on the actual or potential judgment creditor the

200 *Abella v Anderson* [1987] 2 Qd R 1 at 4-5.

201 *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1980] 2 WLR 488 at 495; [1980] 1 All ER 480 at 487; *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 at 276; *Marine Atlantic Inc v Blyth* (1993) 113 DLR (4th) 501 at 504.

202 ss 588FB, 588FC, 588FE(3), (4) and (5) and 588FF. The provisions concern the avoidance of uncommercial and insolvent transactions by a corporation.

obligation of establishing, in an application for such interlocutory orders, all of the propositions that would be necessary eventually to gain access to the diverted assets or property in later and different proceedings. To the extent that the non-party affected by the order was completely innocent of the diversion of assets and property, a greater measure of satisfaction would be required that such claims would, ultimately, be successful. But where (as here) the diversion was "blatant"²⁰³ and the non-parties were far from "innocent"²⁰⁴, it was open to the Federal Court to conclude that resolute action was required to defend the utility of its orders in the copyright proceedings. The established conduct of Eagle Homes and the Cardiles justified such prompt action. Nice disputes about the ultimate remedies available to LED, or to a receiver on behalf of Eagle Homes, to recoup the diverted assets and property would have more persuasiveness in the mouths of innocent non-parties than when advanced by parties such as the Cardiles and Ultra Modern in the circumstances found to exist in this case.

- 128 The general liberty to apply, reserved to the appellants, afforded a means to elucidate the prospects of recoupment and the ultimate utility to LED of the asset preservation order which it sought. That was where their arguments should have been heard, once the primary judge made the findings, which he did, concerning the conduct of Eagle Homes and of the appellants. The arguments of the latter, suggesting a jurisdictional impediment (or one of power) were rightly rejected by the Full Court. This Court should affirm the Full Court's approach. It should dismiss all of the original grounds of appeal for, in substance, they (like the appellants' initial submissions to this Court) addressed nothing else than the questions of jurisdiction and power which formed the basis of the appellants' special leave application²⁰⁵.

Discretionary considerations and form of orders

- 129 The appellants, nonetheless, made a number of telling points in their oral arguments concerning the width of the orders which LED had sought and which, on remitter, the primary judge ultimately made. For example, they complained

203 (1997) 78 FCR 65 at 86.

204 (1997) 78 FCR 65 at 78.

205 Ground 1 in the notice of appeal asserted that the Federal Court did not have jurisdiction to make the orders against the appellants where there was no cause of action maintainable by LED against them and in respect of property in the hands of the appellants not available to LED to satisfy a judgment which LED might in future obtain against Eagle Homes. Ground 2 asserted that the Full Court had erred in interfering with the order made by Emmett J and in granting "Mareva relief" upon five stated grounds at least three of which (grounds 2(a), (b) and (c)) refer to substantially the same point as in the first ground.

about the terms of those orders restraining the Cardiles and Ultra Modern "from disposing of or dealing with any of their money, property or other assets" other than for specified purposes. It is difficult to justify an order so broadly expressed. It effectively freezes all of the assets of the appellants subject only to the specified exceptions. The ultimate measure of the property and other assets of the appellants which could properly be made the subject of an asset preservation order is that part of such property and assets which, on a reasonable estimate, would be needed to meet a judgment of the Federal Court in favour of LED in the copyright proceedings. No more. There was no warrant for freezing the assets of the appellants beyond LED's potential judgment. True, it would have been difficult for the primary judge to estimate, with precision, the ultimate recovery of LED, given that the claim for any account of profits had been heard by another judge and reserved. However, it was necessary, in terms of principle, to limit the disturbance of the property and other assets of the Cardiles and Ultra Modern to the potential recovery of LED and nothing more.

130 Although the orders as made listed many of the exclusions common in such orders, the appellants also complained that the exception for "the ordinary living expenses of [the Cardiles]" was insufficiently broad to permit them to take a holiday. I will not condescend to consider whether this was so for there are three substantial answers to the complaints belatedly made about the form of the orders.

