

Injunctions and Trusts.

Chancery Bar Association

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Steven Gee QC



1. The title of “Injunctions and Trusts” is broad. My plan is (i) to start with some history, (ii) then look at how the injunction jurisdiction can usefully be described today, (iii) then look at Proprietary Claims Constructive trusts and tracing, and (iv) then look at the meaning and effect of the example freezing order and recent judgments which have misunderstood this. (v) Our time is limited and I hope that we shall have some time for questions at the end. I will start with some history.

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2. William Williamson Kerr obtained a double first at Oxford in 1843. He was the son of a colonial judge in Quebec. He was called to the Bar at Lincoln’s Inn and became the author of 4 text books on Chancery law and procedure, on fraud and mistake, discovery, receivers and his Treatise on Injunctions. This ran to 7 editions, was published throughout the common law world including in America, and is in print today. The case list consisted of 37 pages of double columns. The cited judgments concerned disputes born out of the way that then business was done, wrongs committed, inheritances given and transmitted through the generations, and wealth obtained and spent. It was a long way from Roman law, then and still compulsory at Oxford, which receives a formal acknowledgment on the first page. Kerr wrote that “The subject matter of the jurisdiction of the Court of Chancery is civil property. The Court is conversant only with questions of property and the maintenance of civil rights”. This included trust property.

Statute of Eliz I Fraudulent Conveyances

3. The book recorded the cases that before judgment a man could not be restrained by his creditors from dealing with his own assets. It also referred to the statute of 1571 of Eliz I rendering void conveyances of property to defraud creditors. This was not the first statute to do so. A statute of Edward III had sought to render void transfers where men lived in St Martins Le Grand enjoying protection from legal process, living off the proceeds of loans having transferred their assets to evade their debts. The same problem was addressed in Roman law. It is part of the way of the world.

Property and Resources

4. A spouse who might receive money from a discretionary trust has no property right in the trust assets. What a man owns as property, may be very different from his resources. A man might create a trust in the Cook Islands deposit its assets in a tax haven, and have a deal with Luxembourg lawyers that controlling the assets that they will act on his directions. A trust may have wide powers for a Protector enabling him to appoint new trustees, and to control how trust assets are used. In New Zealand the legislation on ancillary relief in matrimonial cases is based on matrimonial property, in England it is based on a person's resources. Trust assets, whoever owns them may be part of another person's resources.
5. In Australia there are taxes and people who do not want to pay them. This led to a series of Cases brought by tax commissioners which froze assets held by a wife a trust or a company. These were followed in the Chabra case where assets might be held by a limited company as nominee for the defendant, being "his assets".
6. Matters came to a head in the Cardile case in the High Court of Australia. There the court held that the jurisdiction to restrain dealings with assets which could lead to an eventual judgment being unsatisfied, was not the injunction jurisdiction but the inherent jurisdiction of the court to protect its own process. This extends to prevention of acts know which could lead to a future judgment going unsatisfied. The principle is that there is jurisdiction to grant an injunction against anyone to preserve assets wherever they may be or whoever holds them or owns them which by one route or another can be compulsorily applied to meet a judgment. In Australia there can be free standing proceedings to prevent abuse which will result in a future judgment in future substantive proceedings being unsatisfied. This is good for the taxman but even he has to give up if the taxpayer has gone with all his assets abroad.
7. There are limits on territorial jurisdiction against third parties and on what order should properly be made by the English court against a third party regulating its conduct abroad. This self imposed restraint by the court recognises that there are other states each with their national law and courts. Meagher Gummow and Lehane, the Australian Book on Equity proclaimed there is no such thing as a Mareva injunction. The High Court of Australia's views on the inherent jurisdiction made superfluous an investigation into the Australian injunction jurisdiction. In Australia today Freezing "orders" are injunctions in everything but name, and are controlled with nearly identical procedural rules in every state. They are very similar to the CPR. Their standard form order is similar. The position is similar in other common law jurisdictions with the exception of America

which as decided by Justice Scalia and the Supreme Court in the Grupo Mexicano case, inherited English law as it stood frozen in 1789 when the Judiciary Act was passed, and so lacked jurisdiction to prevent preference for Mexican creditors. This was so whether there was no power or a power which was not in fact exercised. The Bond holders had no interest in GMD's assets and equitable remedies were only available post judgment. Chancellor Kent of New York, and the first professor of law at Columbia University, said: "The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights." *Wiggins v. Armstrong*, 2 Johns. Ch. 144, 145—146 (N. Y. 1816). "The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress." The current position in the United States is reviewed in detail in Appendix 1 to Commercial Injunctions. There are various exceptions including in relation to interim arbitral orders, statutory intervention, fraudulent conveyances, equitable causes of action for example for rescission of a contract, and bankruptcy.

