

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

KARL PELECHOWSKI

APPELLANT

AND

THE REGISTRAR, COURT OF APPEAL

RESPONDENT

Pelechowski v The Registrar, Court of Appeal (S62-1998) [1999] HCA 19
6 May 1999

ORDER

1. *Appeal allowed.*
2. *Set aside the declaration and orders made by the New South Wales Court of Appeal on 28 October 1997 and 3 February 1998 and in their place, order that the summons against the appellant filed on 7 August 1996 be dismissed.*
3. *Discharge the appellant from any order, condition or undertaking to this Court which is restrictive of his personal liberty.*
4. *The respondent to pay the appellant's costs in this Court and in the New South Wales Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation:

A J McQuillen for the appellant (instructed by Greg Walsh & Co)

P Menzies QC with R P L Lancaster for the respondent (instructed by Crown Solicitor's Office of New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Pelechowski v The Registrar, Court of Appeal

Courts and tribunals – District Court of New South Wales – Powers – Asset preservation order made after judgment – Whether order beyond power.

Courts and tribunals – Powers – Implied power – Asset preservation order made after judgment – Whether power necessary for the effective exercise of jurisdiction – Relevance of express powers.

Contempt – District Court of New South Wales – Breach of order – Order beyond power – Whether contempt committed – Whether order a nullity or effective until set aside.

Costs – Availability – Proceedings criminal in nature but not a criminal prosecution.

Words and phrases – "necessary".

District Court Act 1973 (NSW), ss 46, 203.

Interpretation Act 1987 (NSW), ss 34, 35.

1 GAUDRON, GUMMOW AND CALLINAN JJ. The appellant, Karl Pelechowski, appeals against his conviction and sentence by the New South Wales Court of Appeal on a charge of contempt in respect of an order made against him in the District Court of that State.

The facts

2 At all material times, Mr Pelechowski and Ms Penelope Jane Stephens have been and are, as joint tenants, the registered proprietors of Lot 2033 in Deposited Plan No 255371. This Lot ("the Land") constitutes 9 Kippax Place, Erskine Park, an outer suburb of Sydney, and is land under the provisions of the *Real Property Act* 1900 (NSW) ("the Real Property Act").

3 On 18 January 1983, Michael Rahme (on the one part) and "Karl & Penny Pelechowski" (on the other part) entered into an "AGREEMENT FOR LOAN" ("the Agreement"). The Agreement provided that Mr Rahme would lend \$50,000 to the borrowers for a period of 12 months from 18 January 1983 and that the borrowers would repay the principal with interest of \$7,000. The Agreement stated that, should repayment of the loan exceed "the expiry date", the borrowers agreed to pay "14% monthly interest until settlement of property". The Agreement indicated that "Karl & Penny Pelechowski" were "Real Estate Licensee" [sic].

4 The parties had become acquainted during a period leading up to January 1983 when Mr Rahme purchased a property through a real estate business conducted by Mr Pelechowski and Ms Stephens at Mount Druitt. Mr Rahme provided the loan moneys to the borrowers from cash held by him in a bank safe deposit box.

The main proceedings

5 On 20 February 1990, Mr Rahme caused a Statement of Liquidated Claim to be issued out of the District Court of New South Wales at Penrith. Mr Rahme claimed the sum of \$92,439.95 plus interest from Mr Pelechowski and "Penny Pelechowski", alleged to be owing as a result of the Agreement. On 5 April 1993, an Amended Statement of Liquidated Claim was issued out of the District Court at Penrith which, among other things, indicated that Ms Pelechowski was also known as "Penelope Jane Stephens".

6 On 2 February 1994, the proceedings reflected in the Amended Statement of Liquidated Claim began before Christie DCJ at Parramatta. On that occasion,

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evidence was led on behalf of Mr Rahme from a person who witnessed the Agreement. At the conclusion of that evidence, the proceedings were adjourned until 15 April 1994 at Sydney.

7 On 29 March 1994, Mr Rahme filed a notice of motion seeking an order against "the Defendants Karl Pelechowski and Penny Pelechowski (also known as Penelope Jane Stephens)" restraining them from selling, disposing, encumbering, further encumbering or otherwise dealing with their interest in the Land. The restraining order was sought "pending further order of this Honourable [District] Court". In the alternative, Mr Rahme sought that "Karl Pelechowski and Penny Pelechowski (also known as Penelope Jane Stephens)" be restrained from dealing with a portion of the proceeds of sale of the property "pending final determination of the Hearing of [Mr Rahme's] Claim as against the Defendants".

8 On 15 April 1994, Christie DCJ heard the balance of the evidence in the main proceedings as well as the notice of motion. Mr Rahme was represented by counsel, Mr Pelechowski appeared in person and Ms Stephens did not appear, whether by counsel or personally. On the same day, Christie DCJ provided oral reasons for judgment. His Honour gave judgment for Mr Rahme against Mr Pelechowski and Ms Stephens in the sum of \$105,090 and made a limited order as to costs. Christie DCJ then dealt with the notice of motion and stated:

"That motion seeks to protect [Mr Rahme's] interest in a verdict which he now has against the defendants of \$105,090 with the exception of the costs.
...

Having regard to the view that I have of the defendants' evidence in this matter I propose to accede to the orders sought in [the] notice of motion and I order that the defendants Karl Pelechowski and Penny Pelechowski also known as Penelope Jane Stephens be restrained from selling or otherwise disposing of, encumbering or further encumbering or otherwise dealing with their interest in any way in the property situate and known as 9 Kippax Place, Erskine Park. I order that that order shall continue until further order or payment of the verdict."

Mr Pelechowski was, but Ms Stephens was not, in court when Christie DCJ gave judgment for Mr Rahme and made the order restraining any dealing in the Land.

9 It can be seen that the order granted by Christie DCJ had the effect of restraining any dealing in the Land until further order or payment of the verdict,

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even though the notice of motion appeared to be designed to protect Mr Rahme's position pending final determination of the main proceedings, a stage which had been reached when judgment was given in the sum of \$105,090 and a costs order was made.

- 10 After the delivery by Christie DCJ of his reasons for judgment, Mr Pelechowski sought leave to appeal. The following conversation then ensued:

"[CHRISTIE DCJ]: You don't need my leave to appeal. Lest it be thought otherwise you are actually seeking a stay of proceedings pending an appeal. If you are, I refuse a stay of proceedings but if you lodge an appeal that will in any event give you the stay of proceedings *but not in regard to the order I made regarding the property*. Do you understand[?]"

PELECHOWSKI: Yes, I understand, your Honour." (Emphasis added)

However, the order restraining any dealing in the Land was apparently not entered nor was a sealed copy obtained and served on either Mr Pelechowski or Ms Stephens. The evidence also does not disclose the taking by Mr Rahme of any steps to obtain either the issue under s 41 of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act") of a bankruptcy notice against Mr Pelechowski or Ms Stephens or the issue of a writ of execution against the Land.

- 11 Notwithstanding his awareness of the restraining order, Mr Pelechowski applied on 26 April 1994 (11 days later) for a loan from Household Financial Services Limited ("HFS"). The application, in which Mr Pelechowski was stated to be the "MAIN APPLICANT" and Ms Stephens the "CO-APPLICANT", was signed by both Mr Pelechowski and Ms Stephens. On 29 April 1994, Mr Pelechowski and Ms Stephens entered into a contract with HFS for a credit facility against which they could draw a maximum of \$25,000. The credit facility was secured by Mr Pelechowski and Ms Stephens granting to HFS on the same day a mortgage over the Land. The mortgage was subsequently registered under the Real Property Act.

- 12 On 29 April 1994, Mr Pelechowski drew against the credit facility (at least) the sum of \$21,586 by way of a cash advance. In July 1994, the credit facility was increased to \$45,000 and, in the period from 29 April to 27 August 1994, Mr Pelechowski made further drawings, to a maximum indebtedness of \$44,875.82. The order restraining any dealing in the Land remained in force during this period.

13 On 11 May 1994, HFS lodged a caveat under s 74F of the Real Property Act on the title to the Land. As envisaged by s 74F(6) of that Act¹, the consent of the registered proprietors to the lodging of the caveat was provided by Mr Pelechowski and Ms Stephens endorsing the caveat.

14 On 11 May 1994, Mr Pelechowski lodged in the Court of Appeal of New South Wales a notice of appeal against the orders of Christie DCJ. On a later date, he filed a notice of motion seeking to stay those orders pending the appeal. In turn, Mr Rahme filed a notice of motion seeking security for his costs in relation to the appeal by Mr Pelechowski. Although the position is not clear on the material before this Court, Mr Pelechowski did not pursue his appeal to the Court of Appeal.

The contempt proceedings

15 On 2 August 1994, the solicitor for Mr Rahme learned of the caveat lodged on the title to the Land. After further inquiries, Mr Rahme filed on 7 October 1994 notices of motion against Mr Pelechowski and Ms Stephens seeking the referral to the Supreme Court of an allegation that they were guilty of contempt of court. This application for referral was stated to be under s 203 of the *District Court Act* 1973 (NSW) ("the District Court Act").

16 In *Registrar of the Court of Appeal v Maniam [No 1]*², the Court of Appeal explained that the District Court Act establishes two procedures for dealing with contempt of that Court. The District Court itself may deal with contempt committed in the face of the Court or in the hearing of the Court (s 199). Further provision is made by s 203. This states:

1 Section 74F(6) provides:

"On the lodgment of a caveat under subsection (1), the Registrar-General must give notice in writing of the lodgment of the caveat to the registered proprietor of the estate or interest affected by the caveat by:

- (a) sending the notice by post to the address of the registered proprietor specified in the caveat, or
- (b) giving the notice in such other manner, whether by advertisement or otherwise, as the Registrar-General considers appropriate,

unless the consent of the registered proprietor is endorsed on the caveat."

2 (1991) 25 NSWLR 459 at 462-463, 469, 478-479.

5.

- "(1) Without prejudice to the powers of the District Court under section 199, where it is alleged, or appears to the District Court on its own view, that a person is guilty of contempt of court, whether committed in the face or hearing of the District Court or not, the District Court may refer the matter to the Supreme Court for determination.
- (2) On any matter being referred to the Supreme Court under subsection (1), the Supreme Court shall dispose of the matter in such manner as it considers appropriate."

17 In *Maniam*³, Mahoney JA said that for the power under s 203 to be exercised:

"it must first be alleged or appear to the court that a person is guilty of contempt of court; then the judge must ordinarily afford to the person in question the opportunity of showing why, in exercise of s 203, the judge should not refer the matter to the Supreme Court for determination. ... [T]he judge may, in the exercise of the discretion given by s 203, then refer the matter to the Supreme Court for determination."

18 On 30 May 1995, the notices of motion seeking referral were heard by Twigg DCJ in the District Court at Penrith. After concluding that there was an appearance that Mr Pelechowski and Ms Stephens were guilty of contempt of court, his Honour afforded both persons an opportunity to show why the matter should not be referred to the Supreme Court. As Mr Pelechowski was in court on 30 May 1995, Twigg DCJ afforded him that opportunity on the same day. Mr Pelechowski, who was represented by his solicitor on that occasion, made a brief statement to his Honour before declining to provide any further evidence. Twigg DCJ then exercised his discretion under s 203 of the District Court Act to refer the matter to the Supreme Court.

19 Ms Stephens was absent from the court on 30 May 1995 due to illness and his Honour adjourned the notice of motion against her until 2 June 1995. On this latter day, and after affording Ms Stephens, through her solicitor, an opportunity to show why the matter should not be referred, Twigg DCJ made an order referring the matter to the Supreme Court.

20 On 7 August 1996, a summons was filed by the Registrar in the Supreme Court seeking a declaration that Mr Pelechowski and Ms Stephens were guilty of contempt of court and orders that they be punished or otherwise dealt with for such contempt of court. In accordance with s 48(2)(i) of the *Supreme Court Act* 1970

3 (1991) 25 NSWLR 459 at 469.

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(NSW) ("the Supreme Court Act") as it stood at this time⁴, the summons was assigned to the Court of Appeal. The summons was filed by the Registrar with a view to the provisions of Pt 55 r 11(3)(a) of the Supreme Court Rules 1970 (NSW)⁵. The Registrar subsequently discontinued the proceedings against Ms Stephens.

21 On 11 July 1997, 5 August 1997 and 20 August 1997, the Court of Appeal (Handley, Beazley and Stein JJA) heard the summons. On 28 October 1997, their Honours delivered their reasons for judgment on the question of liability. Handley JA delivered the principal reasons for judgment, with which Beazley and Stein JJA agreed. Handley JA used the phrase "Mareva injunction" to identify the order restraining any dealing in the Land and found that Mr Pelechowski knew of the nature of a mortgage and that it constituted an encumbrance. His Honour noted that Mr Pelechowski had used the word "encumbrance" twice when referring to the order in the proceedings before Christie DCJ and that Mr Pelechowski had greater knowledge of land dealings than the average member of the public in light of having undertaken a real estate course, having obtained a real estate licence and having been a branch manager of a suburban real estate agency.

22 Handley JA also concluded that the District Court had power to grant the Mareva order against Mr Pelechowski by reason of the terms of s 46(1) of the District Court Act. Relevantly, this provision states:

"Without affecting the generality of Division 8, the [District] Court shall, in any action, have power to grant any injunction (whether interlocutory or

4 At the relevant time, s 48(2)(i) assigned to the Court of Appeal proceedings "for the punishment of contempt of the [Supreme] Court or of any other court". Section 48(2)(i) was amended by s 3 and Sched 1 of the *Courts Legislation Amendment Act* 1996 (NSW) so as to now assign to the Court of Appeal only a contempt of the Court of Appeal.

5 Pt 55 r 11(3)(a) provides:

"Where -

- (a) it appears to the District Court on its own view that a person is guilty of contempt of court, whether committed in the face or hearing of the District Court or not, and the District Court refers the matter to the Court for determination under section 203(1) of the District Court Act 1973;

...

the registrar must commence proceedings for punishment of the contempt, and no direction from the Court shall be necessary to enable the registrar to do so."

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otherwise) which the Supreme Court might have granted if the action were proceedings in the Supreme Court."

Handley JA held:

"*Riley McKay Pty Ltd v McKay & Anor*⁶ established that the Supreme Court had power, derived from s 23 of the *Supreme Court Act* and its inherent jurisdiction, to grant a Mareva [order]. *Prima facie* the District Court has the same power under s 46(1). [Counsel for Mr Pelechowski] submitted that there was no equivalent to s 23 in the *District Court Act* and as a so-called inferior court it did not have the same inherent jurisdiction as the Supreme Court. However, with respect, this cannot affect the express terms of s 46(1)."

23 On 3 February 1998, the Court of Appeal delivered its reasons for judgment on the question of penalty. The Court of Appeal sentenced Mr Pelechowski to a fixed term of imprisonment of six months, indicating that no lesser penalty would vindicate the authority of the court. The Court of Appeal also noted that the imposition of a fine would be a wholly inappropriate response to the wilful and deliberate flouting of the Mareva order.

24 The ordering of the business of the Supreme Court with respect to contempt proceedings, such as in issue in the present case, had the result that there was no intermediate appeal between the conviction and an appeal, by special leave, to this Court.

25 In this Court Mr Pelechowski appeals against the sentence imposed by the Court of Appeal but also contends that the order of the District Court, of which he was adjudged in contempt, was an order which the District Court was not empowered to make. That latter submission raised questions as to the extent of the power of the District Court to grant relief of an equitable nature, whether in aid of legal or equitable rights. To these aspects of the appeal we now turn.

The District Court

26 Section 8(2) of the District Court Act establishes that Court as a court of record. Section 9 states:

"(1) The Court shall have a civil jurisdiction, consisting of:

6 [1982] 1 NSWLR 264.

8.

