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The undertaking in damages

*Steven Gee**

Interim injunctions and other interlocutory orders can cause loss or expense to non parties and others which in fairness the applicants ought to pay. The undertaking required under the CPR for any injunction has been ignored, is too restrictive and is unclear. Recent decisions in the Chancery Division have held that the court has been left with no jurisdiction to grant relief to non parties, because the necessary undertakings have not been required, and have endorsed, on historical grounds which appear to be less than satisfactory, a practice which seems less than just. This article examines the history, the current practice and the case for reform.

Introduction

The High Court of Chancery had no general jurisdiction to award compensation against a plaintiff who had obtained an interlocutory injunction but then failed in his substantive claim or was shown to be not entitled to the order. There might have been statutory reform to give the court that power, and it can be questioned whether it would be simpler, and involve less risk of unfairness, to have a statutory jurisdiction to award compensation for unjustified orders.¹ However, the solution has been one designed by the judges; to take undertakings to the court which would result in proper payments being made, and which, if broken, expose the undertaker to being held in contempt. If undertakings are to perform this purpose, they must protect those liable to be damaged, be in sufficiently wide terms, and be stipulated for by the court whilst the applicant still needs his order. With the development of the *Mareva* jurisdiction it has been recognized that the granting of an injunction, or other discretionary interim order, can significantly affect persons who are not defendants in the case. A number of decisions recognize that the interests of these non parties may make it unjust to grant an injunction and that, if an order is to be made, the interests of the non parties should be protected. However, although the undertakings which are required in freezing order cases, including those protecting non parties, are almost universally insisted upon, there is uncertainty about what is or should be the proper practice for other orders. The position under the CPR in the High Court is regulated by the *Practice Direction-Interim Injunctions* which supplements CPR Part 25. Paragraph 5.1 provides that for any “injunction” there must be an undertaking in damages by the applicant to the court covering “. . . any damages which the respondent(s) (or any other

* QC. I would like to acknowledge the assistance I received about French practice from Professor Emmanuel Gaillard of Shearman Sterling, Paris, and about practice in the Federal Court of Australia from Noel Russell, a barrister from Victoria.

1. A Zuckerman, *Civil Procedure*, 2nd edn (2003), 317.

party served with or notified of the order) sustain . . . ”. This provision has been ignored in practice,² is too restrictive and is unclear. It did away with the practice which required protection of defendants who were not enjoined, sanctioned for over 100 years before the CPR came into effect. The position has not been improved with practice forms³ issued in March 2005 which take the further step of carrying into the forms the uncertainties of the words of the practice direction. This article looks at the evolution of the practice on undertakings in damages, including the problems encountered and the solutions adopted, to consider what position has been reached under the CPR, and to consider what changes should be made.

The development of the practice concerning the undertaking in damages before the *Mareva* era

The practice of requiring an undertaking in damages became an “almost universal practice”⁴ of the Court of Chancery for applications made *ex parte*. The defendant was not present and could suffer immediate loss. Sir George Jessel MR said in *Smith v. Day*⁵ that the practice had been “invented” by Sir James Knight Bruce following his appointment as Vice-Chancellor in 1841, and this has been repeated subsequently by Ashburner in the *Principles of Equity*,⁶ Lord Diplock in *F. Hoffman-La Roche v. Secretary of State*,⁷ and by judges in other cases.⁸ However, the concept of imposing an appropriate term, such as requiring security from the plaintiff for the possible loss to the defendant, as the price for granting an injunction, appears in cases which predate that appointment.⁹

It came to be recognized that with an *inter partes* application on motion, where the court did not know who would eventually prevail, the requirement of an undertaking in damages facilitated the court in two objectives. First, the court would be able to abstain from expressing premature views on the merits. Secondly, the procedure enabled the court to grant an injunction knowing that if the defendant prevailed he would usually obtain some compensation for having been subjected to the injunction. From about 1859 this became the usual procedure in the Court of Chancery,¹⁰ albeit not an invariable one: for example, it would not be required in a clear case of fraud.¹¹

2. *Miller Brewing Co v. Mersey Docks and Harbour Board* [2004] FSR 5; *SmithKline Beecham Plc v. Apotex Europe Ltd (No. 3)* [2005] EWHC 1655; [2005] FSR 44; [2006] 2 All ER 53.

3. PF 39 CH Order for an Injunction (Intended Action) and PF 40 CH Order for an Interim Injunction. The suffix CH has been used to show that these forms are mainly intended for use in the Chancery Division: *Practice Direction – Forms supplementing CPR Part 4*, para 1.4.

4. In *Chappell v. Davidson* (1856) 8 De G M & G 1, 2, Knight Bruce LJ described this as the practice for “the last twelve or thirteen years”.

5. (1882) 21 Ch D 421, 424.

6. 1st edn (1902), 476.

7. [1975] AC 295, 360.

8. *W v. H* [2001] 1 All ER 300, 310; *SmithKline Beecham Plc v. Apotex Europe Ltd (No. 3)* [2005] EWHC 1655 (Ch); [2005] FSR 44, [25].

9. See the cases mentioned by Kriewaldt J in *Chiesholm v. Rieff* (1953) 2 FLR 211, 214, and Brooking J in *Bond Brewing Holdings v. National Australia Bank* [1991] 1 VLR 580, 599, including the judgment of Lord Cottenham LC in *Sanxter v. Foster* (1841) Cr & Ph 302, in which Mr Knight Bruce appeared as counsel.

10. *A-G v. Albany Hotel Co* [1896] 2 Ch 696, 703, *per* Lindley LJ, setting out his recollection of the introduction of the practice “thirty-five or thirty-six years ago”; *Tuck v. Silver* (1859) John. 218; *Wakefield v. Duke of Buccleugh* (1865) 13 WR 856.

11. *Ingram v. Stiff* (1859) John. 220n.

The precedent in Sir Henry Seton's *Forms of Decrees in Equity*¹² for an injunction granted against a single defendant, contained an undertaking in damages extending to "the Defts" in the plural, and stated that the registrars of the court "are instructed always to insert [the undertaking]" for an *ex parte* injunction or restraining order. Once the practice was established, it was an obvious inference for the registrar that, when nothing was said on the application, this was a term of the order. The draft order produced by him would include that undertaking, on the assumption that the court required it and the plaintiff would provide it. If the plaintiff declined to provide it, then the order would not be passed, and the matter would go back to the judge.¹³

There was an anxiety on the part of the judges to obtain an undertaking which had been given with the plaintiff's authority. This led to rules being laid down in a series of cases, and recorded in the textbooks,¹⁴ as to how the undertaking had to be given. There was some authority that allowed a limited company to give the undertaking through a director signing the registrar's book, or to the registrar on a separate piece of paper,¹⁵ and there were cases in which the undertaking was accepted by the court when given expressly by counsel for the company. The court would not accept undertakings proffered by a party's solicitors.¹⁶ There had to be an express undertaking either by the individual plaintiff or by someone whom the court would accept could give an undertaking binding on the litigant.¹⁷ Counsel seeking an urgent interlocutory injunction had to make arrangements for the undertaking to be given by a person acceptable to the court, so that the order could be pronounced orally by the judge, drawn up by the registrar, and passed.¹⁸

In *Tucker v. New Brunswick Trading Co of London*¹⁹ the plaintiff brought an action against a company (D1) and three other defendants (D2, D3 and D4) seeking to prevent the company from confirming two agreements with (among others) D2 and D3. An *ex parte* application for injunctions was refused and short notice of motion was given to D1 and D2. At that hearing, Chitty J granted an injunction against D1. Neither D3 nor D4 were represented at that hearing; notice of motion had not been served on them. "At the close of the discussion, [Counsel] for [D2], asked for the usual undertaking in damages to which the plaintiff's counsel, Mr Romer QC, replied, that of course it would be given."²⁰ There was then some discussion before the registrar about the drawing up of the order, including discussion of whether the undertaking ought to extend to protect D2. The registrar decided to draw up the order with a cross-undertaking protecting only D1.²¹ Subsequently no order was made on the adjourned hearing of the notice of motion, and so there was no longer any injunction for which undertakings could be required as the price

12. 3rd edn (1862), 867.