8. Now the current position in England is of course very different from the position on injunctions in Victorian England as authoritatively stated in Kerr's Treatise echoed by Lord Diplock in the *Siskina*.
9. Descriptions have been made of the injunction jurisdiction at the highest level. These have included the need for there to be a legal or equitable right to be enforced, with various exceptions added. Others have resisted the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories: "That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."
10. The need for a legal or equitable right or duty which was to be enforced or protected before an injunction could be granted is illustrated by the cases prior to the [Arbitration Act 1996](#), about intervening by injunction in arbitration proceedings. The court could not intervene to prevent an arbitration when there was a perfectly valid arbitration agreement and the question was whether a dispute had arisen under the clause because there was no legal or equitable right not to be proceeded against under the clause. But the court could intervene when the arbitration agreement itself was impeached as void or voidable ab initio because then the injunction held the position pending the outcome of the action in which the agreement was impeached.

11. The language of “cause of action” is casting into convenient terminology the legal conclusion about whether a remedy could be granted on particular facts. If there is a remedy there is a cause of action.
12. What in the past had previously been regarded as an exclusionary rule defined by precedent and described as the “auxillary jurisdiction” in equity, based on enforcement of rights, can now be seen to have exceptions. The Mareva jurisdiction is an exception. Another is the anti-suit jurisdiction in which conduct which is unconscionable can be restrained.
13. There is now a recognised jurisdiction to grant an injunction against a third party based on the cause of action and a substantive right against a defendant, such as a Mareva injunction against the defendant’s wife who holds assets for the defendant or owes him money, or against an offshore company which appears to hold assets for the defendant or under his control. There can be an injunction requiring a person to publicise that there has *not* been infringement of a Community registered design. This has been justified as an ancillary order to the declaration of non-infringement to avoid commercial uncertainty in the market arising from an incorrect claim.
14. The jurisdiction of the court against non parties is not dependent upon any legal right or cause of action against them. In *Cartier v BT* persons unknown abroad were selling counterfeit in breach of trademarks. They were doing so on the internet. The web addresses would be changed . There was a method for ISPs to block public access to these internet sites. But there was no cause of action against them, and they had committed no wrong. They merely provided the public with access to the internet for example through broadband. This was a problem which existed in Victorian times with expensive boxes of counterfeit cigars being shipped to warehouses and held by wharfingers who were innocent of wrongdoing. They were still the subject of the injunction jurisdiction and could be ordered to pay the costs of the proceedings to stop dealings with the infringing goods. In *Cartier* an injunction was granted against the ISPs subject to the trademark holders indemnifying the ISPs of the costs of blocking the sites. In *Google Inc. v. Equustek Solutions Inc* [2017] 1 S.C.R. 824, web sites being used by to exploit trade secrets purloined from Equustek, a small technology company. Court orders forbidding the misuse by Datalink were ignored. De-indexing webpages but not entire websites proved to be ineffective since the the objectionable content was move to new pages within websites, circumventing the court orders. Moreover, Google had limited the de-indexing to searches conducted on “google.ca”. Equustek obtained an interlocutory injunction to enjoin Google from displaying any part of D’s websites on any of its search results

worldwide.the Supreme Court of Canada upheld an injunction against Google requiring it to deindex.

“...Much like a Norwich[Pharmacal] order or a Mareva injunction against a non-party, the interlocutory injunction in this case flows from the necessity of Google’s assistance in order to prevent the facilitation of Datalink’s ability to defy court orders and do irreparable harm to Equustek. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.”

- 15.The substance is that there are situations where the court needs to enlist the public to help enforce court orders. What these cases show is that there is a jurisdiction to grant injunctions for the purpose of furthering the due administration of justice.
- 16.The majority judgment in *Mercedes Benz AG v Leiduck*, turned on the meaning of rules of court in Hong Kong governing service of proceedings out of the jurisdiction. It is common for a question of service out of the jurisdiction to be resolved first by a court, as it was in *The Siskina*, because if determined against the claimant, the court has no jurisdiction to entertain the claim. Lord Nicholls said in what has become a much-cited statement of principle:

“...the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. **But that does not mean that the situations in which injunctions may be granted are now set in stone for all time.** As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today’s conditions and standards, not those of yester-year.”

- 17.In *Annika Smethurst v Commissioner of Police* [2020] HCA 14, there had been an unlawful search carried out. Annika Smethurst was a graduate of Monash University a journalist who had won awards, and until recently was the national political editor for News Corporation. Her front-page stories had led to high-profile resignations. They included a speaker of the House of Representatives (Bronwyn Bishop), a federal health minister (Susan Ley), and, as part of a *Herald Sun* reporting team, a Victorian premier (Ted Baillieu). In 2018, she received leaked secret plans to widen the domestic spying powers of the Australian Signals Directorate (ASD).