- (a) its jurisdiction conferred by Part 3, and
 - (b) the jurisdiction conferred by or under any other Act or law on the Court, not being its jurisdiction referred to in subsection (2).
- (2) The Court shall have a criminal jurisdiction, consisting of:
- (a) its jurisdiction conferred by Part 4, and
 - (b) the jurisdiction conferred by or under any other Act or law on the Court in its criminal jurisdiction."

Part 3 comprises ss 25-161 and is headed "The civil jurisdiction of the Court". Part 4 (ss 165-175) is headed "The criminal jurisdiction of the Court".

27 In *United Telecasters Sydney Ltd v Hardy*⁷, Samuels AP (with whom Clarke and Meagher JJA agreed), in giving the judgment of the Court of Appeal, applied to the District Court the principle which, in *Attorney-General for New South Wales v Mayas Pty Ltd*⁸, McHugh JA had explained as follows:

"If an inferior tribunal exercising judicial power has no authority to make an order of the kind in question, the failure to obey it cannot be a contempt. Such an order is a nullity. Any person may disregard it. Different considerations arise, however, if the order is of a kind within the tribunal's power but which was improperly made. In that class of case, the order is good until it is set aside by a superior tribunal. While it exists it must be obeyed."

28 In *United Telecasters*, the Court of Appeal held that the District Court did not have power to order the prior restraint of a threatened contempt by a television station in broadcasting material which might identify the accused in a trial before that Court⁹. The Court of Appeal also held that the District Court did not have power to accept undertakings in the same terms. In the latter connection, the Court referred¹⁰ to the decision of this Court in *Thomson Australian Holdings Pty Ltd v*

7 (1991) 23 NSWLR 323 at 335.

8 (1988) 14 NSWLR 342 at 357.

9 (1991) 23 NSWLR 323 at 335.

10 (1991) 23 NSWLR 323 at 335.

9.

*Trade Practices Commission*¹¹. It followed, as Samuels AP put it, that the order in question "was a complete nullity and bound no-one"¹² and could not found a proceeding for contempt. Further, his Honour held that¹³:

"[s]ince [the District Court] had no power to issue an injunction in those terms, it can have no power to accept an undertaking in the same terms. Since the undertaking was clearly unenforceable I would dismiss the claim for a declaration that [United Telecasters] was guilty of a contempt for breaching an undertaking to the court."

29 It is upon those propositions that Mr Pelechowski founds his present appeal to this Court. The question then becomes whether the District Court did have the power to make the order the subject of the successful contempt proceedings. The appeal thus turns upon the statutory or other authority which supports the making of such an asset preservation order.

30 The Registrar referred, in particular, to the conferral upon the District Court of the power to grant equitable remedies, particularly injunctions.

31 The interpretation of the particular provisions upon which this appeal turns are best approached with an understanding of the pre-1973 legislation which the District Court Act replaced. This was the *District Courts Act* 1912 (NSW) ("the 1912 Act").

32 Section 74 of the 1912 Act stated:

"(1) The defendant or the plaintiff in replevin in any action in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, may rely upon the facts which entitled him to such relief by way of defence.

(2) Notice of such facts, with the words 'for defence on equitable grounds,' shall be given as hereinafter provided, and the plaintiff or defendant (as the case may be) may reply to any such plea facts which avoid the same on equitable grounds."

11 (1981) 148 CLR 150 at 165.

12 (1991) 23 NSWLR 323 at 335.

13 (1991) 23 NSWLR 323 at 336.

Provision to like effect was made with respect to actions at common law in the Supreme Court of New South Wales by s 95 of the *Common Law Procedure Act* 1899 (NSW). Before it was supplemented in 1957 with a new provision¹⁴, s 95 was interpreted as accepting the position whereby, on the trial of an action at common law, a verdict was found for or against the plaintiff and there was no provision for acceptance of a defence subject to the imposition of conditions upon the defendant. The result was that the section did not apply unless the equitable defence which the defendant sought to raise would, if successful, entitle the defendant to a perpetual and unconditional injunction¹⁵.

33 Section 74 of the 1912 Act was repealed by s 3(1) of the *Law Reform (Law and Equity) Act* 1972 (NSW) ("the Law and Equity Act"). This statute commenced on 1 July 1972. Section 5 of the Law and Equity Act provides for the rules of equity to prevail in any conflict or variance with the rules of common law relating to the same matter and s 6 requires every inferior court to give effect to every ground of defence, equitable or legal, in as full and ample a manner as might and ought be done in the like case by the Supreme Court under the Supreme Court Act. The Supreme Court Act also came into force on 1 July 1972.

34 In its terms, s 74 of the 1912 Act did not confer upon the District Court jurisdiction to institute proceedings which otherwise might properly be commenced only in the equity jurisdiction of the Supreme Court. Nor does the Law and Equity Act. Section 7 thereof states that that statute does not "enlarge the jurisdiction of any court as regards the nature or extent of the relief available

14 Section 98, inserted by s 5 of the *Supreme Court Procedure Act* 1957 (NSW).

15 See *Carter v Smith* (1952) 52 SR (NSW) 290 at 292-293, 294, 294-295; Jacobs, "Law and Equity in New South Wales after the Supreme Court Procedure Act, 1957, Section 5", (1959) 3 *Sydney Law Review* 83 at 86-88.

in that court". In *United Telecasters*¹⁶, Samuels AP pointed out that the result was that, although all inferior courts could now entertain every ground of defence, equitable or legal, there had been no enlargement of the jurisdiction of any inferior court as regards the nature and extent of the relief available in that court.

35 A limited jurisdiction in equity had been conferred by s 4 of the *District Courts (Amendment) Act* 1949 (NSW). This added a new Pt IIIA to the 1912 Act. The new Part comprised s 131A which gave to the District Court all the powers and authority of the Supreme Court in certain equity proceedings, such as those for the execution of trusts, foreclosure or redemption of mortgages, the administration of a deceased estate and for specific performance and rectification, but, in all cases, with a limitation as to the monetary sum involved.

36 It was in that state of affairs that the 1912 Act was replaced by the current legislation. It commenced on 1 July 1973, one year after the commencement of the Supreme Court Act and the Law and Equity Act. The former statute, in particular, instituted major changes in the structure and procedures of the Supreme Court of New South Wales.

37 The action brought by Mr Rahme on the Agreement was in the civil jurisdiction conferred by Div 2, not Div 8, of Pt 3 of the District Court Act. Division 8 (ss 132-142F) of Pt 3 is headed "Miscellaneous jurisdiction" and subdiv 2 thereof (ss 133-139) is headed "Possession of land, equity and other proceedings". Section 134 is in form and nature the successor of s 131A of the 1912 Act. It provides that the District Court shall have the same jurisdiction as the Supreme Court and may exercise all the powers and authority of the Supreme Court in such matters as the execution of trusts, foreclosure or redemption of mortgages, the administration of deceased estates, specific performance and rectification and equitable claims or demands for recovery of money or damages. At each instance, the proceedings are defined by reference to a specified sum of money which is involved. The action in which judgment was recovered against Mr Pelechowski did not fall within the jurisdiction conferred by Div 8, in particular s 134.

38 Subdivision 3 of Div 8 (ss 140-142) is headed "Temporary injunctions". Section 140(1) states:

"(1) The Court shall have jurisdiction to grant an injunction, to be called a temporary injunction, to restrain:

16 (1991) 23 NSWLR 323 at 332.

12.

- (a) a threatened or apprehended trespass or nuisance, or
- (b) the breach of a negative stipulation in a contract the consideration for which does not exceed \$20,000,

in like manner, subject to this Subdivision, as the Supreme Court might grant an interlocutory injunction in like circumstances."

Subject to other provisions in the subdivision, a temporary injunction shall continue in force for a specified period not exceeding 14 days (s 140(2)) and provision is made for renewal beyond 14 days if the Court be satisfied that the additional time is required to enable proceedings to be commenced and heard in the Supreme Court in relation to the matter (s 140(3)). The order made against Mr Pelechowski after recovery of judgment against him was not a temporary injunction within the meaning of s 140.

39 The term "action" is defined in s 4(1) of the District Court Act as meaning "action in the Court" but as not including any proceedings under Div 8 of Pt 3. Division 2 of Pt 3 is headed "Actions: jurisdiction" and subdiv 1 thereof (ss 44-48) makes provision for general jurisdiction in relation to actions. Paragraph (a) of s 44(1) provides that, subject to the statute and with certain exceptions not presently material, the District Court has jurisdiction to hear and dispose of any action of a kind which, if brought in the Supreme Court, would be assigned to the Common Law Division thereof and in which the amount claimed does not exceed a stipulated amount. The action brought by Mr Rahme claiming indebtedness owing under the Agreement answered that description.

40 Section 46 has the marginal note "Ancillary equitable relief: injunctions". Section 35(1) of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act") provides that headings to Parts, Divisions or subdivisions or Schedules into which an Act is divided shall be taken to be part of the Act. However, the effect of s 35(4) of the Interpretation Act is, as submitted by counsel for the respondent, that the marginal note to s 46 is not to be taken to be part of the Act. Nevertheless, this material, whilst not forming part of the Act, is set out in the document containing the text of the Act as printed by the Government Printer. Therefore, as indicated in *Darling Casino Ltd v NSW Casino Control Authority*¹⁷, such material may be considered in the interpretation of s 46. That follows from par (a) of s 34(2) of the Interpretation Act. The marginal note is capable of assisting in the ascertainment of the meaning of the section. Consideration may be given to it for such purposes as to confirm that the meaning is the ordinary meaning conveyed by the text, taking into account its context in the statute and the purpose or object underlying the

¹⁷ (1997) 191 CLR 602 at 621.

statute (s 34(1)(a)) and to determine the meaning of the provision if it is ambiguous (s 34(1)(b)(i)).

41 Section 46(1) of the District Court Act states:

"Without affecting the generality of Division 8, the Court shall, in any action, have power to grant any injunction (whether interlocutory or otherwise) which the Supreme Court might have granted if the action were proceedings in the Supreme Court."

The power granted by s 46(1) is not confined by reference to matters not required by its terms or the context in which it appears¹⁸. But it is necessary to construe those terms and to consider the context.

42 The opening words in s 46(1), with their reference to Div 8, must be read with the statement in the definition of "action" that the term does not include any proceedings under Div 8. Section 46(1) does apply to actions commenced under Div 3.

43 Section 46(2) makes provision in relation to the power to grant an injunction under s 46(1). It provides that the District Court and the judges shall, in addition to the powers and authority they otherwise enjoy, have "all the powers and authority of the Supreme Court and the Judges thereof in the like circumstances" (par (a)). So far as practicable and subject to the District Court Act and the District Court Rules 1973 (NSW), the practice and procedure of the District Court shall be the same as that of the Supreme Court applicable in the like circumstances (par (c)).

44 It is apparent that the injunctive remedy for which provision is made in s 46 is ancillary to the exercise of the jurisdiction of the District Court to hear and dispose of the actions specified in s 44. These are essentially in the nature of claims for damages for wrongs or other invasions of legal rights, titles and interests.

45 The legal rights of Mr Rahme under the Agreement in respect of which he brought the action in the District Court were rights of this nature. However, they merged in the judgment he recovered in that Court¹⁹. The order which he then obtained as a post-judgment remedy was, at best, designed to preserve the Land as an asset of the judgment debtors (Mr Pelechowski and Ms Stephens) so that it

18 *CDJ v VAJ* (1998) 72 ALJR 1548 at 1556, 1565; 157 ALR 686 at 697, 709-710.

19 *Austin v Mills* (1853) 9 Ex 288 [156 ER 123].

would be available for execution or other enforcement of the judgment debt. An order of that nature is neither an injunction nor an injunction "in an action"²⁰ for the purposes of s 46. Orders such as that made here by the District Court may be made by superior courts of record, yet even there they have a different basis in principle and doctrine to injunctions in aid of legal rights, titles and interests in pending litigation²¹.

- 46 The result is that the remedy for which s 46 provides did not support the order in question here. Nor was there any other provision which expressly provided that support.

Implied power

- 47 The Registrar relied upon a power said to be enjoyed by the District Court by implication from the provisions in the District Court Act expressly providing remedies for the enforcement of judgments. Division 4 (ss 84-114) of Pt 3 is headed "Actions: enforcement of judgments". Subdivision 3 (ss 90-94) provides for the examination of judgment debtors, subdiv 4 (ss 97-106) for the attachment of debts and subdiv 5 (ss 107-112) for writs of execution. Further, subdiv 6 (ss 113-114) empowers the Court to issue a writ against the person of a judgment debtor who is about to leave the Commonwealth or to remove property from the Commonwealth with intent to evade payment of the judgment debt. As a condition of authorising the issue of such a writ, the Court may require the provision of security by the judgment creditor (s 113(1A)).

- 48 In s 110, special provision is made whereby a writ of execution may bind land in like manner as a writ of execution against property binds goods and chattels. Section 110 operates subject to s 105 of the Real Property Act. That

20 cf s 23 of the *Federal Court of Australia Act* 1976 (Cth), which confers power to make orders as the Court thinks appropriate "in relation to matters" and which was considered in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 and in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [No 3]* (1998) 72 ALJR 873; 153 ALR 643.

21 See *Cardile v LED Builders Pty Ltd* [1999] HCA 18 at [50].

provision empowers the recording of a writ²² in the register required to be maintained by the Registrar-General under s 31B of the Real Property Act. That statute stipulates that the writ must be lodged with the Registrar-General not later than six months after the date of its issue (s 105(2)(d)). The recording of the writ is ineffective against the dealing by a mortgagee in exercise of its powers under a mortgage that was recorded in the register before the writ was so recorded (s 105A(1)(f)).

49 It is against this background that there falls for consideration the submissions with respect to the implied power of the District Court in a case such as the present where a final judgment had been recovered in an action.

50 Some guidance in the matter is provided by the decision of this Court in *Grassby v The Queen*²³. It was there held that specific provision upon the subject made in the *Justices Act* 1902 (NSW) left no room for the implication of a discretionary power to terminate proceedings in a manner other than that provided²⁴. The result was that a magistrate had no power to order a stay of committal proceedings as an abuse of process. The leading judgment was given by Dawson J. After referring to the proposition that it is the general responsibility of a superior court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power, his Honour continued²⁵:

"It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster²⁶. On the other hand, a magistrate's court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the

22 A term defined in s 3(1) of the Real Property Act as meaning:

"[a] writ that issues out of a court of competent jurisdiction and authorises the sale of land for the purpose of satisfying a judgment debt, including a renewal of a writ and a second or subsequent writ issued on a judgment."

23 (1989) 168 CLR 1.

24 (1989) 168 CLR 1 at 18.

25 (1989) 168 CLR 1 at 16-17. See also *Reid v Howard* (1995) 184 CLR 1 at 16-17; *Director of Public Prosecutions v Shirvanian* (1998) 44 NSWLR 129 at 132-133, 136, 155-156.

26 And with respect to federal jurisdiction, by Ch III of the Constitution.

well of undefined powers which is available to the Supreme Court. However, notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise ... Those implied powers may in many instances serve a function similar to that served by the inherent powers exercised by a superior court but they are derived from a different source and are limited in their extent. The distinction between inherent jurisdiction and jurisdiction by implication is not always made explicit, but it is, as Menzies J points out^[27], fundamental."

Dawson J concluded that recognition of the existence of the powers which an inferior court must possess by way of necessary implication will be called for²⁸:

"whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be 'derived by implication from statutory provisions conferring particular jurisdiction'".

51 The term "necessary" in such a setting as this is to be understood in the sense given it by Pollock CB in *The Attorney-General v Walker*²⁹, namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided in Div 4 of Pt 3 of the District Court Act. In this setting, the term "necessary" does not have the meaning of "essential"; rather it is to be "subjected to the touchstone of reasonableness"³⁰.