13. *A-G v. Albany Hotel Co* [1896] 2 Ch 696 (North J).

14. *Daniell's Chancery Practice*, 5th edn (1871), 1519; 6th edn (1884), 1611; *Seton*, 4th edn (1877), 174; 5th edn (1891), 455–456; *Pemberton on Judgments and Orders*, 3rd edn (1882), 207; *Kerr on Injunctions*, 3rd edn (1888), 628; *Joyce on Injunctions* (1872), 1307–1308.

15. *Pacific Steam Navigation Co v. Gibbs* (1865) 14 WR 218.

16. *Walter v. Brown* (1885) 29 So J 435

17. *Spanish General Agency Corp v. Spanish Corp Ltd* (1890) 63 LT 161.

18. *Spanish General Agency Corp v. Spanish Corp Ltd* (1890) 63 LT 161, in which the writ had to be amended to get over the point, and the *ex parte* injunction was discharged when this was not done immediately.

19. (1890) 44 Ch D 249; (1890) 59 LJ (NS) (Ch) 551; (1890) 63 LT 69.

20. (1890) 44 Ch D 249, 250.

21. The registrar used the wording in *Seton* but inserted the name of the company after the words "the Defendants", which had the effect of limiting the protection of the undertaking to D1.

for its continuance. There was a petition to wind up D1. D2 and D3, who were parties affected by the injunction, gave notice of appeal asking that the order be reversed or varied to extend the undertaking to protecting D2 and D3.

The Court of Appeal held that there had been an error in drawing up the order because D2's counsel had "applied for and obtained an undertaking for damages, and it ought to have been embodied in the order . . .". The plaintiff's counsel had in effect given an undertaking to the court covering D2. True it was that Chitty J might have corrected the order under the equivalent of the slip rule;²² however, the Court of Appeal could set "right an order which does not in fact express the intention of the Judge".

What about D3? The plaintiff's counsel in argument told the Court of Appeal that, if an undertaking had been required which protected D3, then the plaintiff would have "given up" his injunction.²³ Cotton LJ said, "we cannot impose any undertaking which he has not given"; and Lindley LJ said, "[D3] did not ask for an undertaking, and for anything we can tell, if he had done so the Plaintiff would have declined to take the injunction". The request for the undertaking had come from D2's counsel, who was asking for an undertaking protecting his client, and the response did not give an undertaking protecting D3.

Cotton LJ referred in his judgment with approval to a sentence which appeared in the fourth edition of *Pemberton*²⁴ on *Judgments Orders and Practice*, published in 1889. This was a sentence which had not appeared in the previous edition:²⁵ "The Undertaking applies to all the defendants although one or more only may be restrained." That sentence set out the effect of the form of undertaking set out in Sir Henry Seton's *Forms of Decrees in Equity*,²⁶ of which the senior registrar of the Chancery Division was a co-editor, and which was referred to by the other leading textbooks.²⁷ The approval of it established that an undertaking ought to be required protecting all the defendants, whether or not enjoined. This remains good policy; other defendants can be expected to be affected by an injunction granted in the action, albeit not restraining them, and they should have no lesser protection. The likelihood of loss to D3 was obvious from the fact that he was a party to a contract which D1 was restrained from confirming; the plaintiff appreciated this because his counsel told the Court of Appeal that the plaintiff would have given up the injunction rather than provide an undertaking covering D3. The practice approved in *Tucker* recognized that an injunction might well affect other parties to the suit, and put in place on the original application a mechanism so that at the end of the day they could be compensated for losses caused to them by the injunction. The comment should be made that whether others likely to be affected by an injunction obtained an undertaking protecting them, should not depend on the plaintiff's choice of whom to sue. By deciding not to join D2, D3 and D4, the plaintiff would not have removed the need, as a matter of

22. If application had been made to Chitty J, he had jurisdiction to correct the passed order under RSC Ord XXVIII, r 12: "The Court or a Judge" could direct the amendment of "any defect or error in any proceedings." This was why the Court of Appeal gave no costs to the appellants even though the appeal had succeeded as regards D2: see (1890) 44 Ch D 249, 252.

23. (1890) 59 LJ NS (Ch) 551, 552; see also (1890) 63 LT 69, 70.

24. Mr Pemberton was a Chancery Registrar.

25. 3rd edn (1882).

26. 4th edn (1877), 171, which reproduced that in the 3rd edn (1862), 867.

27. *Daniell's Chancery Practice*, 5th edn (1871), 1519, the then current *Daniell*, 6th edn (1884), 1611, and by the then current 3rd edn (1888) of *Kerr on Injunctions*, at 628.

fairness for persons liable to be affected by the order to be protected by an undertaking in damages. It might be suggested that, because D2's counsel had asked for the "usual" undertaking in damages, this ought to have been taken by the Court of Appeal as referring to the form which protected all the defendants. But the court interpreted the response as going no further than giving an undertaking to protect the person whose counsel had requested it.

At that date the practice of requiring an undertaking had become so established that frequently nothing was mentioned in court.²⁸ There is no mention in the judgments of an undertaking being given by implication, because in 1890 Chancery practice was that an undertaking could only be given expressly, and not by silence.²⁹ What was implied was the term of the order which required it to be given.³⁰ The judgments drew the distinction between what practice ought to have been followed and what undertaking was in fact expressly given to the court.

Where the required undertaking was not provided by counsel during the application, the injunction would come into effect before provision of the undertaking, and if the undertaking was then not given the court would discharge the injunction. This was not entirely satisfactory because damage might be caused through compliance with the order before it was discharged, and there would be no mechanism in place under the order to permit the court to award compensation.

*Howard v. Press Printers Ltd*³¹ concerned the meaning of a memorandum of an interlocutory order signed by the respective solicitors and which had been agreed as a *modus vivendi* until the trial. The defendant had agreed to provide an undertaking until trial but there was no mention of any cross-undertaking in damages. The registrar thought that an undertaking in damages should be inserted in the order. Farwell J agreed, saying that the position was the same as if an injunction were to be granted. But his decision was reversed by the Court of Appeal. The ratio was that there was no such practice established when the defendant provided an undertaking to the court. Romer LJ (as he had become) said of an order granting an injunction that "the Court makes it a term, whether it is expressed or not, that the injunction is granted on the terms of an undertaking as to damages". There is nothing in the judgments to suggest that the actual giving of the undertaking to the court could be implied. Since the court was considering the meaning of an agreement, there might have been room for implying a term promising that a cross-undertaking in damages would be given to the court; but that was a different matter.

Fifteen days later, Kekewich J announced a new statement of practice made by the judges of the Chancery Division: "In future whenever an undertaking to the Court is given in lieu of an interlocutory injunction there shall be inserted in the order a cross-undertaking in damages by the applicant unless the contrary is agreed and expressed at the

28. *Spanish General Agency Corp v. Spanish Corp Ltd* (1890) 63 LT 161; *A-G v. Albany Hotel Co* [1896] 2 Ch 696.