The story prompted an investigation by the Australian Federal Police (AFP), who raided the journalist's Canberra flat on 4 June 2019. "I had arranged to go home to my apartment ... to meet a cleaner, and, within two minutes of arriving, the police were at my door." "It just felt like an incredible intrusion." For seven hours, seven armed AFP officers went through Smethurst's two-bedroom flat. News crews camped outside. If found guilty of the crime of publishing classified material, the sentence was at up to five years in prison.

18. The raid resulted in data being downloaded on to a police USB stick. That data was not confidential to the journalist- what was confidential was that she had it- and she had no property right to usb drive. The HCA held that the warrant had failed properly to state the alleged offence, was unlawful and the police had committed the tort of trespass. The plurality judgment refused relief for the usb stick to be delivered up stating

It is well settled that for the grant of an injunction in equity's auxiliary jurisdiction, interlocutory or final, a plaintiff must have a legal right which the injunction will protect[61]."

It distinguished on the facts a case of serious ongoing damage caused by tort for which damages would not be an adequate remedy.

19. Eventually a decision was made not to prosecute, but it came too late. In August 2020 she announced she was stepping down from her role due to the "heavy toll" the past 12 months had taken on her facing the threat of charges.
20. Legal developments and social change make the descriptions of the jurisdictions exercised by the old Court of Chancery, including failed applications for injunctions based on interference with neighbours' rights of light in Victorian London, a page in legal history. Professor Birks, who was my tutor on trusts at Oxford, on Meagher Gummow and Lehane in LQR 2004 p. 344 said

"THIS book will be 30 years old next year. It has become authoritative and is in a sense indispensable. It arouses very mixed feelings. As an immense repository of accumulated knowledge it invites admiration, even wonder. That tribute can be paid with unfeigned respect. Yet the awe resembles that which in a museum of natural history might be offered to a life-sized but lifeless mammoth. The learning belongs to the past, to an age in which law books were content to collect the utterance of authority but felt no responsibility to make sense of it to the contemporary world. It is not a bad test of a modern law book to ask what a professor of, say, philosophy, politics or physics would make of it. Of this one the answer is that such a

reader would rapidly become bewildered, angry, and frustrated. This is law as a mystery for lawyers, and the days for that have gone.”

21. In order to describe the jurisdiction to grant injunctions new words must be found.
22. In England the old classifications of equity assist on how the old High Court of Chancery operated. There is now a single court applying principles governing the law and practice of injunctions. An injunction is granted for a purpose which justifies the granting of the injunction. These purposes can be identified from case law and other sources of law. That the categories are not closed is shown by the emergence of the Mareva injunction, and the adoption of it in s.37(1) of the Senior Courts Act 1981. In practice, arguments which start as being about jurisdiction to grant an injunction are often about how a discretion is to be exercised.
23. Examples of justifying purposes show how wide the jurisdiction is not just in a theoretical sense but also on a practical level which is in fact exercised. Examples include:
 - (i) protecting or enforcing a legal or equitable right, including proprietary rights and rights in respect of trust assets, and enforcing contracts including arbitration agreements and exclusive jurisdiction clauses. If there is no right to be protected, no injunction can be granted to protect it. What can be said is that where there is a right which the law protects, the court can grant a remedy (*ubi jus ibi remedium*); what cannot be said is that because the claimant points to a remedy, therefore he has a right. If there is no proper basis to ground the injunction, no injunction will be granted; The divorced Earl had no right to prevent his former wife calling herself his Countess and a man has no right to a view.
 - (ii) ancillary to enforcement of a judgment (also known as “equitable execution”);
 - (iii) to prevent vexatious, oppressive or unconscionable conduct; This is particularly important with anti suit injunctions and restraining non -parties to the clause.
 - (iv) to protect the court’s own jurisdiction or processes, or to prevent abuse of process;
 - (v) to prevent unjustified dissipation of assets resulting in a judgment being left unsatisfied;