52 In the present case, an asset preservation order might properly have restrained any dealing by the judgment debtors with the Land for such period as was appropriate for the judgment creditor to move promptly to utilise the provisions with respect to writs of execution in subdiv 5 of Div 4 of Pt 3 of the District Court Act. Such an order may reasonably have been required as ancillary to the proper objective of preventing the recording of adverse dealings in the register before the

27 In *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7.

28 (1989) 168 CLR 1 at 17.

29 (1849) 3 Ex 242 at 255-256 [154 ER 833 at 838-839].

30 *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447 at 452. See also *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450; *Proprietors Units Plan No 52 v Gold* (1993) 44 FCR 123 at 126; Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", (1997) 113 *Law Quarterly Review* 120 at 130-131.

recording of a writ of execution against the Land on the application of the judgment creditor. Other examples may be imagined.

53 However, the order made in this case was different in its nature and effect. The effect was to give Mr Rahme something in the nature of an additional security for payment of the judgment debt, by denying to Mr Pelechowski and Ms Stephens the exercise of their proprietary rights which otherwise had not been diminished by the recovery of a judgment itself. The order operated without receipt of any undertaking by Mr Rahme expeditiously to pursue the remedies provided by the District Court Act or the Bankruptcy Act. The importance, in such a situation, of an undertaking to proceed expeditiously is emphasised in the joint judgment in *Cardile v LED Builders Pty Ltd*³¹.

54 The restraint imposed by the District Court was to continue "until further order or payment of the verdict". The order was not so expressed as to operate in aid of recovery of so much of the judgment debt as might be recouped upon a sale under a writ of execution. Nor, should Mr Rahme have decided to pursue his rights under the Bankruptcy Act, was the order expressed as subjected to rights of creditors under an insolvent administration of the affairs of the judgment debtors. The submissions by the Registrar with respect to implied power should be rejected.

Conclusions

55 We have referred to the statements in *Attorney-General for New South Wales v Mayas Pty Ltd*³² and *United Telecasters*³³ with respect to the consequences for a contempt application of an absence in the District Court of power to make the order in question. In the present case, it follows that the orders adjudging the appellant guilty of contempt and imposing sentence upon him should not have been made.

56 The appeal to this Court should be allowed, the declaration and orders of the Court of Appeal of 28 October 1997 and 3 February 1998 should be set aside and in place thereof the summons against the appellant filed on 7 August 1996 should be dismissed.

57 The appellant should be discharged from any order, undertaking to this Court or condition which is restrictive of his personal liberty.

31 [1999] HCA 18 at [53].

32 (1988) 14 NSWLR 342 at 357.

33 (1991) 23 NSWLR 323 at 335-336.

- 58 The contempt proceeding in the Court of Appeal was criminal in nature³⁴ but it was not a criminal prosecution. The respondent should pay the costs of the appellant in this Court and in the Court of Appeal.

34 *Witham v Holloway* (1995) 183 CLR 525. A costs order was made in that case and in *Lane v Registrar of Supreme Court of NSW* (1981) 148 CLR 245.

- 59 McHUGH J. This appeal is brought against an order of the Court of Appeal of New South Wales holding the appellant guilty of contempt of an order of the District Court of that State and ordering his imprisonment for six months. Three issues arise in the appeal. First, whether in the circumstances of this case the District Court of New South Wales had jurisdiction to make a post-judgment asset preservation order against the appellant. Second, if that order was within jurisdiction, whether the sentence of six months' imprisonment for breach of it was manifestly excessive in the circumstances of the case. Third, in circumstances where this Court has suspended the operation of a sentence pending the hearing of an application or an appeal in the Court, whether, after the hearing, the Court has power to require the applicant or appellant to serve the balance of the sentence imposed, notwithstanding that the nominal period of the sentence has expired.

Factual background

- 60 In January 1983, the appellant, Mr Karl Pelechowski, and Ms Penelope Stephens borrowed a sum of money from a Mr Rahme. The loan agreement took the form of an executed deed and provided for full repayment of the principal sum together with specified interest within one year from the date of execution. At the end of the agreed loan period, most of the debt remained unpaid.
- 61 Six years later, in February 1990, Mr Rahme commenced proceedings in the District Court of New South Wales to recover the amount owing under the deed, then said to be almost \$100,000. The proceedings, which were heard by Christie DCJ, concluded on 15 April 1994. The appellant represented himself, but did not give oral evidence. There was no appearance by or for Ms Stephens at the trial although she had filed a statement of defence denying the agreement. Christie DCJ refused to accept the assertions of the appellant that neither he nor Ms Stephens had made the agreement or that they owed the debt. Those assertions had been made from the Bar table in cross-examination and address, in affidavits which the learned judge allowed the appellant to tender and in the appellant's sworn defence.
- 62 Shortly before the District Court hearing was concluded, Mr Rahme filed and served a notice of motion seeking an order restraining the appellant and Ms Stephens from any dealings with a house in the Sydney suburb of Erskine Park. The house was the only significant asset of both the appellant and Ms Stephens. The motion was supported by an affidavit, sworn by Mr Rahme, declaring that he was concerned that the appellant would leave the country without satisfying any judgment debt owing.
- 63 Christie DCJ heard the motion immediately after he had pronounced his *ex tempore* reasons and verdict in favour of the plaintiff, Mr Rahme, in the action for the debt. After referring to the poor view that he had taken of the appellant's

credibility during the trial³⁵, his Honour ordered that the appellant and Ms Stephens "be restrained from selling or otherwise disposing of, encumbering or further encumbering or otherwise dealing with their interest in any way in the property". His Honour also ordered that this restriction should "continue until further order or payment of the verdict". The record indicates that the meaning and purpose of these orders were clearly explained to the appellant and that he conceded his understanding of them.

- 64 In late April 1994, the appellant defied the orders. He and Ms Stephens entered into a loan agreement with a finance company. They gave a second mortgage over the Erskine Park property as security for the loan. In accordance with the terms of the agreement, a caveat was placed on the title to protect the finance company's interest as second mortgagee. During the loan negotiations, the appellant did not disclose to the second mortgagee the existence of the order made by Christie DCJ. As a result of this transaction, the equity of the appellant and Ms Stephens in the Erskine Park property was reduced to virtually nothing. They expended the money borrowed from the finance company on living expenses and legal costs.
- 65 After Mr Rahme became aware of this defiance of the District Court's order, he made an application to the District Court to have the appellant dealt with for contempt³⁶. Twigg DCJ, who heard the application, referred the matter to the Supreme Court. The reason for the referral was that any contempt had not occurred in the face or hearing of the Court³⁷. Consequently, the District Court had no power to deal with the alleged contempt³⁸. Pursuant to the Rules³⁹ of the Supreme Court, the Registrar of the Court of Appeal caused a summons to be issued against the appellant and Ms Stephens to answer a charge of contempt before the Court of Appeal of New South Wales. Ultimately, proceedings against Ms Stephens were not pressed.

35 Not only had his Honour rejected the sworn defence of the appellant but he found "preposterous" assertions made by the appellant against a retired postmistress who gave evidence that Mr Rahme, Ms Stephens and the appellant had signed the loan agreement at her then post office which was in the same street where the appellant then worked.

36 *District Court Act 1973* (NSW), s 203.

37 Section 199.

38 *Registrar of the Court of Appeal v Maniam [No 1]* (1991) 25 NSWLR 459 at 462-463 per Kirby P, 469 per Mahoney JA and 478-479 per Hope A-JA.

39 *Supreme Court Rules 1970* (NSW), Pt 55 r 11(3).

The Court of Appeal's decision

- 66 The Court of Appeal (Handley, Beazley and Stein JJA) heard the summons for contempt over three days in July and August 1997. Counsel for the appellant contended that the appellant could not be found guilty of contempt for one or more of three reasons. First, the order made by Christie DCJ was so unclear and ambiguous that it could not found a case of contempt. Second, the appellant had not had proper notice of the terms of the order. Third, the order was beyond the jurisdiction of the District Court and of no force and effect. On 28 October 1997, the Court of Appeal rejected the appellant's arguments and declared him guilty of contempt of the District Court by reason of his "wilful breaches" of the District Court's order made by Christie DCJ. Handley JA delivered the main judgment, with which Beazley and Stein JJA agreed. The proceedings were adjourned to hear further evidence and submissions as to the penalty (if any) to be imposed. Those proceedings were heard on 10 December 1997.
- 67 On 3 February 1998, the Court delivered a single judgment sentencing the appellant to six months' imprisonment. Counsel for the appellant had asked the Court to take into account, among other things, the appellant's allegedly disordered state of mind and stress at the time the order was breached. This suggestion was expressly rejected by the Court, in that it was "contrary to the findings of the court in its judgment of 28 October 1997." The Court reiterated its view that the breaches were "clearly deliberate and wilful and [committed] with a knowledge and understanding of the order." As to counsel's claim that the appellant had offered "repeated and fulsome apologies" for his contempt, the Court took the view that the apology that had been proffered was belated, vague and insincere. The fact that the apology was not accompanied by any offer, however small, to satisfy even part of the judgment debt reinforced the Court's doubts. The Court emphasised the appellant's apparent disregard of his obligations arising out of the District Court proceedings. The learned judges said "[i]t is patent that the [appellant] has no proposal to satisfy the judgment debt, nor indeed to make any offer of payment to Mr Rahme, however small."
- 68 In deciding to impose a custodial sentence, the Court said that, in the circumstances of the case, a fine would be "wholly inappropriate", given that the contempt was wilful and deliberate and that the appellant had already driven himself to the brink of bankruptcy, seemingly with little concern. Their Honours said:

"The contempt must be regarded in a most serious light. We are unsure whether the contemnor fully appreciates or understands, even at this stage, the seriousness of his conduct. Indeed, it is possible that some of his evidence has been deliberately false with the intent to mislead the court. His belated apology is to be contrasted with his earlier defiance.

...

We are cognizant that not all wilful and deliberate interferences with the administration of justice should attract a custodial sentence ... But here the court is faced with a particularly blatant and determined threat to the integrity of the civil justice system.

...

No lesser penalty than 6 months gaol will suffice to vindicate the authority of the court."

- 69 The Court ordered the six month sentence to commence on the day of judgment, 3 February 1998, with the result that it would expire on 3 August 1998. The Court refused the appellant's application for bail, pending the making of an application for special leave to appeal to this Court.
- 70 On 26 February 1998, however, Gummow J granted bail to the appellant pending determination of his application for special leave to appeal. On 1 May 1998, this Court granted the appellant special leave to appeal against his conviction and sentence and ordered that his bail be extended until such time as his appeal was determined by the Court.

Validity of the District Court's order regarding the property

- 71 The appellant contends that the asset preservation order made by Christie DCJ was a nullity because orders of that type are beyond the jurisdiction of the District Court. A long line of cases establishes that an order made by an inferior court, such as the District Court, will be null and void if that Court did not have jurisdiction to make the order⁴⁰. Those decisions also hold that such an order cannot found a prosecution for contempt. Whether a particular matter is within an inferior court's jurisdiction is often a difficult question necessitating a careful examination of the legislation from which the court's authority stems.
- 72 Central to the determination of the issue of jurisdiction in this case is s 46 of the *District Court Act 1973* (NSW) ("the Act"). That section, which contains a side note - "Ancillary equitable relief: injunctions" - provides:

40 *Revell v Blake* (1873) LR 8 CP 533 at 544 per Blackburn J; *Scott v Bennett* (1871) LR 5 HL 234 at 245-246 per Martin LJ; *Attorney-General for New South Wales v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 357 per McHugh JA; *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 335 per Samuels AP.

23.

(1) Without affecting the generality of Division 8⁴¹, the Court shall, in any action, have power to grant any injunction ... which the Supreme Court might have granted if the action were proceedings in the Supreme Court.

(2) In relation to the power of the Court to grant an injunction under this section:

(a) the Court and the Judges shall, in addition to the powers and authority otherwise conferred on it and them, have all the powers and authority of the Supreme Court and the Judges thereof in the like circumstances,

...

(c) the practice and procedure of the Court shall, so far as practicable and subject to this Act and the rules, be the same as the practice and procedure of the Supreme Court applicable in the like circumstances, and

(d) without affecting the generality of the foregoing provisions of this section, the powers, authority and duty conferred by ... [paragraph (a)] ... and the practice and procedure of the Court referred to in paragraph (c) shall, subject to the rules, extend to the enforcement of any order of the Court made in connection with proceedings for the grant of the injunction."

- 73 The appellant contends that s 46(1) of the Act, though conferring a remedial power upon the District Court, does not confer any of the Supreme Court's *jurisdiction*. According to the appellant's argument, it is a superior court's inherent jurisdiction that allows it to make orders in the form of a Mareva injunction or any other asset preservation order and that that jurisdiction cannot be conferred upon an inferior court other than by express words - which, he asserts, are not present in s 46. The appellant submits that all s 46 does is to confer on the District Court a collection of powers which may be exercised "in any action" for the grant of an injunction. Further, so he contends, the statutory context, the content of surrounding provisions and the heading given to s 46 itself all suggest that the provision was intended only to augment the District Court's power to grant remedies to parties whose rights have been infringed. These powers, the appellant submits, are quite separate from the Supreme Court's inherent powers of superintendence and self-

41 Division 8 confers limited jurisdiction on the District Court in respect of a number of areas of law and equity.

regulation, and it is the latter, rather than the former, that provide the authority for Mareva-type orders.

The rationale of Mareva-type orders

- 74 Court orders aimed at preventing the dissipation of a defendant's assets prior to the completion of litigation are often collectively described as "Mareva injunctions", though that term is arguably accurate only in respect of one variety of such order. That is, an *ex parte* order made before the hearing of an action to restrain the defendant from taking assets out of the jurisdiction. Mareva-type injunctions are interlocutory orders, and, like all interlocutory orders, their purpose is to protect the rights of parties involved in litigation. Before 1975, most practitioners would have been astonished to be told that such an order could be made after the delivery of judgment. The practice of, if not the fixed rule applied by, Anglo-Australian courts was that a party could not obtain security, before or after judgment, from another party to ensure that the judgment would be met⁴². Before judgment, the moving party had no right of any kind to prevent the other party from disposing of an asset unless the moving party had some interest in the asset. After judgment, the successful party had to look to one or other of the forms of execution against assets to secure its rights. In 1975, however, the law changed. In two cases - *Mareva Compania Naviera SA v International Bulk Carriers SA*⁴³ and *Nippon Yusen Kaisha v Karageorgis*⁴⁴ - the English Court of Appeal made *ex parte* orders preventing the defendants from taking funds out of the jurisdiction. This was a surprising development because the applicants for the orders had no rights or interests in, or in respect of, the funds. All that they had was an expectation that after judgment they might need to execute against the funds in order to satisfy the judgments which they expected to obtain. In the course of time, the jurisdiction to issue Mareva-type orders has so developed that such an order may be obtained even after judgment has been obtained in the action⁴⁵. Courts throughout the common law world have now accepted that they have jurisdiction to make Mareva-type orders⁴⁶. But upon what jurisprudential basis can such orders be justified?

42 *Mills v Northern Railway of Buenos Ayres Co* (1870) 5 Ch App 621; *Lister & Co v Stubbs* (1890) 45 Ch D 1; *Scott v Scott* [1951] P 193.

43 [1975] 2 Lloyd's Rep 509.

44 [1975] 1 WLR 1093; [1975] 3 All ER 282.

45 *Faith Panton Property Plan Ltd v Hodgetts* [1981] 1 WLR 927; [1981] 2 All ER 877; *Babanaft International Co SA v Bassatne* [1990] Ch 13. See also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.

46 *Praznovsky v Sablyack* [1977] VR 114 (Victoria); *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104 (New Zealand); *BP Exploration Co (Libya) Ltd v Hunt* (Footnote continues on next page)

- 75 In England, the jurisprudential basis of the remedy was eventually found in the notion that it was necessary to prevent abuse of the process of the court by the frustration of its remedies⁴⁷. In New South Wales, the Court of Appeal found the basis of the remedy in the inherent jurisdiction of the Court and s 23 of the *Supreme Court Act* 1970 (NSW) which provides that the Supreme Court "shall have all jurisdiction which may be necessary for the administration of justice in New South Wales." In *Jackson v Sterling Industries Ltd*, Deane J said⁴⁸ that the "general power [ie to make a Mareva-type order] should, however, now be accepted as an established part of 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." His Honour went on to say:

"That being so, the power to grant such 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* of power, in relation to such matters, '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'."