29. Cf. *SmithKline Beecham Plc v. Apotex Europe Ltd (No. 3)* [2005] EWHC 1655 (Ch); [2005] FSR 44, [60]–[61], overlooking the change which started with *Oberrheinische Metallwerke GmbH v. Cocks* [1906] WN 127.

30. *Kerridge v. Foley* (1968) 70 SR (NSW) 251, 255–256, per Sugarman JA, describing the practice in England, and contrasting it with that in New South Wales, where the requirement to provide the undertaking had to be express.

31. (1905) 74 LJ Ch 100; [1904] WN 182 (Farwell J); *rev'd* [1904] WN 198 (CA).

time.”³² This statement of practice followed the practice for injunctions. The statement of practice does not on its face extend to giving the undertaking to the court by implication.

However, in *Oberrheinische Metallwerke GmbH v. Cocks*,³³ no undertaking had been given when it should have been under the new statement of practice, and Kekewich J treated the undertaking as having been given to the court by silence. This was a further step, apparently taken for the first time in 1906. If an applicant for an injunction was content to take an undertaking to the court instead of an injunction, he did so when his counsel knew of the declared practice of the court, applicable “whenever” an undertaking was accepted. He could not be permitted to contend that he did not give the undertaking in damages as required by that practice; his counsel’s conduct judged objectively amounted to providing the undertaking. Silence is consent. The same reasoning applied to an interlocutory injunction. Often a draft order would be prepared by the applicant and initialled by the judge, a formal order being issued by the court offices based only on the initialled order. This was standard practice before the Queen’s Bench Division judge in chambers and in the Commercial Court. Many injunctions would be granted and the order finalized without going through a Chancery Registrar or the equivalent. If through oversight the applicant had not put in the usual undertaking in damages, which his representative knew had to be provided, it would be appropriate to treat that undertaking as having been given by implication, and to correct the order under the slip rule. Courts, including the Court of Appeal, have done this.³⁴

This is sound policy. If the injunction were discharged or no longer needed, there would be no “mechanism” for requiring an undertaking as the price of the order. Experience shows that, unless the undertaking is obtained at the earliest opportunity, events may move on, and the court be left powerless to do justice to those affected by the order.³⁵ Where the concept of the implied giving of the undertaking applies, that outcome is avoided.

The development of the practice concerning the undertakings in the *Mareva* era

The classic view was that in general an interlocutory injunction against a defendant was based upon a cause of action against him.³⁶ An exception was that there could be a case in which the plaintiff sought specific performance against a defendant based on a contract solely with him, and an injunction might be granted against a stranger to the contract, against whom the plaintiff had no substantive cause of action, to preserve the position pending a decree of specific performance.³⁷ What marked out the *Mareva* injunction was the lack of connection between the substantive claim and the injunction, and its incursion

32. [1904] WN 203; also mentioned at (1904) 74 LJ Ch 105.

33. [1906] WN 127.

34. *Colledge v. Crossley, The Times*, 18 March 1975 (CA); *The Bank v. A Ltd* (23 June 2000) [2001] CP Rep 14 (Ch) (Laddie J), cited in *SmithKline Beecham Plc v. Apotex Europe* [2005] EWHC 1655 (Ch), [26]–[29]; see also *W v. H* [2001] 1 All ER 300, 319.

35. *Deutsche Schachtbau-und Tiefbohr-Gesellschaft mbH v. Shell International Trading Co* [1990] 1 AC 295, 362B–E; *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA* [1992] 1 Lloyd’s Rep 190; *Commodity Ocean Transport v. Basford Corp* [1987] 2 Lloyd’s Rep 197, 200; *Remm Construction (SA) Pty v. Allico Newsteel Pty Ltd* (1991) 56 SASR 515, [20]–[21].

36. *Siskina v. Distos SA* [1979] AC 210, 256C–G, per Lord Diplock.

37. *Nicholson v. Knapp* (1838) 9 Sim 326; *Fry on Specific Performance*, 6th edn (1921), § 1162; *Kerr on Injunctions*, 3rd edn (1888), 485.

into the general principle that at least up until judgment a defendant's assets were his to be dealt with as he chose.

Conceptually one can have a judicial procedure which actually operates against a particular asset and places an encumbrance on that asset to meet the claim if and when judgment is obtained. An example of that would be the arrest of a ship in an admiralty action *in rem*. But as a general proposition pre-judgment asset tracing or preservation by the English courts has to be achieved through orders made against particular individuals or companies, the orders being backed up with the threat of contempt proceedings. This lack of pre-judgment asset arrest jurisdiction has had the consequence that most of the modern procedures to freeze assets have had to be achieved through the development and extension of the law of injunctions, a process which has been criticized by conservatives as unjustified by, and subverting, the body of law applied by the old High Court of Chancery, the principles of equity.³⁸ This has included development of the jurisdiction to grant orders against non parties when there is no cause of action against them, and the practice for protecting persons affected by an injunction not granted against them.

*Searose Ltd v. Seatrain UK Ltd*³⁹ concerned a *Mareva* injunction which would affect an account of the defendant at a specified bank, and the bank would be put to expense. Robert Goff J required an undertaking from the plaintiffs that they would "pay reasonable costs incurred by any person (other than the defendant) to whom notice of the terms of the injunction is given, in ascertaining whether or not any asset to which the order applies . . . is within his possession or control". The undertaking required payment of the costs without any further exercise of discretion. The bank, although entirely innocent and unconnected with the dispute, might otherwise have to incur substantial expense which would not be reimbursed. The plaintiff ought to bear those costs and he might be able to recover them in due course as part of the costs incurred by him in the proceedings.

*Clipper Maritime Co Ltd v. Mineralimportexport*⁴⁰ concerned a *Mareva* injunction granted over a cargo on a ship in port. There, the judge was concerned with the potential effects on the port authority and required undertakings from the plaintiff to pay the actual loss of income from the berth, and administrative costs, caused by the injunction. In *Z Ltd v. A-Z*⁴¹ the Court of Appeal approved the approach in *Searose*, and Kerr LJ said⁴² that "the plaintiffs should be obliged to undertake, as a term of the order, to indemnify any third party against any costs, expenses or fees, reasonably incurred by the third party in seeking to comply with the order, as well as against all liabilities which may flow from such compliance". Lord Denning MR said that the purpose was so that "the bank or other innocent third party [should] not suffer in any way by having to assist and support the course of justice prescribed by the injunction".⁴³ No one said that this aim should be confined to *Mareva* cases; what was said was that a *Mareva* injunction over assets is likely to affect non parties, and that as a matter of fairness they should be protected.

38. Meagher, Gummow and Lehane's *Equity: Doctrines & Remedies*, 4th edn (2003), § 21–435, p 798 ("In truth, there is no jurisdiction to grant a *Mareva* injunction"); and *Miller Brewing Co v. Mersey Docks and Harbour Co* [2004] FSR 5, 81, [84]–[85].

39. [1981] 1 WLR 894.

40. [1981] 1 WLR 1262.

41. [1982] QB 558.

42. *Ibid*, 586.

43. *Ibid*, 575C–D.

The next day, in *Galaxia Maritime SA v. Mineralimportexport*,⁴⁴ the Court of Appeal discharged an injunction because of its likely effects on “third parties”, the owners of a vessel on time charter and the crew. If one needs to shelter non parties against the effects of an injunction, if granted, it is no surprise that, depending on the circumstances, the protection that can be given is insufficient to make it appropriate to grant the order. Subsequently a “standard draft [order]” was included in the Commercial Court Guide, and there was an official *Mareva* Injunction precedent used in the Chancery Division.⁴⁵ Each included an undertaking based on *Z Ltd v. A-Z*.