- (vi) preventing, or reversing the effects of, a contempt of court in respect of an injunction granted to the applicant, or preventing breach of an undertaking given to the court;
- (vii) to prevent exorbitant intrusion into the English jurisdiction by a foreign court; e.g. A US court interfering with the winding up jurisdiction and holding directors to account.
- (viii) ancillary to make effective other relief granted by the court, and to facilitate the due administration of justice;
- (ix) to protect a child who is at risk;
- (x) to implement a statutory regime (e.g. insolvency regimes, prevention of harassment and preventing costs being funded by the company on an unfair prejudice petition under s.994 of the Companies Act 2006);
- (xi) to implement an important English public policy (e.g. protecting the right of employees to access an English court or tribunal on an employment claim);
- (xii) to reverse the effects of an unlawful or wrongful act; for example to require conveyance back of property disposed of in breach of covenant or in breach of an injunction;
- (xiii) to grant ancillary relief in aid of proceedings in a foreign court or an arbitration abroad ([s.25\(1\) of the Civil Jurisdiction and Judgments Act 1982](#) and [s.2\(3\) of the Arbitration Act 1996](#));
- (xiv) to enforce an equitable duty upon a person who had innocently become mixed up in the wrongdoing of another, so as to facilitate that wrongdoing, to provide, upon reasonable request, assistance to the victim of the wrongdoing, and to prevent his facilities being used to commit a wrong.

24. Proof of past facts or of existing facts depends on a balance of probabilities. The availability of a Mareva injunction depends on looking into the future and whether there is a real prospect that assets may be applied to meeting a judgment through enforcement. It is forward looking. The test requires analysis to see if there is **a risk** of this. The issues on whether property can be compulsorily reached to meet a judgment will normally only be subsequently resolved in enforcement proceedings in England or abroad.

25. Before the Judicature Acts 1873–1875, the High Court of Chancery exercised a jurisdiction to enable there to be enforcement of a judgment when execution could not be had at common law. The procedure was by bill in equity seeking the payment of the judgment debt by means of the appointment of a receiver over an asset of the judgment debtor. The practice was for the application for the receiver to be made by interlocutory application before the hearing.
26. The most common case concerned land. The legal theory was that a judgment creditor who wished to enforce his judgment against land of the debtor, which could not be reached by legal execution, could obtain the assistance of equity to do this. This was not because the judgment gave him an “interest” in the land of the debtor; what he had was a right to be paid on the judgment and a need for the assistance of equity to obtain satisfaction of the judgment. The procedure was available because there was an impediment to execution being had at common law and an asset which could be realised through the appointment of a receiver.
27. Although called “equitable execution”, it was the granting of equitable relief to enable satisfaction of an actual judgment to be obtained. The label was misleading - It was not execution, but a substitute for execution.
28. In *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd*,¹¹⁴ the claimant judgment creditor discovered that the judgment debtor had established two discretionary trusts in the Cayman Islands. The beneficiaries of the trusts were the judgment debtor and his wife, and the judgment debtor had power to revoke the trusts by deed delivered to the trustees. A power has been regarded in certain contexts as different from a right in property and therefore subject to different rules. There were textbooks on Powers. It was argued that the power to revoke was not itself an asset, and that it should not be capable of being made the subject of a mandatory order for its exercise as an aid to execution of a judgment. The Privy Council decided that the powers of revocation were such that in equity they were tantamount to ownership, and ordered that the judgment debtor delegate his powers of revocation to the receivers so that they could exercise them with a view to using the proceeds to satisfy the judgment. This decision forwarded the policy of seeing that judgments are satisfied when this can be done without injustice. The right to revoke by deed delivered to the trustees was not a fiduciary power to be exercised for the benefit of others; it was a power held for the judgment debtor’s own benefit, and was a mechanism through which the judgment debtor had access to assets for his own benefit. The assets in the trust were part of the judgment debtor’s resources.

29. Sometime ago the Chancery Bar Association held an event on what was called an “Illusory Trust”. The expression is internally inconsistent. How can there be both a trust and not a trust? To have a trust there must be enforceable obligations concerning assets. There must be these at a minimum for there to be a trust as opposed to assets which are owned by someone. The case discussed at that event was the New Zealand Supreme Court case – Clayton v Clayton No 1. There was a trust which gave to the husband very wide powers over the assets but which was not a general power of appointment tantamount to ownership. There was an argument over whether the trust was a sham, and the husband had in effect retained ownership and whether there was no trust with an “irreducible core of obligation” to benefit others. There was also an argument that the rights of the husband were themselves property rights subject to the NZ legislation. It was on the last point that the wife succeeded.
30. Since then there has been a decision of Birss J in the Pugachev case. In that case the trust was found not to be a trust at all, there were rights of Mr P tantamount to ownership, the documents were a sham, and there was a successful claim under s. 423 Insolvency Act. The finding of sham was notwithstanding that the documents were drawn up professionally and the trust set up by professionals. The particular issues which may arise depend on the particular facts including the words of the trust documents. There is no rule that a man does not intend to create a trust when the consequences of upholding the trust may be to work an injustice. But the fact there is a trust involved does not mean that trust assets will be immunised from being reached for non trust liabilities.
31. The standard form of freezing injunction uses the words “his assets”. The history goes back to the original Mareva jurisdiction. It was to stop foreign shipowners withdrawing assets of a defendant company from the jurisdiction and thereby defeating a judgment. Take by way of example the facts in Siskina. It was a one ship company incorporated abroad. The ship had sunk and cargo had been lost. But there were also insurance proceeds from the hull policy which had been placed in London. The cargo interests had no entitlement to sue the company in England for the loss of their cargo. There was no territorial jurisdiction. The Mareva injunction was refused because there was no territorial jurisdiction on the substantive claim. Injunction in the rule of court relied on for service abroad did not include an interim injunction but was limited to a final injunction.
32. We can usefully speak about Mareva injunctions to distinguish them from injunctions founded on property rights in assets which are subject to different rules. In a case involving a claim to property the cause of action is founded on property rights.