- 76 There can be no doubt therefore that, if the action between Mr Rahme and the appellant and Ms Stephens had been brought in the Supreme Court of New South Wales, that Court would have had jurisdiction⁴⁹ to make the order that Christie DCJ made in the present case. Whether a judge of the Supreme Court would have made an order on the limited material before Christie DCJ may be doubted. But that is of no present relevance. The critical question is whether s 46 conferred *jurisdiction* on the District Court to make such an order. In my opinion, it did.

- 77 Jurisdiction is authority to decide⁵⁰. It is "the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented

(1980) 114 DLR (3d) 35 (Canada); *Bank of New Zealand v Jones* [1982] Qd R 466 (Queensland); *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264 (New South Wales); *Devlin v Collins* (1984) 37 SASR 98 (South Australia).

47 *Barclay-Johnson v Yuill* [1980] 1 WLR 1259 at 1264-1266; [1980] 3 All ER 190 at 194-196.

48 (1987) 162 CLR 612 at 623 per Deane J with whose judgment Mason CJ and Wilson and Dawson JJ agreed (at 616).

49 See eg *Balfour Williamson v Douterluingne* [1979] 2 NSWLR 884; *Ballabil Holdings v Hospital Products* (1985) 1 NSWLR 155.

50 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 627 per Toohey J; *Gould v Brown* (1998) 193 CLR 346 at 422 per McHugh J.

in a formal way for its decision."⁵¹ When s 46(1) says that the District Court "shall, in any action, have power to grant any injunction ... which the Supreme Court might have granted if the action were proceedings in the Supreme Court", it gives the District Court authority to adjudicate in actions that could have been brought in the Supreme Court seeking the grant of an injunction. Consequently, it gives it jurisdiction in such matters. Moreover, the sub-section not only confers jurisdiction, it defines the rights and liabilities of the parties in actions in the District Court where an injunction is sought that could have been granted in a similar action in the Supreme Court. In *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*⁵², Dixon J pointed out that statute law contains "varying examples of attempts to provide for matters of substance by arming courts with power to deal with them, instead of legislating directly and laying down inflexible rules prescribing independently the liabilities of the parties or what they may or must do." Nothing turns on the omission of the word "jurisdiction" in s 46. Nor is there any reason to think that the express mention of the term "jurisdiction" in s 133⁵³ indicates that s 46(1) was not conferring jurisdiction on the District Court. Section 46(1) gives the District Court authority to decide the rights of parties in an action calling for the grant of injunctions, and that is sufficient basis to hold that the sub-section confers jurisdiction.

78 The power conferred by s 46(1) is clearly wide enough to authorise the District Court to grant Mareva-type injunctions, including assets preservation orders, in an "action". That term is defined in s 4 of the Act to mean an "action in the Court, but does not include any proceedings under Division 8 of Part 3 or under Part 4." The present action was one for debt, and was outside Div 8 and Pt 4. Hence, the District Court had jurisdiction to grant a Mareva-type injunction in the action brought by Mr Rahme against the appellant and Ms Stephens.

79 The appellant sought to place a gloss on s 46(1) by reference to the side note to the section - "Ancillary equitable relief: injunctions" - and the historical fact that Mareva-type injunctions were unknown at the time that s 46 was enacted. Neither of these matters provides a persuasive reason for reading down the wide words of s 46(1). The side note merely confirms what is obvious from reading s 46 with the rest of the Act - the District Court is first and foremost a common law court on which s 46 confers an auxiliary equitable jurisdiction in aid of its common law jurisdiction. That Mareva injunctions were unknown in New South Wales in 1973 is a matter of no moment. The jurisdiction conferred by s 46 marches hand in hand with the jurisdiction of the Supreme Court. As the jurisdiction of the Supreme

⁵¹ *Halsbury's Laws of England*, 4th ed, vol 10, par 715.

⁵² (1945) 70 CLR 141 at 168.

⁵³ "The Court shall have the same jurisdiction as the Supreme Court ... in proceedings for possession of land ...".

Court in respect of the grant of injunctions expands - whether by the development of equitable principle or as the result of statutory enactment - so does the jurisdiction of the District Court. In *Knight v FP Special Assets Ltd*⁵⁴ Gaudron J pointed out:

"It is contrary to long-established principle and wholly inappropriate that the grant of power to a court (including the conferral of jurisdiction) should be construed as subject to a limitation not appearing in the words of that grant."

Those words must be borne in mind when construing s 46(1).

- 80 One limitation that s 46(1) does impose on the jurisdiction of the District Court to grant injunctions is that its authority to injunct must be "in any action". Given this limitation, the appellant contends that the jurisdiction of Christie DCJ to grant an assets preservation injunction finished with his pronouncement of judgment for Mr Rahme. At that point, so the appellant argues, the action was over, Mr Rahme's cause of action having become merged in the judgment.
- 81 It is true, of course, that once the action was litigated in the District Court and judgment given, there was "a final and complete decision of the case in the ... court, and consequently that the question, whether the debt recovered was due, cannot be again litigated in any other Court."⁵⁵ But that does not mean that the action was finished for all purposes. Thus, the Act provides that, where the judgment debt has not been satisfied, the registrar of the District Court may "issue a writ of execution to enforce the judgment in the action"⁵⁶. A judgment is given in "the action". I can see no reason in principle or expediency why the power to grant an assets preservation injunction to prevent the defendant from frustrating the beneficial effect of a judgment for the plaintiff should not be regarded as given in an "action" even when it is given after judgment is pronounced.
- 82 Moreover, in the present case, the application for injunction was filed before judgment was pronounced. When judgment was pronounced, the parties understood that the motion for the assets preservation order had still to be resolved. That being so, it is impossible to conclude that the action between the parties had finished once judgment had been pronounced. To hold in the circumstances of this case that an assets preservation order could have been made immediately before

⁵⁴ (1992) 174 CLR 178 at 205. See also Mason CJ and Deane J at 191.

⁵⁵ *Austin v Mills* (1853) 9 Ex 288 at 293 [156 ER 123 at 125].

⁵⁶ Section 107(1). See also ss 126, 127 and 128.

judgment for Mr Rahme was formally pronounced, but not immediately after, is a result that should be avoided if it is reasonably open to do so, as I think it is.

83 In any event, s 46(2) extends the grant of jurisdiction conferred by s 46(1). Even if s 46(1) does not give the District Court jurisdiction to make an assets preservation injunction after judgment is pronounced, s 46(2) surely does. It declares that "[I]n relation to the power of the Court to grant an injunction under this section ... the Court and the Judges shall, in addition to the powers and *authority* otherwise conferred on it and them, have all the powers and *authority* of the Supreme Court and the Judges thereof in the like circumstances" (emphasis added). The powers and authority conferred by this sub-section are expressed in terms wide enough to encompass the authority - that is to say, the jurisdiction - to make an order preserving or protecting assets after judgment in an action has been given.

84 The appeal against conviction must fail.

The appellant could have been charged with another form of contempt

85 Understandably in the present case, the charge of contempt against the appellant was confined to the breaching of a particular order. This has enabled him to mount an argument concerning the jurisdiction of the District Court to make the order in question. But his conduct was so blatant, so contemptuous of the authority of the courts of justice, and so calculated to cause litigants generally to lose confidence in the capacity of courts to protect their rights that I think that he might properly have been charged with contempt of the administration of justice as a continuing process. In *Attorney-General v Leveller Magazine*⁵⁷, Lord Diplock pointed out:

"My Lords, although criminal contempts of court [may] take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

86 Whenever the conduct of a person may be seen as undermining the authority of the courts of justice generally or as calculated to destroy the confidence of potential litigants or witnesses in the capacity of the sovereign's courts to protect their rights, a contempt of court can occur although no proceedings are on foot or the conduct is not tied to specific proceedings or a particular court. For that reason, it is a

57 [1979] AC 440 at 449.

contempt of court to penalise a person for taking time off for jury service⁵⁸ or for giving evidence in proceedings⁵⁹ or, in breach of a curial order, to reveal the identity of a witness⁶⁰.

- 87 The circumstances of the appellant's breach was such that it would have been open to the Court of Appeal to conclude that his defiance of the order of Christie DCJ went beyond mere disobedience of that order or an intention to defeat the rights of Mr Rahme. It would have been open to it to hold that his conduct in mortgaging the Erskine Park house was, and was intended as, a contemptuous rejection of the authority of the courts generally and an attack on the administration of justice itself. In that event, questions as to the formal validity of the District Court's order would have been beside the point.

The appropriateness of the sentence

- 88 The appellant contends that the sentence of six months' imprisonment imposed by the Court of Appeal was manifestly excessive in the circumstances. In considering the appropriateness or otherwise of a sentence imposed for a contempt of court, it must always be borne in mind that the jurisdiction to commit for contempt exists so that the authority of the courts of law can be maintained. If breaches of the orders of the courts were regarded as of little moment, respect for and observance of the law would inevitably deteriorate and, ultimately, pose a threat to social order⁶¹.
- 89 The appellant and the respondent accepted that, as the contempt proceedings were heard at first instance by the Court of Appeal, this Court stands in the position of an intermediate court of appeal from the sentence imposed and should apply the principles appropriate to an intermediate court of appeal in like circumstances. Further, as the proceedings are criminal in nature, the principles applied in reviewing the appellant's sentence must be those of an intermediate court of criminal appeal.
- 90 Given the findings of the courts below regarding the appellant's behaviour in court, his understanding of the orders made against him and his apparent indifference to those orders, the six months' imprisonment was within the range of appropriate

58 *R v Lovelady; Ex parte Attorney-General* [1982] WAR 65; *Re Lydeard* (1966) 130 JP 622.

59 *Attorney-General v Butterworth* [1963] 1 QB 696 at 709.

60 *R v Socialist Worker Printers and Publishers Ltd; Ex parte Attorney-General* [1975] QB 637 at 652.

61 *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 115 per Gibbs CJ, Mason, Wilson and Deane JJ.

punishment that the Court of Appeal was entitled to impose. The appellant relied on medical evidence to support a claim that he had a "disordered state of mind" at the time of relevant events. However, the learned judges of the Court of Appeal had the great advantage of seeing the appellant give evidence. They took a poor view of the credibility of his evidence and rejected his claim that his mental state excused his actions. Accordingly, there was no error in the sentence imposed which would justify this Court reassessing the sentence.

The High Court's power to suspend bail

- 91 The bail orders made in Chambers by Gummow J and by Brennan CJ, Gummow and Callinan JJ on the granting of special leave to appeal are set out elsewhere and need not be repeated here⁶². It is true, as the appellant contends, that the orders made by this Court regarding bail do not expressly state that his sentence is to be suspended pending the resolution of this appeal. The appellant contends, moreover, that this Court does not have the power to suspend and then reactivate a sentence where it is expressed to commence and conclude on specific dates, as was the order made by the Court of Appeal in this case. There are, therefore, two questions to be addressed: does this Court have power to suspend and reactivate a sentence; and, if it does have such a power, was it exercised on either or both of the occasions when this Court granted bail to the appellant?
- 92 In support of his argument that this Court is not empowered to suspend a sentence imposed by another court, the appellant relied upon this Court's decision in *Whan v McConaghy*⁶³. In *Whan*, the Court had to determine whether the New South Wales Court of Appeal had statutory power, or inherent jurisdiction, to suspend the commencement of a sentence imposed by the District Court and expressed to commence on a specific date. A majority of the Court found there was no such jurisdiction or power. The majority also found that the Court of Appeal had neither inherent jurisdiction to substitute a fresh sentence where the original sentence had expired unserved nor any statutory power to vary a sentence to take account of periods of bail⁶⁴. However, *Whan* does not determine the authority of this Court to grant bail and to suspend and reactivate a sentence as an incident in the exercise of its jurisdiction to grant special leave to appeal and to determine an appeal. Indeed, counsel for the appellant virtually conceded so much in argument before this Court.

⁶² See e.g. *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711 at 712-713 per Gummow J in Chambers.

⁶³ (1984) 153 CLR 631.

⁶⁴ (1984) 153 CLR 631 at 639 per Mason, Murphy, Wilson and Deane JJ.

- 93 The inherent jurisdiction and statutory powers of the New South Wales Court of Appeal, which were the subject of decision in *Whan*, provide no useful analogy in determining this Court's powers to suspend a sentence and reactivate it. This Court's appellate jurisdiction derives from s 73 of the Constitution. That provision empowers the Court to hear appeals, including appeals on sentence, from the Supreme Courts of the States. Constitutional appellate jurisdiction is, of its nature, a more complete and wide-ranging source of authority than the statutory jurisdiction conferred upon appellate courts in the States and Territories. It authorises whatever orders are necessary to protect the utility and integrity of the appellate process in the nation's ultimate appellate court. Thus, it authorises the stay of the execution of a condemned man pending the Court's consideration of his special leave application⁶⁵. During argument in *Tait v The Queen*⁶⁶, Dixon CJ said that he had "never had any doubt that the incidental powers of the Court can preserve any subject matter, human or not, pending a decision." The making of orders suspending and preserving a sentence while a party is on bail, pending the resolution of an appeal or special leave application, is undoubtedly within the incidental powers of this Court. To find otherwise would be to constrain artificially a jurisdiction intended to be of the greatest possible breadth, subject only to limits imposed by the Constitution itself, of which there are none presently relevant.
- 94 It remains then to determine whether in fact the orders made by Gummow J and the Full Court did operate to suspend the appellant's sentence. In my view, the two orders at issue can be construed in no other way. Both orders specifically stated that the bail period would "not be taken into account in calculating the period of service of [the appellant's] sentence pursuant to the judgment of the New South Wales Court of Appeal." These words can bear no other construction than that the effect and the intention of the orders was to suspend the running of the sentence; and that, in the event that the special leave application was refused or the appeal dismissed, the appellant would serve as part of his sentence so much of his bail period as was commensurate with the balance of his outstanding sentence.

Order

- 95 The appeal should be dismissed. The appellant should be taken into custody to serve so much of his sentence as remains unserved by reason of the grant of bail to him by this Court.

⁶⁵ *Tait v The Queen* (1962) 108 CLR 620.

⁶⁶ (1962) 108 CLR 620 at 623.

96 KIRBY J. This appeal, from orders of the New South Wales Court of Appeal, arises out of a challenge to decisions of that Court that the appellant had committed a serious contempt of court and should be sentenced to imprisonment for six months⁶⁷.

97 The questions raised by the appeal concern the jurisdiction and power of the District Court to make the order which the appellant disobeyed; whether in the circumstances he was entitled to ignore that order; whether the punishment imposed by the Court of Appeal was excessive; and whether this Court, in disposing of the appeal, could recommence the order of imprisonment.

The facts

98 In January 1983, Mr Karl Pelechowski (the appellant), Ms Penelope Stephens (also known as Pelechowski) and Mr Michael Rahme executed a document, in the form of a deed, pursuant to which Mr Rahme lent the appellant and Ms Stephens \$50,000 upon conditions as to the payment of interest and repayment of the principal in twelve months. The parties executed the deed in the presence of a Justice of the Peace, a female officer of a nearby post office. Although some amounts were paid in apparent compliance with the deed, the bulk of the debt remained unpaid at the expiry of the agreed time.