131 First, the proper place for the appellants to have raised such matters was before the primary judge when the proceedings were returned to him on remitter. It was precisely to permit "outstanding adjectival questions"²⁰⁶ to be resolved in an efficient way, that the Full Court, instead of fashioning orders for itself (as it might have done), returned the entire matter to a single judge where the "fine tuning" of the orders could more appropriately and effectively be achieved. The fact that the appellants did not raise before the primary judge, on remitter, any of the discretionary considerations or objections to the form of the orders urged upon this Court, is a reason why they would ordinarily not be heard to complain about such matters²⁰⁷.

132 Secondly, the orders as they stand reserve liberty to any party, including the appellants, to apply on short notice to a judge of the Federal Court. The proper place to have raised issues concerned with the suggested over-reach of the orders eventually made, and the re-fashioning of those orders, was before the primary judge. As was demonstrated by the eventual acquiescence of LED before this Court, it was not at all unlikely that, had defects in the terms of the orders been brought to notice, LED would have consented to proper amendments. This is the way in which disputes concerning the form of orders are ordinarily resolved, at

²⁰⁶ (1997) 78 FCR 65 at 78.

²⁰⁷ cf *Bass v Permanent Trustee Co Ltd* [1999] HCA 9 at [89].

least unless the orders are misconceived in law or are so ineptly framed that they are incurably defective²⁰⁸.

133 Thirdly, the complaints about the form of the orders were not the essential matter about which the parties had argued their respective cases. From first to last, the issues in contention were those relating to the jurisdiction and power of the Federal Court to make asset preservation orders *at all*. Not orders framed in this or that way. There is no mention in the Full Court's reasons of the suggested defects of form. This is because those were not the issues before that court. The only matters of a discretionary character raised in the original grounds of appeal to this Court concerned first, the alleged error of the Full Court in disturbing the order of the primary judge in circumstances where, as it was complained, "there was no evidence that the [appellants] would be or were likely to dispose of their property in circumstances that might constitute an abuse of process" and secondly, that the Full Court had erred in taking into account "the declaration by [Eagle Homes] of dividends out of its profits, the lawfulness of which declaration was not put in issue".

134 Neither of these specific grounds had legal merit. It was clearly open, both to the primary judge and to the Full Court, to infer that unless restrained by asset preservation orders, the appellants would dispose of the assets which they had received in order to frustrate the utility of the Federal Court proceedings. Such conduct, if ultimately proved, could amount to an abuse of process. Taken in isolation, the declaration by Eagle Homes of the dividends in favour of the Cardiles might have been lawful. But in their context, it was certainly open to the Federal Court to infer that they constituted an endeavour to deplete the assets of Eagle Homes, leaving only a husk to meet any eventual judgment²⁰⁹.

135 In view of the long history of this unfortunate saga, there are strong reasons of convenience to avoid yet a further remitter of the proceedings to the Federal Court to make the variations in the orders which the appellants belatedly advocated. To that end, I agree that the grounds of appeal should be amended to permit the appellants, although long out of time, to bring an appeal from the orders ultimately made by the primary judge, on remitter from the Full Court. I concur in the form of the substantive substituted orders which Gaudron, McHugh, Gummow and Callinan JJ have proposed. They largely follow the document handed to the Court for LED, after the scope of the appeal was enlarged.

136 Only if this Court were to allow the appeal, might it substitute the amended orders for those made by the primary judge, on remitter. However, for the three

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

209 *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 589-590 per Kerr LJ; cf *Tilbury, Civil Remedies* (1990) vol 1 at 336-338.

reasons which I have mentioned, the enlargement of the appeal should not be at the cost of LED. That party came to this Court to meet arguments of jurisdiction and power. Upon those arguments, it was entitled to succeed. The complaints as to form can, and should, be addressed by this Court. But because they could, and should, have been raised in the Federal Court, the appellants should have no costs of the variation. They lost their substantive arguments. They should therefore pay the costs.

Orders

- 137 I therefore concur in the orders proposed by Gaudron, McHugh, Gummow and Callinan JJ save that I would order that the appellants pay the costs of the appeal to this Court and I would not disturb the costs order in their favour in the Full Court of the Federal Court.