33. When we speak of property rights we must be careful in a case to identify the issue which is being addressed. Let me give an example. A man agrees to buy a car in England and he drives it across the Channel to France where creditors of the seller seize the car. Who owns the car depends on French law of ownership. This is an application of the *lex situs* rule. As between the man and his vendor he may have a contractual right under which he is entitled to demand transfer of ownership of the car. Glasgow Rangers went into administration having granted season tickets for entry to Ibrox stadium. Under English law the season ticket holder had an irrevocable licence entitling him to admission to the stadium and to sit in a seat within a defined class, but he had no property right in the stadium itself or in the seats. His rights were contractual.
34. It is said that F W Maitland taught trusts by reference to how particular issues would be resolved. This avoids a use of labels as a substitute for rigorous legal analysis. For example the vendor purchaser trust gives rise to rights against third parties who acquire the property from the vendor. But exactly what rights and obligation there are, are not answered by labelling the position as one concerning trust assets.

Proprietary Claims: Trusts, Constructive Trusts, and Tracing

35. A property right in or in respect of a fund is a substantive right, and can found a remedy granted to enforce that property right. It is a claim to the property itself, and is only asserted against the holder of the property, or one who is in a position to give effect to the proprietary interest. This claim is based on ownership of property, and is not fault based. An equitable property right will be lost where property is transferred to a bona fide purchaser for value without notice, or when overridden by the *lex situs*.
36. There is a distinction between personal claims in tort, delict or quasi delict (to enforce a non-contractual liability against a person), a personal claim to enforce a contractual liability, and a claim to enforce a proprietary right.
37. The rules of “following” and “tracing” assets, are rules about identifying assets or their proceeds to which a claimant has a proprietary claim. Tracing through bank accounts may involve limiting what can be traced to the lowest intermediate balance but the rules allow “backward tracing” where the overall effect as a matter of substance of money being transferred through accounts, is that the full value of particular assets has passed through the account into a recipient account.
38. A person may become a trustee because he has agreed to become a trustee expressly or by implication, or because that is the effect of a transaction by which both parties intend to create a trust from the outset, and which is not a transaction impugned by the claimant. The defendant’s possession of the

property is governed ab initio by the trust and confidence by means of which he obtained it, or his agreement as to how the property is to be used and dealt with by him. The expression “constructive trust” can be used to refer to a trust created by a transaction which is not impugned, where there is identifiable property subject to the trust and a fiduciary relationship between the trustee and the beneficiary. Examples are property received under a secret trust, or an oral arrangement for a person to acquire property, or as to how it is to be used, and for whose benefit it is held. Where an agent or other fiduciary receives a bribe or secret commission in breach of his fiduciary duty to his principal, he holds it on trust for his principal, who has a proprietary claim to it.

39. A claim to hold someone liable based on involvement in a breach of trust whether through knowing receipt of trust property or dishonest assistance in a breach of trust, is a personal claim and is fault based. It falls within art.7 (2) of the Judgments Regulation recast, as a claim “...in matters relating to tort, delict or quasi-delict...”. The defendant is not a trustee. He is not a de facto trustee or a trustee in the ordinary sense of the word, but is a person who is held liable by the court as if he had been a trustee. There is no “remedial constructive trust” in English law, in the sense of an actual trust on assets being imposed as a remedy. In such a case the expressions “constructive trust” and “constructive trustee” are misleading, for there is no trust, and often no possibility of a proprietary remedy because he holds no assets to which the claimant is entitled; they are “nothing more than a formula for equitable relief”. It is a claim for compensation or to account as a constructive trustee, and not a proprietary claim. It is a claim which is based on the ground that the claimant had rights of property in respect of particular assets, but it does not seek a remedy to preserve those assets or to obtain them for the claimant. The expression “proprietary claim” is used as a label for a claim to assets, but depending on the context might possibly be used to describe a claim grounded on the fact that assets belonged in the past to the claimant when the cause of action arose. These are different claims with different remedies. The words “property” and “proprietary” can have different meanings in different contexts. A trust involves personal rights against a trustee, but under English law it also gives rise to rights of beneficiaries against third parties, for example, the right to recover trust property from them, and that trust property is not available for distribution to creditors on insolvency. The rights are appropriately to be described as rights of ownership of property. The rights of the beneficiary and the nature of his interest in trust property are governed by the law governing the trust. If under that law the rights are personal rights against the trustee who retains all rights of ownership in the property then under English conflict

of law rules the beneficiary has no ownership rights in the property of the trust.