99 On 20 February 1990, Mr Rahme caused a Statement of Liquidated Claim to be issued out of the District Court of New South Wales. The hearing of the action commenced at Parramatta in February 1994 before Christie DCJ. It was stood over for conclusion in Sydney. By the time of the hearing, the debt, together with interest, was just above \$100,000, allowing credit for the sums paid. Whereas Mr Rahme was legally represented at the trial, the appellant was not and Ms Stephens did not appear. The appellant disputed the deed and the debt. This was somewhat unconvincing given his earlier payments. He cross-examined the Justice of the Peace to suggest that she had a sexual or romantic relationship with Mr Rahme. Various unsubstantiated allegations were made by him concerning Mr Rahme's involvement in criminal activities. The appellant declined to give oral evidence. Unsurprisingly, this conduct did not impress Christie DCJ.

100 Between the hearing at Parramatta and the resumption of the trial in Sydney on 15 April 1994, Mr Rahme caused a motion to be filed in the action. This sought an order that the appellant and Ms Stephens "be restrained from selling or otherwise disposing of, encumbering or further encumbering or otherwise dealing with their interest" in an identified property at Erskine Park, New South Wales, of

67 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 28 October 1997 (conviction); *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 (penalty).

which they were the registered proprietors. The order was sought "pending further order" of the District Court. Although the motion was returned for hearing on the date of the resumed hearing of the action, it was not dealt with until Christie DCJ had disposed of Mr Rahme's substantive claim. This he did by giving *ex tempore* reasons and pronouncing his verdict. He stated that he did not accept the assertions of the appellant either as to the loan document or as to its execution. He found the proposition about the female witness to the deed to be "preposterous". He entered a verdict in favour of Mr Rahme against the appellant and Ms Stephens in the sum of \$105,090. He ordered them to pay Mr Rahme's costs.

101 At that stage, in a continuation of his *ex tempore* reasons, Christie DCJ turned to the motion. Service of the motion had been proved and, during the hearing, the appellant had eventually admitted receiving it. His Honour had explained its purpose to the appellant. The appellant merely stated that he objected to it, found it offensive and had "not had time to have it examined by a legal person". Filed in support of the orders sought in the motion was an affidavit of Mr Rahme. It contained a statement that he believed that the appellant was "of non Australian origin" and that he was concerned that he might "return to his country of origin". The affidavit deposed to the interest of the appellant and Ms Stephens in the property at Erskine Park and to lack of evidence of "any other assets other than personal belongings" owned by them. Against this background, and that of the trial which had just concluded, Christie DCJ said of the motion:

"Having regard to the view that I have of the [defendant's] evidence in this matter I propose to accede to the orders sought in notice of motion (sic) and I order that the defendants ... be restrained from selling or otherwise disposing of, encumbering or further encumbering or otherwise dealing with their interest in any way in the property [at Erskine Park]. I order that that order shall continue until further order or payment of the verdict."

102 The reference to the defendant's evidence must be taken to be a reference to the appellant's assertions during the questions which he asked and his address because, as I have said, he declined to give sworn testimony.

103 At the end of his Honour's reasons, the appellant sought leave to appeal. It was explained that he did not need leave of Christie DCJ. But, in case the application was to be interpreted as one for a stay of execution, his Honour refused it. He specifically explained that any stay of proceedings on the judgment following the verdict would not affect "the order I made regarding the property". He asked the appellant if he understood this. The appellant gave an affirmative reply.

104 Soon after, in the appellant's presence, the foregoing order was made, and while it was still in force, the appellant and Ms Stephens, on 26 April 1994, applied for a loan from a finance company. They offered as security for the loan their joint interest in the property at Erskine Park. The loan application stated that the

property was worth \$145,000 and that a first mortgage of \$47,500 had been granted to a bank. There was no disclosure of the verdict and order of Christie DCJ. Three days later the finance company agreed to make \$25,000 available to the appellant and Ms Stephens. A registrable second mortgage in favour of the finance company was executed by them. They consented to the lodgment of a caveat to protect that mortgage interest. In July 1994, the finance company, still apparently unaware of Christie DCJ's orders, extended the credit limit to \$45,000. Pursuant to this facility, sums were paid to the appellant totalling, in all, more than \$40,000. They were expended on living expenses and for the costs of legal representation in other proceedings in which the appellant was engaged. Together with accumulated interest and having regard to the first mortgage in favour of the bank, the loans effectively extinguished the equity which the appellant and Ms Stephens had enjoyed in the property at Erskine Park at the time of Christie DCJ's order.

105 In May 1994, the appellant lodged an appeal to the New South Wales Court of Appeal against the judgment of the District Court. A motion was filed seeking a stay of execution of that judgment. This provoked an application by Mr Rahme for security for the costs of the appeal. The appellant was unable to provide this, and it appears that the appeal was abandoned. Certainly it was never prosecuted. Meanwhile, the conduct of the appellant and Ms Stephens, in apparent defiance of the order made by Christie DCJ, came to the notice of Mr Rahme. He brought it to the notice of the District Court. Application was made that the appellant and Ms Stephens be dealt with for contempt of court⁶⁸. That application was heard by Twigg DCJ who acceded to it. He referred the matter to the Supreme Court for determination. In accordance with the Rules of the Supreme Court of New South Wales⁶⁹, the Registrar of the Court of Appeal ("the respondent") caused a summons to be issued out of that Court addressed to the appellant and Ms Stephens. The summons sought a declaration that they were guilty of contempt of court and orders that they be punished or otherwise dealt with for such contempt.

68 *District Court Act* 1973 (NSW), s 203.

69 *Supreme Court Rules* 1970 (NSW), Pt 55 r 11(3).

Decisions of the Court of Appeal

106 On the return of the summons, the proceedings against Ms Stephens were not pressed. Those against the appellant were adjourned to permit him to secure legal representation which was provided *pro bono* by the Bar Association. Thereafter, the appellant was represented by counsel.

107 In accordance with the then applicable law⁷⁰, the Court of Appeal was constituted for the hearing of the summons by three judges. It heard the issues concerning the liability of the appellant to the charge of contempt first. In October 1997, the Court found the appellant guilty of contempt. It made a declaration to that effect, referring to his "wilful breaches of the injunction granted by [Christie DCJ] on 15 April 1994". The reasons of the Court were given by Handley JA⁷¹. His Honour dealt with the three grounds upon which the appellant had resisted the charge. These were: (1) that the order of Christie DCJ was unclear and ambiguous; (2) that the appellant did not have proper notice of its terms; and (3) that Christie DCJ had no jurisdiction to make the order for the breach of which the appellant had been charged. The first two grounds were readily disposed of, both on the facts and on the applicable law⁷². The findings of the Court of Appeal in that regard have not been contested. On the third ground of objection, the Court of Appeal accepted that, apart from statute, the District Court of New South Wales would have no jurisdiction to make an order such as Christie DCJ had made "in the nature of a Mareva injunction". However, it held that the express terms of s 46 of the *District Court Act* 1973 (NSW) had afforded the judges of the District Court the power to grant any injunction which the Supreme Court might have granted. As, by established authority, the Supreme Court might have granted a Mareva injunction in the circumstances⁷³, Christie DCJ was empowered to do so in a case otherwise within the District Court's jurisdiction. As the District Court otherwise had jurisdiction over the action on several bases⁷⁴, the order was valid. A knowing breach of it amounted to contempt.

70 *Supreme Court Act* 1970 (NSW), s 48(2)(i); cf *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 279-280.

71 Beazley and Stein JJA concurring.

72 Referring to *Hearn v Tennant* (1807) 14 Ves Jun 136 [33 ER 473]; *M'Neil v Garratt* (1841) Cr & Ph 98 [41 ER 427]; *United Telephone Company v Dale* (1884) 25 Ch D 778 at 784-785; *Hall & Co v Trigg* [1897] 2 Ch 219 at 222; *Husson v Husson* [1962] 1 WLR 1434; [1962] 3 All ER 1056.

73 *Riley McKay Pty Ltd v McKay* [1982] 1 NSWLR 264.

74 "[T]he defendants were resident in the State, the cause of action arose here, and the claim was within the monetary limit."

108 The Court of Appeal, constituted as before, returned in December 1997 to hear evidence and submissions relevant to the punishment (if any) which should be ordered. At last, the appellant gave evidence. He proffered what he said was "a total and complete apology" for his actions. Following additional debts which had been incurred to the finance company, the appellant made it clear that he was in no position to make any payments whatever to Mr Rahme. Nor was he likely to be able to do so. He made no proposal to satisfy the judgment debt. Nor did he make any offer of payment to Mr Rahme, "however small"⁷⁵. He swore no affidavit disclosing his entire financial circumstances. The Court of Appeal found⁷⁶:

"His evidence was internally inconsistent, often within a very short time. He was evasive and prone to prevaricate rather than give direct answers to questions. The court must confess to having great difficulty in accepting his evidence unless it is corroborated or obviously correct. ... We do not accept that he is telling the whole truth about the value of the property or his interest in it."

109 The Court of Appeal specifically rejected the submission that the appellant's breach of Christie DCJ's order arose out of a "disordered state of mind". Such a submission had been advanced, but rejected, in the earlier decision dealing with the suggestion that the appellant had not understood the meaning of the order. Before the trial the appellant had, for a time, been a licensed real estate agent. During argument before Christie DCJ he had twice himself used the word "encumbrance". He had expressly stated that he understood the judge's orders. In these circumstances, the finding by the Court of Appeal that "[t]he breaches of the injunction were clearly deliberate and wilful and with a knowledge and understanding of the order" was open to it and appears to be correct⁷⁷.

110 The Court of Appeal accepted the appellant's apology whilst expressing "residual doubts about its genuineness"⁷⁸. It recorded its conclusion "that the substantial debt to Mr Rahme would be the last on the list of [the appellant's]

75 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 2.

76 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 2-3.

77 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 4.

78 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 4.

concerns, that is assuming that he has any concern about the judgment debt"⁷⁹. The Court acknowledged some considerations to be taken into account in favour of the appellant. However, it concluded that it was faced with a "particularly blatant and determined threat to the integrity of the civil justice system", which could not be defied in such a way without loss of public confidence in the credibility of the justice system⁸⁰. It was in these circumstances that the Court of Appeal decided that the proper order was that the appellant should serve a fixed term of imprisonment of six months. It specified that the order should commence on 3 February 1998 (the day it was made) and conclude on 3 August 1998.

The grant of bail

111 A prompt application was made to the Court of Appeal for a grant of bail pending the hearing of an application for special leave to appeal to this Court. Noting that any such application was unlikely to be heard in this Court until August 1998, Handley JA, for the Court, remarked that by that time "the sentence will have been substantially, if not completely, served"⁸¹. This observation was an obvious reference by his Honour to the decision of this Court in *Whan v McConaghy*⁸². That decision had previously occasioned difficulty for the provision of bail to convicted contemnors seeking to challenge orders made with respect to them⁸³. Whilst noting that the appellant might receive bail from this Court⁸⁴, the Court of Appeal refused bail. An application for bail was then immediately made to this Court.

112 In chambers, Gummow J made orders admitting the appellant to bail pending the determination of his application for special leave to appeal. His Honour did so

79 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 4.

80 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 5.

81 *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 11 February 1998 at 2.

82 (1984) 153 CLR 631.

83 *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 269-270, 285-286.

84 Referring to *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514.

upon certain conditions. None of these is presently relevant save for the following⁸⁵:

"5. That on the date to be fixed by notice to him in writing by the Deputy Registrar of this Court as the date upon which the application for special leave to appeal will be heard and determined, he surrender himself to the Sheriff of the Supreme Court of New South Wales upon the determination of the said application to serve any balance of his sentence then remaining unserved in accordance with the fixed term of imprisonment imposed by the New South Wales Court of Appeal pursuant to which he is confined at that time;

...

7. The time during which the applicant is out on bail pursuant to this order should not be taken into account in calculating the period of service of his sentence pursuant to the judgment of the New South Wales Court of Appeal."

113 In the event, the special leave hearing took place on 1 May 1998⁸⁶. Upon the grant of special leave, the question of bail arose once again. Counsel for the appellant applied for a continuation of bail. It was proposed that the reference in condition 5 be altered to refer to the hearing of the appeal and to substitute for the closing words the words "to serve any balance of his sentence then remaining unserved in accordance with the fixed term of imprisonment imposed by the New South Wales Court of Appeal *subject to such order, if any, as the High Court may order*."⁸⁷ The appellant accepted those terms as amended. Resisting the grant of special leave, the Crown Advocate, appearing for the respondent, drew attention to *Whan's* case. She suggested that, in accordance with its holding, "the sentence was running and ... this Court has no express statutory power to prevent that occurring or to stay the operation of the sentence."⁸⁸ The Crown Advocate stated that "[i]t may well be that by the time the appeal is argued the sentence will have expired in any event."⁸⁹ In response, Brennan CJ, speaking for this Court,

85 *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711 at 713.

86 Before a Court constituted by Brennan CJ, Gummow and Callinan JJ.

87 *Pelechowski v The Registrar Court of Appeal*, Application for special leave to appeal, High Court of Australia, 1 May 1998 at 14 (emphasis added).

88 *Pelechowski v The Registrar Court of Appeal*, Application for special leave to appeal, High Court of Australia, 1 May 1998 at 15.

89 *Pelechowski v The Registrar Court of Appeal*, Application for special leave to appeal, High Court of Australia, 1 May 1998 at 15.

indicated that the power of the Court to grant bail in the terms expressed was something which itself could be determined by this Court at the hearing of the appeal. Bail was granted to the appellant in full appreciation that an issue might arise as to the running of the sentence. As predicted, that issue is now presented for resolution.

Issues in the appeal

- 114 The appellant advanced three arguments to resist his return to prison:
1. That the District Court had no jurisdiction, and Christie DCJ had no power, to make the order purportedly made, breach of which had led to the finding of contempt. Accordingly he was entitled, in the circumstances, to ignore that order.
 2. That, if the District Court had the jurisdiction and Christie DCJ had the power to make the order, the order for six months imprisonment was manifestly excessive. This Court, providing effectively a first appeal from the Court of Appeal's order of punishment, should substitute a non-custodial or shorter custodial sentence.
 3. That, in any event, the order of punishment imposed by the Court of Appeal had expired, not having been stayed and this Court had no power to recommence the punishment of imprisonment or to impose a new punishment of its own.
- 115 There is an apparent inconsistency between the second and third grounds. If this Court has no power to re-start an order for punishment effectively stayed to protect the utility of an appeal and no power to impose a different punishment of its own, it could have no power to substitute a different punishment for a custodial order found to be excessive. Logically, if the appellant's third ground is correct, his sentence has expired. Elucidation of whether it was valid in the first place would have no practical significance. This Court, for constitutional reasons, avoids hypothetical or theoretical questions⁹⁰. However, having regard to my conclusions, it is appropriate to take the appellant's grounds and deal with them in the order in which they were presented.
- 116 Argument before the Court narrowed further some of the issues. Thus, it was common ground that the Court was not concerned with whether Christie DCJ had properly exercised any discretion he had in the circumstances. For his part, the

⁹⁰ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300, 302-303, 305, 316-319; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612, 642, 665-668.

respondent made it clear that he was not seeking to support the way in which his Honour had approached the making of the asset preservation order⁹¹ or the precise terms of the order made. As to the second ground, the appellant accepted that the punishment imposed had to be considered on the footing that the Court of Appeal had rejected his contention that he did not understand Christie DCJ's order and that it had been found that he had committed a clear and wilful breach of its terms. The appellant agreed that this Court would only disturb the order for punishment of the Court of Appeal if manifest error were shown. The respondent agreed that, in the challenge to the order fixing the punishment, this Court was in a position similar to that of a Court of Criminal Appeal of reviewing a sentence imposed following a criminal conviction. As to the third ground of appeal, neither party asked this Court to reconsider the correctness of the holding in *Whan's* case. The appellant did not pursue a ground of appeal, originally filed, complaining about the failure of the Court of Appeal to grant him bail.

The District Court: legislative context

117 It is necessary to approach the appellant's challenge to the jurisdiction of the District Court, and the power of Christie DCJ, to make the order complained of with an appreciation of the statutory provisions relied upon, viewed in their context and against the background of the legislative history.