In *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA*⁴⁶ the plaintiff had leased six Boeing 737 aircraft to the defendant, who had defaulted on the rental payments. There was a contractual provision entitling the plaintiff to terminate the leases by taking repossession of the aircraft. The plaintiff obtained an *ex parte* order which included restraining the defendant from removing any of the aircraft from the jurisdiction and an immediate order for delivery up of each of the aircraft to the plaintiff. The plaintiff gave undertakings:

To indemnify any person (other than the Defendant its officers servants or agents) to whom notice of this order is given against any costs, expenses fees or liabilities reasonably incurred in complying with or seeking to comply with the terms of this order . . .

To notify and inform any third parties (if any) affected by this order of their right to apply to this Court for this order to be varied or discharged insofar as this order affects such third parties.

The first was based on that approved in *Z Ltd v. A-Z*. The order was served that night on the captain of an aircraft, which had just flown in, who looked through the order and then, together with the crew, left. The solicitor then gave a copy of the order to a representative of Pandora, the company which had a charter contract with the defendant for transportation of passengers to Majorca, under which no specific aircraft had been designated. Pandora suffered considerable losses as a result of there being no aircraft to carry its passengers, and they had considerable inconvenience and disruption to their holidays. Pandora subsequently applied to the court for compensation from the plaintiff and failed. The undertaking was restricted to costs and liabilities incurred in complying with the order. Pandora only learned of the order after it had been complied with and did nothing themselves to comply with it. The judge went on to say that, had an application been made by Pandora immediately following notification of the order to it, he had no doubt that the judge would have set aside the *ex parte* order unless the plaintiff had given undertakings “which would have reduced as much as possible the loss caused to the interests of third parties [including Pandora]”. There had been a breach of the other undertaking but no proceedings had been brought for contempt and so the court could not impose terms on the plaintiff as a condition of not imposing a penalty for contempt. The court can do this in contempt proceedings once contempt is established, so as to create the equivalent position to what would have been the case had the contempt not occurred.⁴⁷ The case showed how the formulation of undertakings approved in *Z Ltd v. A-Z* could be too narrow to achieve their purpose.

44. [1982] 1 WLR 539.

45. S Gee, *Mareva Injunctions and Anton Piller Relief*, 2nd edn (1990), 303.

46. [1992] 1 Lloyd's Rep 190.

47. *Z Bank v. DI* [1994] 1 Lloyd's Rep 656, 668. See also *Burton v. Winters* [1993] 1 WLR 1077, 1080.

Perhaps unsurprisingly it was thought that there should be the same precedent which applied regardless of the Division to which the action was assigned. Cresswell J, from the Commercial Court, and Millett J, from the Chancery Division, were asked to draft entirely new, up-to-date precedents for *Mareva* injunctions and Anton Piller orders, in the plainest English, which would be understandable by a recipient, who was not a lawyer. New precedents were issued on 28 July 1994, attached to the *Practice Direction: Mareva and Anton Piller Orders: New Forms*.⁴⁸ The new *Mareva* precedents included a cross-undertaking in damages to cover the defendants, and an undertaking that:

The plaintiff will pay the reasonable costs of anyone other than the defendant which have been incurred as a result of this order including the costs of ascertaining whether that person holds any of the defendant's assets and that if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the plaintiff will comply with any order the court may make.

This new form of undertaking in favour of non parties was wider in scope than those in the previous official precedents, and better formulated to achieve its purpose:

1. It was not limited to persons who had been served with or given notice of the order. It applied to all persons who were not defendants. There had been a point taken by the plaintiff in *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA*, that its solicitor had not "served" the order on Pandora but had only, as a result of the request of Pandora's representative, given him a copy. The fact that the point was taken shows a danger of using service of the order as a pre-condition to liability under the undertaking. The facts of the case also illustrate that all the loss may be caused to a non party as a result of someone else's compliance with the order and indeed at a time when the non party is unaware that the order has been made. *Z Ltd v. A-Z* had concerned the position of banks served with or notified of a *Mareva* injunction and the financial consequences to them of taking steps to comply with the order. Hence the reference in the judgments to undertakings to cover the consequences of the bank's complying with the order. Non parties can be caused loss by the actual making of the order; and it is usually undesirable at the *ex parte* stage to limit the undertaking in damages by restricting the undertaking to loss sustained through the non party's complying with the order, or requiring some formal pre-condition that the non party has been "served" with the order, or given notice of it.

2. The "reasonable costs" covered by the new form, which had to be paid to anyone other than the defendants, without any further exercise of discretion by the court, were not limited to costs incurred in complying with the order, but applied to costs incurred as a result of the order. This was the crucial restriction which resulted in Pandora's being left empty handed in *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA*. This widened formula could include, for example, costs incurred in taking advice on whether to apply to discharge the order because of its onerous effects on the non party, or negotiating a variation.

3. The concluding words introduced for the first time an undertaking in damages in favour of non parties, which like the usual undertaking covering defendants, required an exercise of discretion by the court to enforce it and an award of damages. This was the

48. [1994] 4 All ER 52; [1994] RPC 604; also at [1994] 1 WLR 1233, without the forms.

logical consequence of the general principle that non parties should be protected from the financial consequences of the making of an order in a dispute in which they were not involved. Through the giving of the undertaking in damages, the machinery would be in place to enable the court to order the plaintiff to bear all or some of that loss. He, in turn, might be able to pass it on to the defendant, for example as part of a claim for damages, or through an award of costs.

4. Through the requirement of widely formulated undertakings covering non parties the court avoided putting innocent non parties to the trouble, expense and hazards of applying to the court. The forms resulted in the undertakings being required at the earliest opportunity when there was a mechanism to obtain them. Fairness required that non parties be protected at the *ex parte* stage, at least to the extent of the court's putting in place jurisdiction to achieve a just result.

5. As for defendants, including those not enjoined, they were protected by the form of the usual undertaking as to damages required under the established practice of the court.⁴⁹ There was no need to provide further protection for them.

The same form of undertaking was included in the revised standard forms attached to the *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms)*,⁵⁰ which was issued on 28 October 1996. On the same day there was issued the *Practice Direction (Interlocutory Injunctions: Forms)*,⁵¹ which applied to interlocutory applications for injunctions in the Queen's Bench and Chancery Division. Those forms followed the new plain English style of order which had first been adopted in the *Mareva* and *Anton Piller* precedents issued in 1994.

The court has jurisdiction to require a cross-undertaking protecting non parties as a term for granting or continuing any discretionary order, "or at least any order made under [the Supreme Court Act 1981, s 37(1)]".⁵² However, the new forms did not include any standard form protection for non parties. The orders included a cross-undertaking in damages to protect "the Defendant", which was defined in the Interpretation part of the order as including all or both defendants unless the contrary intention appeared in the order. The effect was to continue the practice of requiring a plaintiff to give an undertaking in damages to protect all defendants, including those not enjoined. It protected those who were defendants when the undertaking was given, did not protect those who became defendants after the injunction had been discharged, and did not protect companies other than those specified by the undertaking (eg, companies associated with a defendant company or in the same group of companies).⁵³ There was uncertainty whether the undertaking would protect a person who became a defendant to the action after the undertaking was given but whilst the injunction remained in effect, a feature all the more important because of the absence of protection for non parties.

Perhaps there was no protection because before the coming of the *Mareva* era the courts had not laid down any practice to be followed in protecting non parties against the effects

49. *Tucker v. New Brunswick Trading Co of London* (1890) 44 Ch D 249; *Dubai Bank v. Galadari* (No. 2), *The Times*, 11 October 1989.

50. [1996] 1 WLR 1552.