40. Ownership or proprietary rights in the property itself, are governed by the *lex situs*. Who owns a house depends on the law where the house is. Who owns a car depends on where the car is. This question is about the rights of the parties to the action and anyone else in the world who might claim the asset. It is to be distinguished from the issue of what personal rights and remedies there may be of a claimant against a defendant. In *Lightning v Lightning* there was a resulting trust under English law which was given effect to notwithstanding that the property purchased was in Scotland which did not recognise the trust.
41. The court gives effect to those personal rights "...to the greatest extent possible, having regard to the overriding effect of any disposition under their *lex situs*." If under the *lex situs* an equitable interest in the property is capable of subsisting then the question is whether it has been created. Where this is said to be because of the effect of a contract, the question is not whether its proper law recognises constructive or any trusts. The question is whether the characteristics which the proper law of the contract treats it as having, are such as the *lex situs* would regard as giving rise to a proprietary interest in equity in the asset. Rome I is concerned only with the law applicable to contractual obligations, and Rome II is concerned only with the law applicable to non-contractual obligations. Neither is concerned with the law to be applied to determine rights of ownership in an asset.
42. A claim based on a contractual right may be a claim for compensation, or a claim which enforces a right to property created by the contract, such as a right to specific performance, or the right to realise an equitable charge or lien, which has been created by contract, or a right of the claimant against third parties to preserve and obtain the assets. A claim for misuse of trade secrets is not founded on property rights – it is a tortious cause of action and the conflict of law rules are those for torts.
43. A claim to property against a defendant, as opposed to a personal claim for a remedy requiring payment of money, such as compensation or an account, gives rise to a different analysis for the purpose of (1) establishing jurisdiction over a defendant in respect of the claim, (2) limitation, and (3) granting an injunction.
44. Where a claimant seeks an injunction in respect of assets based on a legal or equitable property right to them, the claimant may have (1) an ownership right in the asset or (2) rights in personam against a defendant in relation to an asset which can be enforced against the defendant regardless of

whether the claimant owns the asset under the *lex situs*. A claim in England to assets seeking to enforce equitable rights against the defendant is a claim made in *personam* against that defendant. The fact that assets are located in a jurisdiction which does not recognise trusts or equitable rights, or have passed through such jurisdictions, does not affect whether there is a good cause of action and entitlement to a remedy applying the law determined by English conflict of law rules. A consequence is that although assets may be abroad in a jurisdiction which does not recognise trusts and beneficial ownership, there may still be a personal claim made in England against a defendant subject to the territorial jurisdiction of the court. The remedy on the personal claim may require the defendant to transfer the asset to the claimant or account for its value or its proceeds.

45. These claims are different from the *Mareva* jurisdiction. In a case for an injunction in support of a claim to the assets sought to be frozen the questions, applying *American Cyanamid*, are whether (1) the claimant has shown that there is a serious issue to be tried on the merits; (2) the balance of convenience is in favour of granting an injunction and (3) it is just and convenient to grant the injunction. The considerations are different from *Mareva* relief. The purpose of the injunction is to preserve what may be the claimant's property, and this is different from the purpose of the *Mareva* injunction which is to prevent dissipation of assets with the consequence that a money judgment may go unsatisfied. The purpose of an injunction is to preserve the asset and prevent it being dealt with by the defendant in a way which could prejudice enforcement of the claimant's rights in respect of the asset. No risk of dissipation need be shown for a proprietary injunction. In considering the balance of convenience if the claimant shows a sufficiently arguable case for a proprietary remedy, then it remains necessary to consider the adequacy of damages as a remedy, for one or both parties.
46. In the case of a claim seeking to require a defendant to disgorge a benefit received by him, the analysis at common law is to ask whether, under the *lex causae*, the defendant owes obligations which would impose on the defendant under that law a liability to disgorge the benefit. If so, the court may hold the defendant liable as constructive trustee when giving remedial effect to the substantive right arising under the *lex causae*.
47. When there is a contractual obligation governed by Rome I, or a non-contractual obligation governed by Rome II, the questions of remedy and damages in an action enforcing the obligation or seeking a remedy for its breach are governed by the *lex causae*. Limitation in both cases would be governed by the *lex causae*.