118 District Courts were first established in New South Wales by the *District Courts Act* 1858 (NSW)⁹². The 1858 Act was repealed by the *District Courts Act* 1901 (NSW). This, in turn, was replaced by the *District Courts Act* 1912 (NSW) which, in 1973, gave way to the current Act. From its foundation, the District Court was a court of record⁹³. It thus had the power to commit for contempt provided the offence occurred in the face of the Court⁹⁴. Other

91 This expression is preferable to reference to such orders as "Mareva injunctions". See *Cardile and Ors v LED Builders Pty Ltd* [1999] HCA 18 at [79]; cf *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 639 per Gaudron J.

92 22 Vict c 18. They were modelled on the courts established in England by the *County Courts Act* 1850 (UK) (13 & 14 Vict c 61) consolidated in *County Courts Act* 1888 (UK) (51 & 52 Vict c 43). See *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 91-93, 105-107.

93 See eg *District Courts Act* 1858 (NSW), s 4.

94 *R v Lefroy* (1873) LR 8 QB 134.

("distance") contempts had to be punished by writ of attachment issued out of the Supreme Court⁹⁵.

119 Historically, the equitable remedy of injunction belonged to the Courts of Chancery in England. It became available from colonial courts on which had been conferred a like jurisdiction. Mimicking reforms first adopted in New York in 1848⁹⁶, the *Judicature Act* 1873 (UK) altered the English court system and provided that law and equity should thereafter be administered by the new courts with a view to avoiding multiplicity of legal proceedings and securing a complete and final determination of all matters in controversy, so far as possible in a single hearing⁹⁷. With the exception of New South Wales, the Australian colonies, where Supreme Courts exercised equitable jurisdiction, soon enacted similar provisions. Although in New South Wales some changes were introduced by particular statutory provisions, the separate administration of equity (and the separate provision of equitable remedies) remained a feature of the administration of justice until the enactment of the *Supreme Court Act* 1970 (NSW)⁹⁸ and the *Law Reform (Law and Equity) Act* 1972 (NSW)⁹⁹.

120 Provisions in the successive *District Courts Acts* of New South Wales, empowering such courts to grant remedies historically equitable in character¹⁰⁰ and to give effect to equitable grounds of defence¹⁰¹ may only be fully understood when the historical divide between the administration of law and equity by different courts is remembered. This divide persisted in New South Wales, with few and special exceptions, until immediately before the *District Court Act* 1973 (NSW) ("the Act") was enacted.

95 *R v Davies* [1906] 1 KB 32; *Registrar of the Court of Appeal v Maniam* [No 1] (1991) 25 NSWLR 459.

96 Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 3rd ed (1992) at 37.

97 *Judicature Act* 1873 (UK), Pt II.

98 ss 57-64. See Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 3rd ed (1992) at 44.

99 s 5 (repealing *Supreme Court Act* 1970 (NSW), s 64).

100 Such as specific performance of agreements. See *District Court Act* 1973 (NSW), s 134(1)(b).

101 See now *Law Reform (Law and Equity) Act* 1972 (NSW), s 6; cf *County Courts Act* 1959 (UK), s 74 considered *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169.

121 Early statutory provisions permitting parties to an action in the District Court to rely on defences based on equitable grounds¹⁰² were limited and specific¹⁰³. They remain so. The court is called "inferior" because its jurisdiction is limited¹⁰⁴. Unless power is expressly conferred on the District Court, or necessarily implied from powers so conferred¹⁰⁵, a party seeking broader remedies must resort to a court of unlimited jurisdiction. In New South Wales, this is the Supreme Court of the State.

122 Until the enactment of the Act, the District Court of New South Wales had no power to issue orders in the nature of injunctions. Given the history of such orders and of the District Court itself, it would be necessary, to sustain the grant of any order of such a character, to be able to point to an express statutory source of the power. The order of Christie DCJ, challenged in these proceedings, is in the nature of an injunction. What is its statutory source?

123 Two provisions have been enacted empowering judges of the District Court to grant injunctions. By s 140(1) of the Act it is provided that:

"The Court shall have jurisdiction to grant an injunction, to be called a temporary injunction, to restrain:

- (a) a threatened or apprehended trespass or nuisance, or
- (b) the breach of a negative stipulation in a contract the consideration for which does not exceed \$20,000,

in like manner, subject to this Subdivision, as the Supreme Court might grant an interlocutory injunction in like circumstances."

Such "temporary injunctions" have, as their name suggests, only a limited duration. A clue to their purpose is given by the power to renew them for a total period exceeding 14 days "if the Court is satisfied that the additional time is required to enable proceedings to be commenced or heard in the Supreme Court in relation to

102 See eg *District Courts Act* 1901 (NSW), ss 61, 62; *District Courts Act* 1912 (NSW), ss 74, 75.

103 See eg Bonthorne (ed), *The Practice of the District Courts of New South Wales*, 5th ed (1927) at 72-73.

104 *Levy v Moylan* (1850) 10 CB 189 [138 ER 78].

105 cf *Taylor v Taylor* (1979) 143 CLR 1 at 5-6; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624; *Grassby v The Queen* (1989) 168 CLR 1 at 16-17; *Egan v Willis* (1998) 73 ALJR 75 at 112; 158 ALR 527 at 576; *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 at 147.

the matter"¹⁰⁶. The order of Christie DCJ was not of that character. Section 140 is therefore irrelevant to this case.

- 124 The source of statutory power relied upon by the respondent to support Christie DCJ's order was s 46 of the Act. It appears in Pt 3 of the Act which specifies "The civil jurisdiction of the Court". The second Division of that Part is titled "Actions: jurisdiction". The first subdivision deals with "General jurisdiction in relation to actions". The word "action" is defined in s 4(1) of the Act to mean "action in the Court", but not including proceedings under Div 8 of Pt 3¹⁰⁷ or under Pt 4¹⁰⁸. The actions concerned are actions of a common law character¹⁰⁹. It is in this statutory setting that the provisions of s 46 appear. The terms of the section appear in the reasons of McHugh J.

Recourse to the section's heading

- 125 The appellant's attempt to confine the relief available under s 46 of the Act began with a reference to the heading to the section. He argued that this made it plain that the power to grant an injunction was to be restricted to injunctions of the traditional equitable variety and not a statutory hybrid, *sui generis* to the District Court. For his part, the respondent submitted that the heading was not part of the Act, and could not be read as extrinsic material. Even if it were to be considered as extrinsic material, the respondent submitted that the phrase was of no particular assistance in ascertaining the scope or meaning of s 46. In support of his submission that the heading was not part of the Act, the respondent referred to s 35 of the *Interpretation Act* 1987 (NSW). That section provides that headings to Parts, Divisions, Subdivisions or Schedules to an Act "shall be taken to be part of the Act"¹¹⁰. But, except for immaterial exceptions, "a heading to a provision of an Act ... shall be taken not to be part of the Act"¹¹¹.

- 126 What is, or is not, "part of" an Act might be material in a particular case, depending upon the precise words of the heading in question. The issue is not whether the reference to "[a]ncillary equitable relief" is part of s 46. Clearly

106 Act, s 140(3).

107 Being proceedings for the possession of land, equity and other specified proceedings. The provision for temporary injunctions (s 140) appears in this Part.

108 The criminal jurisdiction of the Court.

109 Thus, s 44(1)(a) refers to actions of a kind "which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court".

110 See, s 35(1).

111 See, s 35(2).

enough, by force of the *Interpretation Act*, it is not. However, that leaves open the question of whether resort may be had to the words in the heading in order to give content to the meaning of the word "injunction" for which s 46(1) provides.

127 The established rule applied by this Court has been that "[t]he headings in a statute ... can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision"¹¹². However, "where the enacting words are clear and unambiguous, the title, or headings, must give way, and full effect must be given to the enactment"¹¹³. In the present case, there is a measure of ambiguity arising from the use of the word "injunction" and from the context. Resort to the heading therefore appears permissible by reference to the foregoing authorities which are, in turn, compatible with the *Interpretation Act*. Section 34(1) of the *Interpretation Act* allows resort to be had to "any material not forming part of the Act" if it "is capable of assisting in the ascertainment of the meaning of the provision". Without limiting the effect of sub-s (1), s 34(2)(a) provides that "all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer" may be considered in the interpretation of a provision of an Act. I see no incompatibility between this approach to the reconciliation of ss 34 and 35(2)(a) of the *Interpretation Act*. It is unnecessary in this case to resolve the question whether a broader rule as to the use of headings exists generally or at least in the construction of federal statutes¹¹⁴. The heading to s 46 of the Act may be taken into account in determining the meaning of that provision¹¹⁵.

128 This said, the heading does not take the understanding of the meaning and operation of s 46 very far. Clearly, it indicates that the provision is one which is to be viewed as yet another step in the demolition of the strict separation between common law courts and those of equity and the relief which each traditionally provides. Appearing, as the power does, in the midst of a Division of the Act dealing generally with common law actions in the District Court, it is clear that the "injunction" contemplated by s 46(1) is to be ancillary to, in the sense of supportive of, the effectiveness of the District Court's jurisdiction in actions before the Court. Injunctions had, until 1973, been regarded as an equitable remedy. To so describe them in New South Wales in 1973 in s 46 of the Act would merely have been

112 *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 16 per Latham CJ applying *In re The Commercial Bank of Australia Limited* (1893) 19 VLR 333 at 375.

113 *Bennett v Minister for Public Works (NSW)* (1908) 7 CLR 372 at 383 per Isaacs J.

114 A question left open by McHugh J in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 618.

115 cf *Ragless v District Council of Prospect* [1922] SASR 299 at 311.

stating the obvious to a lawyer reading the Act at that time. But, since that time, the word "injunction" has come to be used frequently in statutes, federal¹¹⁶ and State, without necessarily importing all of the characteristics and requirements of the injunction as granted by the Chancery Court or its successors. Against the background of diverse statutory provisions for orders called "injunctions", and differing judicial expositions of what such orders require in their particular statutory contexts, I agree with the comment that "[l]egal usage alone, and not logic, decides which court orders can, and which cannot, accurately be described as injunctions"¹¹⁷. In the end, the facility of such orders, so described, being provided by s 46 of the Act, it is necessary for courts, exploring the limitations on the jurisdiction and powers so conferred, to search for the legislative purpose and to do so with the tools conventionally used in that task.

Textual analysis of the grant of injunctive power

129 The appellant subjected s 46 of the Act to close textual analysis. He submitted that significance attached to three terms in s 46(1), namely "in any action", "power", and "injunction". From these, he argued that the jurisdiction conferred by the section was extremely limited and did not extend to supporting Christie DCJ's order.

130 The words "in any action" were, it was suggested, words of limitation. That is plain enough, for it would have been possible for the phrase to have been omitted. The question is what it means. In this appeal the question was not whether the proceedings were "in an action" as opposed to "in proceedings ancillary to an action"¹¹⁸. When filed, the motion was certainly returned as incidental to the action, then part-heard. But the appellant argued that the phrase "in an action" meant that the "action" must still be a current one in the sense of undetermined. By the time Christie DCJ made his order on the motion, restraining the appellant from encumbering his property, the "action" (so it was argued) had concluded. It had merged in the judgment, based on the verdict which Christie DCJ had announced. Therefore, there was no longer any "action" in which the District Court had jurisdiction, or the judge power, to grant an injunction of any kind, still less the broad injunction granted in this case.

116 See eg *Trade Practices Act* 1974 (Cth), s 80; cf *Walter Developments Pty Ltd v Roberts* (1995) 16 ACSR 280 at 283; *Family Law Act* 1975 (Cth), s 68B; *Superannuation Industry (Supervision) Act* 1993 (Cth), s 315.

117 Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, 3rd ed (1992) at 531.

118 See *Fraser Credits Pty Ltd v Osterberg-Olsen* [1978] 1 NSWLR 121; *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86.

131 The appellant contrasted the narrower language found in the provisions of the Act with the broader powers provided to other courts by different statutes. Thus the Federal Court's power, held to sustain asset preservation orders of the Mareva kind, derived from s 23 of the *Federal Court of Australia Act* 1976 (Cth). That section confers power "in relation to matters"¹¹⁹. Furthermore, the Federal Court is, by statute, created as a superior court of record and a court of law and equity, characteristics missing from the District Court¹²⁰. From this, the appellant submitted that importance attached to the fact that the injunctive power conferred on the District Court by s 46 of the Act had to be "in" the action. It was not enough that it should be "in relation to matters" in the action, for that is not what Parliament had provided.

132 Secondly, the appellant latched on to the use of the word "power" in s 46(1) of the Act contrasting this with the word "jurisdiction" used in s 140 providing for "temporary injunctions". According to this argument, s 46(1) did not expand the jurisdiction of the District Court. It merely conferred a limited "power" to be exercised "in" the action and then only if to grant the injunction was otherwise within the jurisdiction of the District Court. It was submitted that because the District Court did not have jurisdiction to punish persons for contempt, otherwise than in the face of the Court, an order for the preservation of assets of the Mareva type (which would render parties, and possibly non-parties, susceptible to punishment for contempt for the breach) was not apt to the jurisdiction of the District Court and thus not within the grant of power contemplated in s 46(1) of the Act. In confirmation of this conclusion, the appellant pointed out that s 46 had been included in the powers of the District Court in 1973, two years before the English Court of Appeal "discovered" for the first time the existence of Mareva relief¹²¹.

133 Thirdly, the appellant sought to draw out the inferences from the use of the word "injunction" itself in s 46(1). With the assistance of the heading, this word was to be viewed as permitting an injunction of the equitable type, subject to all the rules conventionally observed by equity. The "power" was subject to "both jurisdictional and other limits"¹²². It was not available to require a person in the position of the appellant, in effect, to provide security for the payment of a

119 The width of the expression is remarked upon in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 and in *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 885; 153 ALR 643 at 658.

120 *Federal Court of Australia Act* 1976 (Cth), s 5(2).

121 In *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093; [1975] 3 All ER 282 and *Mareva Compania Naviera SA v International Bulkcarriers SA* ("The Mareva") [1975] 2 Lloyd's Rep 509.

122 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 per Deane J.

judgment earlier ordered by the trial judge¹²³. If Parliament had the purpose of affording such a large power to District Court judges, it would have said so expressly. Instead, it had provided in the Act a detailed regime for the recovery of judgment debts. That regime is found in Pt 3 Div 4 of the Act titled "Actions: enforcement of judgments". The Sheriff or bailiff is there empowered to execute a writ of execution and to seize or take under the writ, and cause to be sold (relevantly), any land of which the person named in the writ as judgment debtor is "seized or entitled"¹²⁴. Special and detailed provisions are made as to execution against land¹²⁵. The appellant contended that the "injunction" provided by Christie DCJ, and particularly in the language used in the order, went beyond the scope of the "injunction" provided by s 46 understood in its context in the Act. The fact that the Supreme Court might have jurisdiction to make such an order was irrelevant. The "jurisdiction" of the Supreme Court had not been conferred on the District Court, merely certain "powers". The additional powers and authority of the Supreme Court vested in the District Court by s 46(2)(a) did not enlarge the jurisdiction of the latter. The power was confined to ancillary functions and then only "[i]n relation to the power" of the District Court to grant an injunction under s 46(1). If the latter did not exist, neither (so the argument went) did the former.

134 Whilst the appellant's arguments display ingenuity, they have no legal merit. The order of Christie DCJ was within the jurisdiction of the District Court and within the power conferred on his Honour by s 46(1) of the Act. Statutory provisions conferring jurisdiction or power on a court or the judges of a court should not be construed as subject to any limitation which is not required by their language and purpose¹²⁶. Courts, including those with the large, varied and growing jurisdiction of the District Court of New South Wales, must, when provided with particular powers, be afforded a large latitude to mould and adapt the use of those powers to the necessities of the multitude of cases coming before them. This Court should therefore approach the content of the power to grant an injunction under s 46 of the Act without adopting an attitude which would require the power to be closely confined or needlessly restricted to historical categories. It is a simple enough word. It connotes a judicial order restraining a person from performing a specified act. It is quite contrary to the obvious purpose of the legislation, enlarging the jurisdiction of the District Court, to read the provision down or to confine its operation in an artificial or narrow way.