51. [1996] 1 WLR 1551.

52. *Allied Irish Bank v. Ashford Hotels Ltd* [1997] 3 All ER 309, 316; *Smith Kline & French Laboratories (Australia) Ltd v. Secretary, Department of Community Services and Health* (1989) 89 ALR 366, 371; *Corporate Transport Services v. Toll* (2005) 214 ALR 644, [42].

53. *Berkeley Administration Inc v. McClelland* [1996] ILPr 772.

of an interlocutory injunction, and subsequently the case law about non parties had mainly concerned *Mareva* injunctions. In *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA*⁵⁴ the plaintiff had argued that the part of the order requiring delivery up under RSC Ord 29, r 2 or the Torts (Interference with Goods) Act 1977, s 4 was not a *Mareva* injunction, and so not within the authorities concerned with *Mareva* Injunctions. This part of the order was not “an injunction” in the sense of an order made under the jurisdictions inherited through the Judicature Acts by the High Court from the High Court of Chancery and the common law courts, or an order made under the Supreme Court Act 1981, s 37. Many court orders require a defendant to do something, but are not regarded as injunctions.⁵⁵ An order for costs, or an order for specific restitution of chattels⁵⁶ is not classified as an injunction. Legal usage controls what is an “injunction”.⁵⁷ However, the judge, it is suggested correctly, rejected the plaintiff’s submission that the authorities about non parties in *Mareva* cases had no application to orders which were not *Mareva* orders or even injunctions.⁵⁸ The general principle established by them does not depend upon the classification of the type of order, or the jurisdiction under which the order is made. It is a principle resting on the need for the court to do justice, and to act fairly, both as between the parties to a dispute, and in relation to non parties liable to be affected by the order.

The CPR era

CPR, Part 25 concerns interim remedies, and it is supplemented by a Practice Direction, in which para 5.1(1) provides:

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

(1) an undertaking by the applicant to the court to pay any damages which the respondent(s) (or any other party served with or notified of the order) sustain which the court considers the applicant should pay,

The Practice Direction then addresses specifically freezing injunctions and search orders, which are regarded as particularly draconian orders, and for which “example” orders were provided.

Before CPR, the dividing line in the Practice Directions had been between *Mareva* and other injunctions. Under CPR the line comes between freezing injunctions and other injunctions. CPR 25.1(1)(f) describes a freezing injunction as “an order (i) restraining a party from removing from the jurisdiction assets located there; or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not”. Whatever the juristic provenance of the injunction, as long as it comes within this

54. [1992] 1 Lloyd’s Rep 190.

55. *Cardile v. LED Builders Pty Ltd* (1999) 198 CLR 380, 412, per Kirby J.

56. *Doulton Potteries Ltd v. Bronotte* [1971] 1 NSWLR 591, holding that such an order was not an “injunction” within r 8A of the Fourth Schedule to the Equity Act 1901 of NSW.

57. *CSR Ltd v. Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390; *ISC Technologies Ltd v. W K Radcliffe* (7 December 1990) Unreported (Millet J), 10–12, when deciding that neither an order for an account and payment nor an order to restore a fund was an injunction within the meaning of the relevant rule of court; *CSR Ltd v. Cigna Insurance Australia Ltd* (1999) 198 CLR 345, 390; *Cardile v. LED Builders Pty Ltd* (1999) 198 CLR 380, 395; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th edn (2002), 703.

58. [1992] 1 Lloyd’s Rep 190, 195.

description, it is a “freezing injunction”.⁵⁹ This would include an injunction in aid of execution of a judgment or enforcement of an award,⁶⁰ or an interim injunction granted in contemplation of a final order by way of specific performance of a contractual promise,⁶¹ or an injunction based on a claimed proprietary right, or based on a transaction said to defraud creditors within the Insolvency Act 1986, s 423.⁶²

An example of a freezing injunction is attached to the Practice Direction supplementing Part 25. This provides for a standard cross-undertaking in damages protecting the respondent, who is the person(s) actually enjoined under the order. There is also an undertaking:

The Applicant will pay the reasonable costs of anyone other than the Respondent which have been incurred as a result of this order including the costs of finding out whether that person holds any of the Respondent's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the Applicant will comply with any order the court may make.

This adopts the wording of the undertaking in the standard forms for *Mareva* injunctions in force before the commencement of the CPR, which protected “anyone other than a defendant”, whereas the CPR undertaking protects “anyone other than the Respondent”.

CPR did not continue the forms attached to the *Practice Direction (Mareva Injunctions and Anton Piller Orders: Forms)*⁶³ or the *Practice Direction (Interlocutory Injunctions: Forms)*,⁶⁴ and did not provide any equivalent to the standard forms attached to it. A note appeared in *Civil Procedure 2000*⁶⁵ stating that “these forms were not refurbished in time for the commencement of the CPR in April 1999”, and suggesting that the previous standard forms were to be used “adapted as necessary”. The CPR in Part 4 continued certain county court standard forms⁶⁶ which predated the CPR. These contemplate, and protect, a single defendant or respondent.

(i) *The width of the undertaking required under paragraph 5.1(1)*

The required undertaking protects the respondent(s). It appears both from the example orders and the practice direction (para 5.3) that “respondent(s)” refers only to one or more persons actually enjoined by the order.⁶⁷ This does not include defendants who are not

59. *Gill v. Flightwise Travel Service Ltd* [2003] EWHC 3082 (Ch), [26] (“The expression ‘freezing order’, in the absence of a good reason to the contrary, is to be given its natural meaning. [The] orders purported to freeze property in the hands of the appellants.”)

60. *Deutsche Schachtbau- und Tiefbohr-Gesellschaft mbH v. Shell International Trading Co* [1990] 1 AC 295, 317, per Sir John Donaldson MR, referring to *Bullus v. Bullus* (1910) 102 LT 399 (injunction granted in aid of execution of a judgment) and distinguishing it from a *Mareva* injunction.

61. *Astro Exitto Navegacion SA v. Southland Enterprise Co* [1983] 1 AC 787; *Smith v. Peters* (1875) LR 20 Eq 511.

62. *Gill v. Flightwise Travel Service Ltd* [2003] EWHC 3082 (Ch).

63. [1996] 1 WLR 1552.

64. [1996] 1 WLR 1551.

65. Vol 1, note 25.1.12, at pp 326–327.

66. N16 (General form of injunction), N16(1) (General form of injunction (formal parts only) and N138).

67. This is also consistent with the definition of “respondent” in CPR 23.1, which is for CPR Part 23, and includes the person against whom the order is sought, and anyone else directed by the court to be a respondent.

enjoined, or persons who are not parties to the proceedings or the application for the injunction. It also protects “any other party served with or notified of the order”. In *Gadget Shop Ltd v. Bug.Com Ltd*⁶⁸ Rimer J said of para 5.1(1): “It is anyway not clear to me that the reference to ‘any other party’ includes a non-party.” This was a fair observation. In *Smith Kline & French Laboratories (Australia) Ltd v. Secretary, Department of Community Services and Health*,⁶⁹ the Federal Court of Australia had been given an undertaking which read: “Upon the applicants by their counsel undertaking to pay any party adversely affected by the interlocutory injunction . . . such compensation (if any) as the court thinks just, in such manner as the court directs.”⁷⁰ Gummow J held that the undertaking was restricted to protection of a party to the action. Of course that decision was on the interpretation of an actual undertaking given to the court, and not a procedural rule. If the word “party” in para 5.1(1) is restricted to a party to the claim, then under CPR outside of freezing injunctions there is no provision requiring protection of non parties to the proceedings.