48. Where money has been taken fraudulently from a claimant, then this gives rise to non-contractual claims under Rome II. If English law is to be applied, the money in the hands of a recipient is normally treated as held on trust for the claimant, namely as subject to an actual trust in favour of the claimant.

The Standard form Order and what injunction will be granted where a non party company is involved.

49. The Mareva injunction was directed at assets within the jurisdiction of the court which belonged to the defendant – hence the expression “his assets”. In the earliest form of order it was limited in meaning to assets which were owned by the defendant beneficially. But Mareva was just the start of a jurisdiction. There needed to be changes in the form of order granted so as to include assets which might be reached one way or another. This came in a series of changes to the standard form order, which have been interpreted in a series of cases. One change is that the order applies to assets including assets not beneficially owned by the defendant and another is the order applies to assets controlled by the defendant including where there is a third party asset holder who acts upon his instructions.

50. The defendant in *Group Seven Ltd v Allied Investment Corp Ltd* had control over a debt owed to a Maltese company because he owned all the shares in it and was its sole director. The issue was whether he had committed a contempt. The third party was the Maltese company, it owned the debt owed by the third party to it, and the defendant could control the asset by passing a shareholders’ resolution to settle the debt owed to the company by the third party on certain terms, or doing so himself on behalf of the company. It was a contempt case. The judge decided that because the defendant in law acted on behalf of the company as its agent, or as an organ of the company, and not for himself personally this was sufficient to take the facts outside of the second and third sentences.

51. In *FM Capital Partners Ltd v Marino* this decision was followed. The issue was the form of injunction for the future. There was judgment on liability against an individual (O) for dishonest assistance for breach of fiduciary duty and bribery, channelling commissions away from the claimant. Real risk of dissipation of assets was established and a worldwide freezing injunction was granted based on the standard form. The order made referred by name to a holding company in which the judgment debtor held 100% of the shares. Two other named companies were owned 100% by the holding company, one of which had no employees. The judgment debtor and his sister were directors of each company.

The standard form had been adapted. The words “(which shall include a body corporate)” were inserted after a third party in the third sentence of para.6 of the standard form. These words appear to have been inserted as a matter of caution so as expressly to alert the defendant that his companies were third parties within para.6, and did not alter its scope. Paragraph 7 had been adapted to include assets of the three companies which were wholly owned (directly or indirectly) by O, including the bank accounts of those companies. There was a notification requirement which applied to “any company whose assets are frozen”. The issue was whether the injunction should be varied by deleting these, and also the words “and whether the respondent is interested in them legally, beneficially or otherwise” in the first sentence of para.6 of the standard form order.

That issue should have been approached by considering (1) what scope of injunction should be adopted to prevent unjustified dissipation of assets which could result in a money judgment being unsatisfied; and (2) drawing up an order giving effect to that scope. On (1) it was relevant to consider how a money judgment might have been enforced and whether assets could be compulsorily applied to satisfy that judgment. That would include enforcement abroad by a foreign court.

The deputy judge said “...There may be occasions where the freezing order could be expressed by the court to apply to the assets of a company wholly owned or controlled by the respondent, where that company is not a defendant to the substantive litigation, but that jurisdiction is to be exercised only exceptionally, for example, where in truth the company’s assets are the respondent’s assets ([for example] non-trading companies which have no active business and “which are in truth no more than pockets or wallets of that respondent...”). This is a proposition about what form of words should be used and when. It overlooks that para.6 is part of the standard form order in the Commercial Court Guide, and that it is common as a matter of experience for a defendant to exercise control over assets of offshore companies which he owns, which are assets which may be compulsorily applied to satisfy a judgment. That control may be through a power of attorney or because he is the sole director or because he is the 100% shareholder.

The deputy judge decided that:

(1)The third sentence of para.6 did not “...mean that the [R]espondent had “control” over the company’s assets..., because any decision taken by the [R]espondent as to the disposition of or dealing with the company’s assets was not taken by the [him] in his or her own right, but was taken in his or her capacity as an organ or agent of the company.” This is the error in interpretation of para.6 in Group Seven.

(2)Each company’s bank accounts were therefore outside of “assets” frozen by the order, and this should be made clear through deleting from the order references to the companies’ bank accounts as being within the prohibition imposed on the Respondent by the injunction.