123 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 626.

124 Act, s 109.

125 Act, s 110.

126 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 191, 205; cf *Patrick Stevedores v MUA [No 3]* (1998) 72 ALJR 873 at 903; 153 ALR 643 at 682-683.

135 The foregoing approach to the meaning and scope of s 46 of the Act derives, in part, from the historical context in which the decision to afford the District Court a new power to grant injunctions must be viewed. In part, it follows from a recognition that the express grant, by statute, of the power to issue an injunctive order necessarily attracts compatible implied powers, imputed to the legislative grant so as to make effective the express grant of power¹²⁷. It would be erroneous, in the face of the novel enlargement of the jurisdiction of the District Court to read the section in a way which would effectively rob it of utility as an ancillary relief to the disposal of "actions" in the court. Bearing in mind the oft repeated injunction to take the opposite approach to the meaning of statutory provisions conferring jurisdiction and powers on courts, I would reject the attempt of the appellant to lead this Court into that error.

136 Nor should the words "in any action" in s 46(1) receive the artificially narrow construction which the appellant urged. Whatever their ultimate scope might be, it is impossible to contend that the "action" was not still on foot when Christie DCJ turned to dispose of the motion which had been filed in that action. The suggestion that the "action", which afforded jurisdiction to the District Court, disappeared for all purposes at the moment the verdict was pronounced by Christie DCJ does not bear serious examination. It is incompatible with numerous provisions of the Act which contemplate that the "action" remains alive after judgment, for the purposes of execution¹²⁸ or for orders for a new trial¹²⁹, appeals¹³⁰ or stay orders¹³¹. Furthermore, upon the appellant's theory, the judge, after pronouncing the verdict, and even before the judgment was formally entered, would be deprived of the protections proper and necessary to his or her office because the "action" was concluded. I regard that construction of s 46(1) as fanciful. The use of the phrase "in any action" was designed to emphasise that the conferral of the power to grant injunctive orders was not at large but required, as a precondition, the existence of an action in which the injunction was sought. Provided the precondition of the existence of an action is established, the power to grant an injunction is afforded. It is the precondition of the "action" which founds the jurisdiction of the District Court. No additional or separate grant of jurisdiction was needed, a point

127 cf *Grassby v The Queen* (1989) 168 CLR 1 at 16-18. No power to grant injunctive relief would be implied otherwise from the powers of the District Court without a provision such as s 46. See *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150.

128 Act, s 107.

129 Act, s 126.

130 Act, s 127.

131 Act, s 128.

distinguishing s 46 from the facility to grant "temporary injunctions" under s 140 of the Act.

137 Equally absurd is the suggestion that the power to grant "any injunction" afforded by the sub-section does not extend to an injunction of the Mareva type for the preservation of assets. The mere fact that injunctions of the Mareva type were not ordered in England or Australia until after the enactment of the Act in 1973 is irrelevant. The power granted to the District Court is expressed in general terms which should be given an ambulatory meaning. It was not frozen in time, confined to the conceptions of "injunctions" held in 1973. It develops and adapts to the procedural innovations in the law affecting that remedy and orders of that type. It does so in this case, not least because the power conferred on the District Court is assimilated to that enjoyed by the Supreme Court as "if the action were proceedings in the Supreme Court".

138 The appellant's argument that the District Court had no power to grant injunctions of the Mareva type, because it had no power to punish contemnors for "distant" acts of disobedience, is likewise unpersuasive. True it is that the effectiveness of injunctions is often supported by proceedings for contempt for disobedience. In conferring a jurisdiction to grant injunctions on the District Court, Parliament must be taken to have been aware of the limits on its power of that Court to punish contemnors for contempt. In fact, the procedure utilised in the present case¹³² provides the means whereby the Supreme Court may become aware of the alleged contempt and, if proved, may punish the contemnor.

139 The suggestion that the word "injunction", read with the heading, did not extend to an order after judgment to prevent the removal of property beyond the jurisdiction or disposal of it within the jurisdiction so as to frustrate the utility of a judgment, is likewise without merit. It may be accepted that the grant of an asset preservation order of the Mareva type after judgment is comparatively rare¹³³. Sir John Donaldson MR explained why this was so in *Deutsche Schachtbau v Shell International Trading Co*¹³⁴:

"Judgment creditors had little need of new protection since they were usually adequately protected by their right to levy execution by a writ of fi fa, attachment of debts or the appointment of a receiver."

132 Act, s 203(1).

133 *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 WLR 632 at 639; [1997] 1 All ER 728 at 735.

134 [1990] 1 AC 295 at 317.

140 Nevertheless, the *power* of a court, otherwise empowered to grant injunctive relief, to provide such an order after judgment cannot be doubted. Ordinarily, such an injunction would be confined to a case where it was "necessary to prevent the removal or dissipation of an asset before the process of execution can realise the value of that asset for the benefit of the judgment creditor"¹³⁵. The innovation of the asset preservation order of the Mareva type lay in the adaptability of injunctive relief to the preservation of assets so that they would remain available to the judgment creditor¹³⁶ and the commercial realism which informed the determination of courts, by these remedies, to defend their processes and to defeat the frustration of their utility¹³⁷. To impose a rigid restriction on that power, would potentially undermine the very reasoning which sustained the development of this remedy in the first place.

141 Nowadays, with electronic fund transfers, liquid assets can be removed from, or dissipated within, the jurisdiction within a matter of hours, if not sooner. The appellant's proposition that the District Court completely lacked power after judgment to provide an injunctive order, must be tested against such a case. Setting in train the statutory procedures for execution upon a judgment would itself take time.

142 The order actually made by Christie DCJ, and the procedures by which it was arrived at, are open to criticism. But in the face of s 46 of the Act, and the broad language in which the power is there given to the judges of the District Court to grant an injunction, the suggestion that that Court lacked the jurisdiction and power to make the order complained of, is without substance. The Supreme Court, in like circumstances, would certainly have had the power to grant an injunction after judgment was pronounced if the action had been proceedings in that Court. Several cases have been reported in which that Court has issued an asset preservation order of the Mareva type after judgment and in aid of execution¹³⁸.

135 *Camdex International Ltd v Bank of Zambia (No 2)* [1997] 1 WLR 632 at 639; [1997] 1 All ER 728 at 735.

136 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 327.

137 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 620-621; *Mercantile Group AG v Aiyela* [1994] QB 366 at 377; *Grenzservice Spedition Ges.m.b.H. v Jans* (1995) 129 DLR (4th) 733 at 755.

138 *Balfour Williamson v Douterluingne* [1979] 2 NSWLR 884; *Ballabil Holdings v Hospital Products* (1985) 1 NSWLR 155; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 330.

So has the Federal Court of Australia¹³⁹, other State Supreme Courts in Australia¹⁴⁰ and courts in England¹⁴¹. Text-writers confirm the availability of such orders despite the existence of statutory regimes for the recovery of judgment¹⁴². Nothing in this Court's past treatment of the matter suggests the contrary¹⁴³. Legal principle and legal policy confirm the existence

139 *Re Ousley; Ex parte Commissioner of Taxation* (1994) 48 FCR 131 at 139; *Ling v Enrobook* (1997) 74 FCR 19 at 29; *Humphris v Jenshol* (1997) 25 ACSR 212 at 230-233.

140 *Devlin v Collins* (1984) 37 SASR 98 at 99, 105, 116; *State Bank of Victoria v Parry* [1989] WAR 240 at 254; *Commissioner of State Taxation (WA) v Mechold Pty Ltd* [1995] ATC 4053 at 4056; *Wattyl Australia Pty Ltd v Gilder Holdings Pty Ltd* unreported, Supreme Court of Victoria, 24 February 1989.

141 *Stewart Chartering v C & O Managements* (Practice Note) [1980] 1 WLR 460 at 461; [1980] 1 All ER 718 at 719; *Orwell Steel Ltd v Asphalt Ltd* [1984] 1 WLR 1097 at 1100; [1985] 3 All ER 747 at 749-750; *Jet West Ltd v Haddican* [1992] 1 WLR 487 at 489-490; [1992] 2 All ER 545 at 548-549.

142 Hoyle, *The Mareva Injunction and Related Orders*, 3rd ed (1997) at 60.

143 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623, 633, 637.

of the power. Any complaint about what Christie DCJ ordered¹⁴⁴ is therefore one about the exercise by his Honour of the District Court's jurisdiction and his power. It is not one about the want of jurisdiction or lack of power to grant an injunction.

The order was not a nullity

143 The appellant complained that the Court of Appeal had erred in failing to hold that Christie DCJ's order was a nullity. Most of the arguments on this issue were addressed to the suggested want of jurisdiction and lack of power to grant an injunction of the Mareva type for the preservation of assets which I have already canvassed. However, some of the arguments appeared to contemplate that, because the procedures appropriate to an injunction, equitable in character, were not observed and the limits of the duration of the order and otherwise were not followed, the order made was fatally defective and fell completely outside the kind of "injunction" which the District Court was empowered to grant by s 46¹⁴⁵. On this footing, the appellant claimed that the order was without legal effect and he was entitled to ignore it. The respondent replied that, even if the complaints about the terms of the order were upheld, it was implicit in Christie DCJ's specification that the order should continue "until further order" that the appellant might apply for variation of its terms. Alternatively, his proper course was to seek the dissolution of the order by the District Court or leave to appeal to the Supreme Court¹⁴⁶. Until varied, dissolved or set aside, the order would stand as a valid order of a court. It would have to be obeyed.

144 It is unnecessary to tarry long over this point. Because I am of the view that the District Court had the jurisdiction and Christie DCJ had the power to make the order in question, the complaints about the content, form, duration or other features of that order, and about whether the judge erred in making it, are all complaints about an order made within jurisdiction, not outside jurisdiction. The grant of the injunction may have been incorrect in the circumstances. It may indeed have been liable to correction, or at least amendment, on appeal or review. But it was not invalid, in the sense of void so that the appellant could ignore it.

145 Allowing that the distinction between jurisdictional and non-jurisdictional error has been criticised in a number of cases¹⁴⁷ and is one which is often difficult

144 No undertaking as to damages was sought or given; cf *Frigo v Culhaci* unreported, New South Wales Court of Appeal, 17 July 1998.

145 For example, it was submitted that Christie DCJ fell into error by making the orders he did on insufficient evidence that the ordinary processes of execution were inadequate in the circumstances of the case before him.

146 Act, s 127.

147 See eg *In re A Company* [1981] AC 374 at 383.

to draw and upon which minds can differ¹⁴⁸, it is a distinction well established in Australian law¹⁴⁹. Care must be taken in extending the rules about jurisdictional error from administrators and administrative tribunals (which are properly brought within the supervision of superior courts¹⁵⁰) to inferior courts whose orders are subject to a facility of appeal, including as to error in defining their jurisdiction¹⁵¹. Having upheld the order of Christie DCJ as being within the jurisdiction of the District Court and within the power conferred on Christie DCJ by s 46 of the Act, there is nothing in the way in which his Honour exercised that power which took it beyond jurisdiction, allowing the appellant to ignore it as if, in law, it did not exist¹⁵².

The punishment of imprisonment was not excessive

146 From the foregoing it follows that the order of the Court of Appeal, declaring that the appellant committed wilful breaches of the injunction granted by Christie DCJ, is sustained. It is therefore necessary to consider the appellant's second ground of appeal complaining that the order of punishment of six months imprisonment was manifestly excessive.

147 In approaching this submission, it is essential to remember a number of general propositions which govern punishment for contempts of the kind in

148 A recent illustration is *Roos v Director of Public Prosecutions* (1994) 34 NSWLR 254 at 263 per Handley JA, 266 per Sheller JA.

149 *McArthur v Williams* (1936) 55 CLR 324 at 364; *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 151-153, 164-166.

150 cf *Roos v Director of Public Prosecutions* (1994) 34 NSWLR 254 at 262-263.

151 cf *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482 at 495; *BHP Petroleum Pty Ltd v Balfour* (1987) 180 CLR 474 at 480-481.

152 cf *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375.

question here where the punishment is not limited by statute¹⁵³ but is at large¹⁵⁴. In determining the order which is appropriate to the contempt found, the Court must take into account those general principles which govern the sentencing of persons convicted of criminal offences which are apt to the peculiar character of contempt. The underlying purpose of the law on this form of contempt is to vindicate the due administration of justice. Contempts of the kind illustrated in this case may be technical¹⁵⁵, wilful but without a specific intent to defy the authority of the Court¹⁵⁶ and contumacious¹⁵⁷. In the last category a serious act of deliberate defiance of judicial authority is evidenced¹⁵⁸.

148 Conceding that such categories of contempt may sometimes overlap, in a case of a technical contempt, where the contemnor has offered an apology which the Court accepts, it will sometimes be sufficient to make a finding of contempt¹⁵⁹ coupled with an order for the payment of costs. Where a wilful contempt is shown, in the sense of deliberate conduct but without specific intent to defy judicial authority, a finding of contempt and an order for the payment of costs may not be sufficient¹⁶⁰. In such a case, a fine (and sometimes more) may be needed to vindicate the authority of the court. But in a case of contumacious defiance of a court's orders and authority, it will frequently be appropriate for a custodial

153 See, for example, Act, s 199(7) where a term of imprisonment not exceeding 28 days is provided.

154 *Registrar, Court of Appeal v Maniam [No 2]* (1992) 26 NSWLR 309 at 314; *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434 at 442.

155 For example, *Ainsworth v Hanrahan* (1991) 25 NSWLR 155. These cases are sometimes called "casual, accidental or unintentional" contempts: *Steiner Products Ltd v Willy Steiner Ltd* [1966] 1 WLR 986 at 992; [1966] 2 All ER 387 at 390.

156 For example, *Attorney-General for NSW v Dean* (1990) 20 NSWLR 650.

157 cf *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 500.

158 *Registrar, Court of Appeal v Maniam [No 2]* (1992) 26 NSWLR 309 at 315.

159 *Director of Public Prosecutions v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 742.

160 *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 461-463; *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 112.

sentence to be imposed as a response to an apparent challenge to the authority of the law¹⁶¹.

149 Unless courts are seen to respond firmly to deliberate defiance of their orders, their effectiveness in the authoritative determination of disputes of law would be undermined. And if they were not effective, "serious and lasting damage to the fabric of the law may result"¹⁶². Obviously, the culpability of the contemnor is relevant to the order which must be made¹⁶³. The contemnor must then be punished in an emphatic way. He or she must be deterred effectively from any temptation to re-offend. However, the focus of attention is not solely on the contemnor. It is also addressed to the community at large and to any others who might consider acting in a similar manner.

150 In the light of its findings, it was clearly open to the Court of Appeal to conclude that the appellant's actions in this case represented a particularly blatant example of conduct constituting a deliberate challenge to the integrity of civil justice in the State, represented by Christie DCJ's order. The only real considerations which redounded to the appellant's favour were that he was 51 years of age, with no prior convictions of any kind; that he had offered an apology to the Court of Appeal which it accepted; and that he had a number of physical and psychological problems compounded by economic dislocation caused by dismissal from his employment, an alleged injury at work and expensive litigation as a consequence.

151 However, these factors had to be qualified. The apology was belated. The Court of Appeal expressed doubts as to its genuineness. The psychiatric and other medical reports received in evidence fell far short of suggesting the presence of any mental unsoundness or psychosis. The Court of Appeal had earlier rejected the claim that the breach of Christie DCJ's order arose out of a disordered state of mind. It had the advantage of observing the appellant. It concluded that his defiance of the order was "clearly deliberate and wilful and with a knowledge and understanding of the order".