On the other hand, there is room for a different view. A search order is described in CPR 25.1(h) as an “order requiring a party to admit another party to premises”, referring to the Civil Procedure Act 1997, s 7, which in s 7(3) states “Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted”. This shows that at least in CPR 25.1(h) “party” is not used in the restrictive sense. When one examines para 5.1(1) alongside the example freezing order which is attached to the same practice direction, and the case law which predates the CPR, one asks why it should be that the rule makers should prescribe a protection for non parties in freezing injunctions but not other injunctions. The principle of protecting innocent non parties from incurring unreimbursed costs or losses as a result of an interlocutory injunction should apply, regardless of the type of injunction. There is a tension between this principle and giving a restrictive interpretation to the word “party”. Perhaps that is why Sir Andrew Morritt V-C, in a *dictum*,⁷¹ assumed that para 5.1(1) required an undertaking protecting a non party to be included in an *ex parte* order which granted an interim breach of confidence injunction. Furthermore, the restrictive interpretation would result in Part 20 defendants being protected; there seems to be no sensible reason for drawing the line between them, and non parties to the action. The restricted meaning would also allow a claimant, by deciding who not to join, to avoid giving an undertaking protecting them. Perhaps the draftsman modelled the provision on *Z Ltd v. A-Z*, and the official precedents following it, which used the expression “third parties”. From 1 October 2005 there has been added a para 9 to the practice direction which applies to “orders which will affect a person other than the applicant or respondent”, who did not attend the hearing, and who is served with the order, “which will affect him”: such a person may well not be a party to the proceedings. This is headed “Injunctions against Third Parties”.⁷² Also in the new para 8.1, introduced from 1 October 2005, about “Delivery-Up Orders”, the expression “third party” has been used to refer to a person at

68. [2001] FSR 26, [93].

69. (1989) 89 ALR 366.

70. The Federal Court of Australia Practice Note No. 3, issued on 14 June 1999, provided a form of “usual undertaking” which protects non parties.

71. *Imutran Ltd v. Uncaged Campaigns Ltd* [2001] 2 All ER 385, [45].

72. The injunction is in fact against “the respondent”, and affects a non party to the proceedings and the application.

whose premises an order will be executed, apparently regardless of whether he is a party to the claim. These considerations suggest that “any other party” in para 5.1(1) should be given a purposive interpretation, an interpretation which would enable the court to deal with cases justly,⁷³ and that they should be read as referring to anyone other than the person(s) enjoined by the order.

The words “served with or notified of the order” restrict those protected by the undertaking. This restriction was in the official precedents based on *Z Ltd v. A-Z*, which had focused on the effects of a *Mareva* order on banks which had been served with or notified of that order. Paragraph 4(b) of the example freezing injunction and example search order annexed to the same practice direction, state: “this order is effective against any Respondent on whom it is served or who is given notice of it”. In fact the order “takes effect”, and can be broken as soon as it is granted,⁷⁴ and these words appear to be directed to whether contempt proceedings might be brought successfully against a respondent.⁷⁵ It seems possible that the same words in para 5.1(1) restrict the benefit of the undertaking to someone who could be held in contempt of court. This restriction was omitted from the undertaking in the standard orders issued in 1994. Under CPR the restriction has been reintroduced. The restriction also subtracts from the long established practice established by *Tucker v. New Brunswick Trading Co of London*,⁷⁶ which required an undertaking protecting defendants regardless of whether they were enjoined; the words exclude the case of a defendant who has not been served with or notified of the order, but suffers loss as a result of that order. The words also raise questions as to what amounts to being served with or notified of the order. Do these words require some voluntary act taken by the applicant which has the consequence that the non party, knowing of the order, has to comply with it, or is it sufficient that the non party has learned of the order in some other way? There is also the question of what loss the undertaking covers. The restrictive words suggest that the purpose is to cover loss flowing from the service or notification of the order.

(ii) Search Orders, Delivery Up orders and orders not considered to be “injunctions”

Paragraph 5.1(1) applies to “any order for an injunction”. The example “search order” contains no protection for a non party, or even an undertaking following the wording of para 5.1(1). Maybe this was because the pre-CPR official Anton Piller precedents had not included such an undertaking. The Glossary to the CPR gives a guide to the meaning of “injunction” which is in wide and general terms which taken literally would include an order for payment of costs, but then states that “it does not give the expressions any meaning in the Rules which they do not otherwise have in the law”. Prior to the Civil Procedure Act 1997, Anton Piller orders were regarded as made under the inherent jurisdiction of the court, and could be regarded as a form of “injunction” granted under the Supreme Court Act 1981, s 37(1). Perhaps the draftsman of the example order thought

73. See CPR 1.1(1) and CPR 1.2(b) which requires the court to interpret any rule so as to achieve this objective.

74. CPR 40.7; *A-G v. Newspaper Publishing* [1988] Ch 333, 377C–E.

75. See RSC Ord 45, r 7(6) and (7) and Gee, *Commercial Injunctions*, 5th edn (2005), paras 19.018, 19.019 and 19.051.

76. (1890) 44 Ch D 249, and followed in *Dubai Bank v. Galadari (No. 2)*, *The Times*, 11 October 1989.

that a “search order”, which is described in CPR 25.1(h) as “an order [made] under s 7 Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc)”, is not an “order for an injunction”, and that therefore para 5.1(1) of the practice direction did not apply. A search order, which is invariably made without notice, and executed almost immediately, may cause substantial loss to the business of a non party, such as a regular supplier to the raided business. He might not even be served with or notified of the order, or at least by the applicants. An interim order for delivery up of goods under the Torts (Interference with Goods) Act 1977, s 4 and CPR 25.1(1)(e) would not in ordinary legal usage be considered as an “injunction”.⁷⁷ Yet an order made under that jurisdiction could cause substantial loss to an innocent non party.⁷⁸

With effect from 1 October 2005,⁷⁹ para 8 was introduced into the practice direction:

Delivery-up orders

8.1 The following provisions apply to orders, other than search orders, for delivery up or preservation of evidence or property where it is likely that such an order will be executed at the premises of the respondent or a third party.

8.2 In such cases the court shall consider whether to include in the order for the benefit or protection of the parties similar provisions to those specified above in relation to injunctions and search orders.

This applies to an order (1) “for delivery up or preservation of evidence or property”; (2) which is likely to be “executed” at someone’s premises; and (3) which is not “a search order”, and therefore is an order outside the provisions in the practice direction relating to search orders. An example would be an order requiring immediate delivery up of certain property following service of the order on the defendant at his home, but not requiring the defendant to admit anyone to his home. For this category of order, which may not be an “injunction”, the court is required to “consider” what “similar provisions” to those relating to search orders and injunctions should be included “for the benefit or protection of the parties”; for example, the appointment of a supervising solicitor and the requirement of suitable undertakings to the court, such as an undertaking in damages. Because of para 8.1, the words “the parties” in para 8.2 appear to include “a third party” at whose premises the order will be executed. Applied to the situation in *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA*,⁸⁰ para 8.2 would require consideration of an undertaking in damages protecting the defendant and the airport authority. It is open to question whether “the parties”, in para 8.2, should be read as including any person liable to be affected by the order, such as Pandora. The use of the definite article, and the contrast with the wording of para 9.1, introduced at the same time, which refers to “orders which will affect a person other than applicant or respondent”, suggest not.

77. *Doulton Potteries Ltd v. Bronotte* [1971] 1 NSWLR 591; *CSR Ltd v. Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 390; *ISC Technologies Ltd v. W K Radcliffe*, (7 December 1990) Unreported (Millett J), at pp 10–12; *CSR Ltd v. Cigna Insurance Australia Ltd* (1999) 198 CLR 345, 390; *Cardile v. LED Builders Pty Ltd* (1999) 198 CLR 380, 395; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 4th edn (2002), 703.