The judge decided that para.6 of the standard form order including the words added out of caution that third party includes a body corporate “...does not, by its terms, apply to the assets of the companies in which [O] has a direct or indirect shareholding.” The reasoning was that where an asset belongs to a company in which the Respondent is 100% shareholder and a director, his only ability is to give instructions on behalf of the company, or as an organ of the company, and he has no ability to use the asset “...as if it were...his own” within the meaning of para.6. It is considered that on the standard form wording there is no such limitation and the reasoning in Group Seven, and the judge’s reasoning are incorrect. The judge decided to omit the concluding words to the first sentence of para.6. This was because “...there [was] no evidence that [O owned] any assets as a trustee or nominee or...on any basis other than as the owner of the legal and beneficial interest....There was no...evidence that there are proper grounds for believing that assets ostensibly held by the defendant on trust or as a nominee for a third party in fact belong to him”. This overlooked that the words used contained no such limitation and that treating them as if they did was inconsistent with the enforcement principle and not justified by the strict construction principle. As a result of the judge’s interpretation of the standard form order he decided to limit its application in the case before him to assets beneficially owned by the defendant.

52.If a defendant has a mandate over a bank account of a company in which he owns all the shares and of which he is the sole director, it is considered that this would be within para.6. This would give the defendant direct control over a specified asset. The fact that the asset is owned by the company and that the defendant would be giving instructions to a third party who controls the asset under a mandate enabling the defendant to give instructions on behalf of the company and the defendant owns all the shares is sufficient to bring the situation within the first second and third sentences, interpreted together. On this the first sentence of para.6 applies its extension to assets regardless of “whether they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise”. The concluding words are to be taken into account when interpreting para.6 as a whole. That paragraph is inconsistent with the limits of the standard form considered in *Federal Bank of the Middle East Ltd v Hadkinson*,¹¹² which applied its prohibition only to assets beneficially owned by the defendant.

53. The standard form order is the starting point and its meaning is relevant to what a judge may be willing to grant. Meaning of an order is crucial for non parties given notice of an order in contempt proceedings and in claims on cross undertaking in damages.
54. One should not be interpreting the standard form order by reference to what particular phrases have been held to mean in a different order. The order has to be interpreted as a whole. In addition there is the difficulty that a judgment debtor may use company assets through his position as a director but this says nothing as to whether such assets may be reachable on enforcement. There is no immunity from the freezing injunction jurisdiction simply because assets are company assets. The provisions in the standard form order about assets which the defendant can use as if they are his own, are provisions to catch what on the evidence on the ex parte application are potentially relevant assets leaving the defendant to apply to discharge the injunction. A businessman who holds his cards close to his chest may find himself subject to an injunction in respect of assets held by a Lichtenstein Foundation. He may also be subject to an injunction in respect of assets held by a BVI company, or a trust established under the law of the Cook Islands. On the question of the width of an injunction the court is exercising a discretion based on evidence and the fact that the defendant is a trustee is not necessarily conclusive.
55. There is a separate issue of whether an injunction should be granted against the non-party company or foundation. The court will normally leave any question of a court order against a bank in respect of an account abroad and the conduct of that account abroad, to the local court having jurisdiction abroad. There is there no “subject matter jurisdiction”.
56. In an appropriate case the court may grant a receiver over the foreign assets. The receiver can then take steps abroad to get in the assets including bringing proceedings there.
57. Let us take a case in which a businessman, Mr X, is connected with an offshore trust structure. So what evidence is required to obtain an injunction over trust assets? The court in exercising its injunction jurisdiction will normally have gaps in the information before it. It is important to understand that the granting of an interim injunction is based on evidence. It is interim relief pending final resolution of a case. Enforcement of an eventual judgment against assets abroad will normally be a matter for the local court.
58. If one has a case where assets are said to be held in a trust there may be a number of unknowns. The terms of the trust instruments. The

circumstances in which they were drawn up. Whether there is an arrangement which does not feature such as an arrangement for trust professionals to follow instructions of the businessman? Where did the trust get its assets from and what was the purpose of the transfer into the trust? In Clayton v Clayton the NZ Supreme Court found it unnecessary to interpret the trust deed or decide whether the trust was a sham or whether there was sufficient core duty to found a trust. That was because the NZ statute operated and the rights which the husband had were sufficient to amount to Property.

59. Mareva injunctions are always interim injunctions. This is so even post judgment in the substantive proceedings. They hold the position pending prospective enforcement proceedings including those against non parties. Those eventual proceedings may be abroad.
60. Group Seven and FM Capital Partners Ltd v Marino represent a triumph of form over substance. In both cases there was misunderstanding of the purpose and effect of words which apply an injunction to assets which are part of a defendant's resources and are under his control. F M Capital also misunderstood the issue which was what the injunction should restrain which was an issue to be answered by reference to the particular facts, included that the case was post judgment and there were findings of dishonesty. There is no black hole in the Mareva jurisdiction for a bank account of a company of which the defendant is a director.