152 The Court of Appeal recorded the fact that the appellant had made no offer to satisfy Mr Rahme's judgment. As a direct result of his actions in breach of Christie DCJ's order, the equity in the property at Erskine Park (which at the time of the order approximated the judgment recovered by Mr Rahme) was completely

¹⁶¹ *Registrar, Court of Appeal v Maniam [No 2]* (1992) 26 NSWLR 309 at 318; *R v Sergiou* (1983) 5 Cr App R (S) 227.

¹⁶² *AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 115.

¹⁶³ *Director of Public Prosecutions v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 741.

dissipated. Therefore, by the appellant's deliberate actions, the objective secured by the order was totally lost. On the evidence, there was no apparent means by which the situation could be restored to the *status quo ante*. The appellant offered none. A fine would have been pointless, given his apparent financial position. No order such as was framed in the case of *Maniam [No 2]*¹⁶⁴ was appropriate, given the appellant's prolonged unemployment and asserted disabilities.

153 For such a clear act of defiance of a court order, which the appellant was found to have understood (and said that he understood), a custodial sentence was, in my view, inevitable. His conduct was not impulsive or accidental. It involved negotiation with the finance company over several days, later pursued over several weeks, in an attempt (ultimately successful) to steal a march on Mr Rahme's hope of recovery of his judgment. What was done was precisely what Christie DCJ must have anticipated when he made an order restraining such conduct.

154 All that can be said, in the end, against the order of imprisonment for six months is that it amounts to a serious burden on a first offender. That is true. The Court of Appeal correctly acknowledged that not all wilful and even deliberate contempts should attract a custodial sentence¹⁶⁵. Before this Court it was submitted that the Court of Appeal ought to have taken into account the serious defects in the form of Christie DCJ's order and the fact that, had the appellant enjoyed the funds to mount an application for leave to appeal, he stood a good chance of having the order set aside. However, in my view, that consideration is irrelevant. The appellant did not pursue an appeal. He did not seek variation of the order. Before any such application would have been heard, he had already taken matters into his own hands. The appellant's real objection was not to the duration of the injunction or its terms. As found by the Court of Appeal, it was to the prospect that Mr Rahme would recover anything of the judgment which the District Court had found in his favour after a contested trial on the merits.

155 No error is shown in the order of the Court of Appeal. Even approaching the matter on the footing that this is effectively a first and last appeal against a custodial sentence, I see no principled basis upon which this Court could disturb the order. It should therefore stand. The appeal against it should be dismissed.

Recommencing the order of imprisonment

156 The foregoing conclusions require me to consider whether this Court has the power to recommence the effective operation of an order of imprisonment and, if

¹⁶⁴ (1992) 26 NSWLR 309.

¹⁶⁵ *The Registrar Court of Appeal v Karl Pelechowski* unreported, New South Wales Court of Appeal, 3 February 1998 at 5 applying *Registrar, Court of Appeal v Maniam [No 2]* (1992) 26 NSWLR 309 at 313-316.

it does, whether it should so order in this case. There can be no doubt about the answer to the second question. The provision of bail to the appellant was intended to defend the utility of his application for special leave and then of his appeal to this Court. It was not to provide him with an immunity from the order of the Court of Appeal, should his appeal fail on the merits, as in my view it does.

157 The order of six months imprisonment imposed on the appellant took effect from the day on which it was pronounced. However, in conformity with the *Sentencing Act* 1989 (NSW)¹⁶⁶, the Court of Appeal put the terms of its order beyond doubt by specifying that the sentence was "to commence today and conclude on 3 August 1998"¹⁶⁷.

158 In *Whan v McConaghy*¹⁶⁸, a prisoner, sentenced to imprisonment by way of periodic detention pursuant to the *Periodic Detention of Prisoners Act* 1981 (NSW) first appealed to the New South Wales Court of Criminal Appeal. When it was realised that the appeal was misconceived, he sought relief prerogative in nature from the Court of Appeal addressed to the District Court to challenge his sentence. He was granted bail on condition that he prosecute proceedings in the Court of Appeal with expedition. When the Court of Appeal dismissed his application for prerogative type relief, it ordered that the time that the prisoner had been on bail should not count as part of his sentence. It directed that the sentence previously imposed should commence on a specified date. This Court held that the orders for bail had neither prevented the commencement of the term of imprisonment nor interrupted it. It further held that the Court of Appeal had no statutory power or inherent jurisdiction to vary the sentence to take into account the period spent on bail and that the sentence had, in law, run its course.

166 s 8(1).

167 *The Registrar Court of Appeal v Karl Pelechowski*, New South Wales Court of Appeal, 3 February 1998 at 5.

168 (1984) 153 CLR 631.

159 Explaining the first step in this reasoning, the joint judgment said¹⁶⁹:

"The fact that the applicant did not actually commence to serve the sentence of imprisonment did not, in itself, prevent the term of the sentence from commencing to run. In that regard, it is to be recalled that not even escape from custody had the effect, at common law, of preventing a term of imprisonment from continuing to run¹⁷⁰."

Their Honours continued¹⁷¹:

"Notwithstanding that, in its modern garb, bail may operate more as a form of conditional liberty than as a form of alternative custody (as it used to do when the bailed person was given over into the custody of his sureties), and thereby assume a character more akin in effect to a stay of execution of an order, it does not of itself interfere with the operation of the order: *R v Brooke*¹⁷². A stay of execution, as its name implies, operates directly on the judgment or order the subject of the stay. Bail, in the absence of the exercise of any associated or supplementary powers that may be available, merely authorizes the accused person to be at liberty notwithstanding the operation of the sentence. That being so ... when the Court of Appeal purported to direct that the sentence of the applicant commence on a new and future date, the sentence of three months imposed had already run its term."

160 Because, unlike the Court of Criminal Appeal, the Court of Appeal had no statutory power to vary the sentence so as to take into account the period spent on bail, and because it had no inherent jurisdiction to substitute a fresh order of commitment to prison for the sentence which had in law expired, the order of the Court of Appeal was set aside. Mr Whan walked away from the unsuccessful challenges to his sentence free of custodial punishment. As Brennan J put it¹⁷³:

"The grant of bail ... effectively cancelled the sentence and allowed the applicant to 'escape from punishment and laugh at justice'."¹⁷⁴

169 (1984) 153 CLR 631 at 636 per Mason, Murphy, Wilson and Deane JJ.

170 *In re Court* (1871) 2 QSCR 171; *Wilson v Attorney-General* [1938] NZLR 496.

171 (1984) 153 CLR 631 at 638.

172 (1788) 2 TR 190 at 196 [100 ER 103 at 106].

173 (1984) 153 CLR 631 at 642.

174 Citing *R v Brooke* (1788) 2 TR 190 at 196 per Buller J [100 ER 103 at 106].

161 The defect in the law exposed by *Whan* was well known to the New South Wales Court of Appeal. In a number of cases, that Court has referred to the need for a statutory facility to recommence custodial sentences which in fact, although not in legal effect, have been suspended by a grant of bail to protect the utility of a legal challenge¹⁷⁵. No such statutory provision has been enacted by the New South Wales Parliament to afford powers apt to the present case.

162 Given the specification by the Court of Appeal of the commencing and concluding dates of the imprisonment which it imposed on the appellant, it is necessary to recall another passage in *Whan*¹⁷⁶:

"A sentence of imprisonment, like any other court order, must operate in accordance with its terms as interpreted in the context of any statutory provisions pursuant to which it is imposed or framed. If the sentence does not itself direct that the term of imprisonment which the offender is ordered to serve be a period commencing on a particular day or if over-riding statutory provisions do not have that effect, the term of imprisonment will ordinarily commence when the offender is taken into custody and begins to serve it. The framing of the sentence or the effect of overriding statutory provision can however, intentionally or inadvertently, be such that the imprisonment to which an offender is sentenced is imprisonment during a period which is identified by reference to a nominated specific commencing date. In such a case, if the offender fails to serve the term of imprisonment imposed, he may be guilty of some further offence (see, eg, *Periodic Detention of Prisoners Act*, s 33). In the absence of statutory provision or valid court order to the contrary however, the term or period during which the offender is sentenced to be imprisoned will commence on the designated day."

163 Notwithstanding the grant of bail by this Court on 26 February 1998, the appellant's sentence, unless lawfully stopped, would continue to run in accordance with its terms. It would then have expired on 3 August 1998. No express statutory power existing to stop the clock, the questions are therefore (1) whether this Court enjoys the power, nowhere expressly stated, to stop and then recommence the sentence imposed on the appellant by the Court of Appeal; (2) if it does, whether the orders so far made effected the suspension of the punishment of imprisonment on the appellant; and (3) whether an order should now be made by this Court for the order of punishment to recommence.

164 There is no authority of this Court in a context such as this, which explicitly addresses the question of its power to halt the operation of a sentence or an order

¹⁷⁵ cf *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 285-286.

¹⁷⁶ (1984) 153 CLR 631 at 635-636.

for punishment otherwise imposed by a court with jurisdiction to do so. However, there can be little doubt that this Court has the power to release to bail an applicant for special leave, or an appellant, before it. Certainly, its power to do this has been asserted by the Court¹⁷⁷. I share the opinion of Brennan J that the power of this Court to grant bail "rests upon the inherent power to preserve from futility the exercise of the Court's jurisdiction to grant special leave to appeal and to allow an appeal thereafter"¹⁷⁸. That power derives from the Constitution. It results from the nature of this Court, provided in the Constitution, as the ultimate appellate court of Australia. It derives from implications inherent in the constitutional character and statutory functions of this Court, including in the consideration of applications for special leave to appeal and in determining appeals once special leave is granted¹⁷⁹. The exercise of the jurisdiction so established may be rare. It may be confined to exceptional cases¹⁸⁰. But it certainly exists.

165 In the present case, no question arises as to the power of the Court to grant bail to the appellant. Bail was granted. The question is what follows, in fact and in law, as a consequence of the grant of bail by this Court.

166 The Constitution confers jurisdiction on this Court to hear appeals from State Supreme Courts¹⁸¹. To defend the utility of an application for special leave, and an appeal, this Court must have the inherent constitutional power, in a matter such as the present, to stop the running of the order of imprisonment in connection with a grant of bail. Such powers are vested in this Court, of necessity, to prevent the right to invoke the jurisdiction of the Court being frustrated or rendered worthless¹⁸². The present case affords a good example of why this is so. The order

177 See eg *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518; *Kelleher v Governor Goulburn Training Centre* (1987) 61 ALJR 278 at 279; 70 ALR 725 at 726; *Malvaso v The Queen* unreported, High Court of Australia, 27 April 1989; *Chew v The Queen (No 2)* (1991) 66 ALJR 221; *Kostikidis v The Queen* (1996) 71 ALJR 79; *Peters v The Queen* (1996) 71 ALJR 309; *Frugtniet v The Queen* (1996) 71 ALJR 311.

178 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518. The power may be implied from the Constitution rather than inherent but the difference matters not.

179 *Tait v The Queen* (1962) 108 CLR 620 where the power was asserted to prevent the execution of a sentence of death pending the determination of the prisoner's application for special leave to appeal to this Court.

180 See eg *Re Cooper's Application for Bail* [1961] ALR 584.

181 Constitution, s 73.

182 *D'Emden v Pedder* (1904) 1 CLR 91 at 109-110; *Grassby v The Queen* (1989) 168 CLR 1 at 16-17.

of imprisonment imposed by the Court of Appeal was of such a length that it would have been virtually impossible for special leave to have been granted and the appeal heard and determined within the period of the operation of the order of imprisonment. Thus, unless bail were available and the operation of the order could be stayed in a proper case, the utility of the constitutional right to appeal would be rendered nugatory. Out of necessity, this Court has the power to protect that right, as it did in this case. This is not a matter in which the sentence imposed was one required by statute to be a particular kind or specified length. Different considerations might arise in such a case.

167 In their terms, the bail orders made initially¹⁸³, later confirmed upon the grant of special leave¹⁸⁴, did not suspend the running of the Court of Appeal's order of imprisonment. This fact encouraged the appellant to submit to this Court that, as in *Whan*, the sentence had therefore continued to take effect according to the terms of the Court of Appeal's orders and was now spent. The respondent urged that the appellant, having expressly agreed to the conditions of bail in the terms specified, should not be heard to deny that the operation of the sentence was suspended, such having been the clear purpose of orders (e) and (g) made on the grant of bail. However, even if the legal foundation of an order of punishment by imprisonment could rest upon a principle of estoppel (which I doubt) there is a preferable construction of the orders made by this Court which involves no reliance upon such considerations. The clear purpose of the order "[t]hat the time during which the Applicant is out on bail ... will not be taken into account in calculating the period of service of his sentence" was to suspend the operation of the Court of Appeal's order of punishment. True, it did not say so exactly. But, in the context, it could have no other meaning. It should be so construed. It was not strictly a condition of the grant of bail but a separate order. As originally drafted, the order of the Full Court so provided by assigning to that paragraph a separate number (par 4) and divorcing it from the conditions of bail.

168 If, as I consider to be the case, this Court possesses jurisdiction to suspend the running of the sentence during the period in which the applicant is admitted to bail, and if it did so (as I would hold), it must have the power, in the exercise of its appellate jurisdiction, determining the appeal, by order, to provide for what then follows. The Court of Appeal does not have that power; but that is because it is not vested with relevant statutory powers¹⁸⁵ nor with the constitutional jurisdiction

183 See *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711 at 712-713.

184 *Karl Pelechowski v The Registrar Court of Appeal*, Order, High Court of Australia, 1 May 1998.

185 *Judiciary Act* 1903 (Cth) s 37. ["The High Court in the exercise of its appellate jurisdiction may affirm, reverse or *modify* the judgment appealed from, and may give
(Footnote continues on next page)"]

and powers of this Court. Yet if, in disposing of an appeal, following a grant of special leave and hearing, it is determined that the original order of punishment was correct, it cannot be supposed that this Court would be confined to pronouncing a decision of no practical effect. The Court would not involve itself in such a pointless exercise. Just as the Constitution, of necessity, defends the utility of the appeal by the appellant, it also permits this Court, where the appeal is dismissed, to fashion orders which defend the utility of its conclusion adverse to the appellant. It would be preferable, as the Court of Appeal has in the past observed, that these matters should be governed in the Court of Appeal by a statute of the Parliament of New South Wales¹⁸⁶. But in the absence of such legislation, the Constitution is not silent. It provides this Court with adequate powers to defend the integrity of its process and the utility of its orders.

169 My conclusion is a minority one. Yet consider the unjust result which follows. An order of a Judge of the District Court of New South Wales, never set aside, is solemnly made and stands on the public record speaking to the appellant (who understands it), to the judgment creditor who secured it and to the community. The order was designed to prevent misconduct of the precise kind which the appellant quickly effected. He defied the court order. He wholly defeated the interests of a litigant who had invoked court process and who trusted the court to uphold his rights, not only in theory but in practicality as well. The power given to the trial judge by Parliament is seriously confined. This Court allows a person, guilty of deliberately flouting a court order and defying another citizen's established civil rights, to walk away unpunished, laughing at justice. It is not a shining moment for the authority and effectiveness of judicial orders in Australia.

Orders

170 The appeal should be dismissed with costs. In accordance with the orders made by this Court when the appellant was admitted to bail, it should be ordered that the appellant be taken into custody by the Sheriff of the Supreme Court of New South Wales, or other officer by him authorised, and returned to the New South Wales Corrective Services authorities to serve the balance of the six months imprisonment provided by the order of the Court of Appeal of the Supreme Court of New South Wales, which order was interrupted by order of this Court on 26 February 1998. Such imprisonment should commence when the appellant is

such judgment as ought to have been given in the first instance ..." (emphasis added)]. cf *Criminal Appeal Act* 1912 (NSW), s 18(3).

186 *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 299; *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 286-287.

63.

returned to custody and conclude after he has served the balance of the imprisonment then remaining unserved, namely five months and six days.