78. See the effects on Pandora of the *ex parte* order made in *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA* [1992] 1 Lloyd’s Rep. 190.

79. Update 40 to the CPR published on 30 September 2005.

80. [1992] 1 Lloyd’s Rep 190.

(iii) *Judicial views in the CPR era: Miller Brewing*

In *Miller Brewing Co v. Mersey Docks and Harbour Co*,⁸¹ 2,200 cases of beer had been detained in Liverpool by Customs. An injunction was granted on a without notice application restraining the person who had ordered this consignment (D) from dealing with beer from a particular manufacturer, based on alleged and threatened trade mark infringement. The cross-undertaking in damages covered “the defendants”. That injunction was continued *inter partes* until trial. The claimant sought delivery up and destruction of infringing goods, and D maintained that he was not the owner, and did not intend to acquire that beer. The particular consignment was stored with the Mersey Docks and Harbour Board, and the shipping agents, who had been notified of the injunction, were responsible for quay rent and container demurrage.⁸² The claimant commenced a second trade mark action concerning this consignment, joining everyone who appeared to have any connection with the goods, including the shipping agents, and seeking delivery up and an order for destruction. Subsequently the shipping agents sought a cross-undertaking in damages protecting them with retrospective effect to cover the 17 months from when the without notice injunction had been granted, contending that this undertaking ought to have been given. The court held that the application was made after the injunction had ceased to have any value, and therefore there was no mechanism enabling this to be done. Counsel for the shipping agents had argued that such an undertaking was required as a matter of standard practice for a freezing injunction and that it should likewise have been imposed in this case. Neuberger J made observations rejecting that contention:

42. . . . A freezing order before judgment is a special type of injunction whose very existence is controversial; see the characteristically withering discussion in Meagher, Gummow & Lehane’s *Equity: Doctrines and Remedies*, 4th Edition, para 21, 445.

43. Non-proprietary freezing injunctions, unlike more classic interlocutory injunctions such as that granted . . . , do not relate to assets in which the applicant has any claim or any interest at the time of grant. Indeed, unlike other sorts of interlocutory injunctions, they create a right where none existed before.

44. . . . [W]hile this court should not be over-indulgent to a person seeking an interlocutory injunction, it seems to me that it would be a strong thing to require him to sign not merely a blank cheque in favour of the defendant, if it turned out that he should not have been granted the injunction, but a series of blank cheques in favour of third parties of whose very existence and interest he may be unaware and for whose losses he may find himself liable even though he is entitled to his injunction.

First, the dividing line drawn by CPR is between the “freezing injunction” and other injunctions. Whilst a *Mareva* injunction is one type of freezing injunction, there are also within this category what the judge called “more classic interlocutory injunctions”, such as injunctions in aid of execution, or granted to enforce a claimed proprietary right. The without notice injunction was not a *Mareva* injunction because it was based on trade mark rights which affected the goods subject to the restraint, and the injunction enforced those claimed rights. However, it restrained D “from dealing in Miller beer manufactured [by the specified manufacturer]”, and was a freezing injunction within CPR 25.1(g)(ii)—“an order . . . (ii) restraining a party from dealing with any assets whether located within the

81. [2004] FSR 5, [81].

82. *Ibid*, [18]–[21].

jurisdiction or not". Also the injunction was sought after the claimant had been informed of the consignment in Liverpool and had the effect (*inter alia*) of restraining D from dealing with that consignment. Because the without notice injunction was a freezing injunction, it should have contained the standard undertaking required by the example freezing injunction, protecting anyone other than the respondent, and which would have protected the shipping agents.

Secondly, on the without notice application the judge should have been told of the consignment in Liverpool and that the injunction was needed for the purpose of preventing any dealing with those goods. This was a matter which ought to have been raised by the claimant as part of its duty of disclosure.⁸³ The case came directly within the statement of principle by Robert Goff J in *Clipper Maritime v. Mineralimportexport*⁸⁴ and the Court of Appeal in *Z Ltd v. A-Z*. In *Miller Brewing* the injunction prevented the goods being moved from the docks and therefore resulted in the shipping agents keeping the goods, and the container, in storage there, and incurring the expenses and liabilities.

Thirdly, the discussion of *Mareva* relief in Meagher, Gummow & Lehane's *Equity, Doctrines and Remedies*, a work which deserves admiration for the depth of its research and learning, is not helpful on this point. In both England and Australia the *Mareva* jurisdiction has been established beyond argument, and is exercised as part of the routine business of the courts. The authors' statement⁸⁵ that "In truth, there is no jurisdiction to grant a *Mareva* injunction" can at most be accepted as a statement of the historical position up until the enactment of the Supreme Act 1981, s 37. Furthermore, the classification of the injunction, as being a *Mareva* injunction or not, should not be allowed to govern whether the court should require undertakings protecting non parties.

Fourthly, placing the burden on a non party to apply later for an appropriate undertaking, a solution favoured by the judge, runs the risk that matters may change following the granting of the *ex parte* injunction, so that there is no longer any mechanism for requiring the appropriate undertakings. If they are not taken on the without notice application, it may soon be too late. The judge said: "I have not had my attention drawn to any case which has led to a procedural problem, nor any reports, whether in the law reports or legal commentaries, of a perceived injustice in this connection";⁸⁶ but this is to overlook the series of cases in which no undertaking could be required because it was too late.⁸⁷

Fifthly, undertakings are given to the court and it is always open to the court to release an undertaking requiring payment under its inherent jurisdiction,⁸⁸ or to decline to enforce an undertaking in damages, in whole or in part.⁸⁹ It should not be assumed that the court

83. *Z Ltd v. A-Z* [1982] QB 558, 576B and 588B–589B. Since the effect on non parties is a relevant factor for the judge on an *ex parte* application, he should be told the matters relating to this which he should consider in deciding whether to grant the order and, if so in what terms.

84. [1981] 1 WLR 1262 (*supra*, fn 40).

85. Meagher, Gummow and Lehane's *Equity: Doctrines & Remedies*, 4th edn (2003), § 21–435, p 798.

86. [2004] FSR 5, [46].

87. *Tucker v. New Brunswick Trading Co of London* (1890) 44 Ch D 249 (D3); *Deutsche Schachtbau-und Tiefbohr-Gesellschaft mbH v. Shell International Trading Co* [1990] 1 AC 295, 362B–E; *Guinness Peat Aviation (Belgium) NV v. Hispania Lineas Aereas SA* [1992] 1 Lloyd's Rep 190; *Commodity Ocean Transport v. Basford Corp* [1987] 2 Lloyd's Rep 197, 200.

88. *CT Bowring (Insurance) Ltd v. Corsi Partners Ltd* [1994] 2 Lloyd's Rep 567, 581; *Cutler v. Wandsworth Stadium* (1945) 172 LT 207.

89. *Cheltenham & Gloucester Building Soc v. Ricketts* [1993] 1 WLR 1545.

would act unfairly or unreasonably in enforcing the undertakings. The judge's observations about blank cheques need to be looked at with this in mind. The judge envisaged that the applicant "is entitled" to his injunction regardless of the position on undertakings.⁹⁰ With respect, this begs the question. The granting of the injunction is discretionary and not as of right, and the question is whether the court should require undertakings protecting non parties as the price of that injunction. With freezing injunctions such undertakings are insisted on as a matter of course, including cases founded on a proprietary claim, and one is entitled to question whether it really would be such a "strong thing" to require the like undertakings in other cases.

Sixthly, the judge's suggested distinction, based on historical grounds, between *Mareva* injunctions and other interlocutory injunctions, overlooks the rationale for protecting non parties. This is the need to be able to do justice in respect of the effects of an unjustified interlocutory order. In France no such distinction is made; a party who suffers loss due to such an order can seek relief on several different grounds.⁹¹

Seventhly, the judgment did not mention para 5.1(1).

(iv) The 2005 Chancery forms

In March 2005 there were issued new practice forms: PF 39 CH Order for an Injunction (Intended Action); and PF 40 CH Order for an Interim Injunction. These include by way of undertaking the same words as appear in para 5.1(1). They give rise to the same problems as that paragraph, but in addition they take those problems to a further stage. If the same words appear as an undertaking stipulated for and accepted by the court, and a question arises on the width of that undertaking, a further consideration arises. It is the court which has stipulated for and obtained from the applicant that undertaking as part of the price of the injunction. It would be unfair for the court to give an interpretation of that undertaking which went further than the words of it clearly justified. The applicant is only bound by the words of the undertaking he has chosen to give. This consideration shows that it is one matter to give para 5.1(1) a purposive interpretation; it is another to stretch the words of an undertaking beyond that which the applicant could and would clearly have understood that he was promising.

(v) Where undertakings are given which avoid the court's hearing an application for an interim injunction

An undertaking given to the court has the same effect as an injunction granted against that person;⁹² breach is a contempt of court. The Chancery Guide, in para 5.22, provides for a cross-undertaking in damages by the party applying for the injunction to be implied in favour of "the other party". First, the CPR does not deal with the position outside of the Chancery Division. Secondly, no protection is contemplated for non parties or for other

90. [2004] FSR 5, [44] (*supra*, fn 81).

91. Art 1382 of the French Civil Code, Art 22 of the Law Related to the Proceedings for Enforcement dated 9 July 1991 and Art 73, paras 1 and 2 of the Law Related to the Proceedings for Enforcement dated 9 July 1991.

92. *Biba Ltd v. Stratford Investments* [1973] Ch 281 287; *Cobra Golf Inc v. Rata* [1998] Ch 109.

defendants who have not given the undertaking; yet, when the undertaking is a substitute for granting an injunction, the same considerations arise.

(vi) *Undertaking in damages given by silence and implication*

Paragraph 5.1(1) lays down a practice which “must” be followed by the applicant unless the court orders otherwise. In *Oberrheinische Metallwerke GmbH v. Cocks*,⁹³ Kekewich J had treated the undertaking as given by silence only 35 days after he had announced a new practice for the Chancery Division. The need for there to be an undertaking as required by para 5.1(1), notwithstanding the delay in issuing an official standard form of order for an interim injunction, had been reinforced judicially by the Vice-Chancellor.⁹⁴ One would have expected that this would be a sufficient platform for the required undertaking to be treated as given by implication, unless the applicant declined to give it, or the court otherwise directed, thus avoiding the court’s being left powerless subsequently for want of a “mechanism”.

In *SmithKline Beecham Plc v. Apotex Europe Ltd (No. 3)*⁹⁵ the defendants gave undertakings which were included in an order which recorded an express undertaking in damages protecting those defendants. Subsequently the court granted an interim injunction against those defendants and again there was a cross-undertaking in damages in favour of them. Eventually the Court of Appeal dismissed the substantive claim. There were other companies which were part of the same group as one of the defendants, which wished to recover from the claimants losses which they said had been sustained by them as a result of these orders. As part of their case they argued that an undertaking was given to the court by implication in the terms of para 5.1(1) of the practice direction, and that the orders should be corrected under the slip rule.

The first order was not an order for “an injunction” and so para 5.1(1) did not apply; para 5.22 of the Chancery Guide only required the “party” applying for the injunction to give a cross-undertaking “in favour of the other” and so did not help the non parties. What about the second order? The consequence of not providing any official precedent or example order which gave effect to para 5.1(1) meant that in practice applicants were not offering the required undertaking, and Chancery judges and associates were not insisting upon it. This continued notwithstanding what had been said by the Vice-Chancellor. The consequence was that it could not be said that an undertaking in those terms had been given, albeit by silence and implication, and it could not be said that the undertaking had been “accidentally” omitted from the orders when this represented a deliberate choice by the claimants, acceded to by the court. The effect of inserting the undertaking would have been to impose on the claimant an undertaking which it had not given, which it is well established that the court has no power to do. For these reasons the decision not to correct the orders under the slip rule was correct. However, Lewinson J observed that:⁹⁶

93. [1906] WN 127.

94. *Imutran v. Uncaged Campaigns Ltd* [2001] 2 All ER 385.

95. [2005] EWHC 1655 (Ch); [2005] FSR 44.

96. *Ibid.*, [37].

In the light of [*Tucker v. New Brunswick Trading Co of London*⁹⁷] it seems to me that if a limited cross-undertaking is offered and accepted by the court, there is in general no room for implying some further offer of an undertaking beyond that which is expressly offered and accepted.

This *dictum* overlooked that at the time of *Tucker* an undertaking could only be given to the court expressly, and that the debate in the case was not about implying an undertaking based on silence. That decision does not help on what can be implied when an undertaking, which it is universally mandatory to give under the Rules, absent contrary order, is not discussed at an application. CPR 25 PD 5.1(1) should provide a good starting point for treating silence as impliedly giving the required undertaking. When an express undertaking is proffered protecting the defendants enjoined, the “respondents”, and there is silence about the position of others, this may well not alert a judge to the fact that an undertaking protecting them is not being offered to the court. It cannot be right that the protection of the interests of those not before the court should depend upon whether the judge, who is often presented with a mass of papers at the last moment and acting under pressure of time, spots the omission.⁹⁸ An applicant who wishes to avoid giving that undertaking ought to raise the point specifically with the court and obtain express dispensation. The analysis should be that not to offer the undertaking required under the Rules, to remain silent about it on the application, and afterwards to assert that he did not give the required undertaking, is an abuse of the process of the court, of which the applicant cannot be permitted to take advantage. As in *Oberrheinische Metallwerke GmbH v. Cocks*,⁹⁹ the court should treat the undertaking as having been given.

Reforms

If the Rules Committee were to reconsider the present rules and forms, it is suggested that they might start with formulating what would be the usual undertaking in damages in terms which avoid the problems of para 5.1(1). A useful starting point could be Rule 25.8 of the Uniform Civil Procedure Rules 2005 of New South Wales:¹⁰⁰

The “usual undertaking as to damages”, if given to the court in connection with any interlocutory order or undertaking, is an undertaking to the court to submit to such order (if any) as the court may consider to be just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation (with or without variation) of the interlocutory order or undertaking.

This form of “usual undertaking”, which protects non parties, is almost invariably insisted upon in New South Wales¹⁰¹ as the price for an interlocutory injunction:

97. (1890) 44 Ch D 249; (1890) 59 LJ NS (Ch) 551; (1890) 63 LT 69.

98. See *Bank of Scotland v. A Ltd* [2001] CP Rep 14 (Ch), commenting on when no undertaking was proffered protecting a respondent.

99. [1906] WN 127.

100. The successor to Part 28, r 7(2) of the New South Wales Supreme Court rules made in 1984, the Federal Court of Australia Practice Note No. 3 issued on 14 June 1999 is similar; the “usual undertaking” given by Practice Note 4 of 2004 for the Commercial List in Victoria in para 3.11(g) protects “the defendant [or as the case may be]”.

101. *Donald Wilfred De Boer and others v. Williams* [2004] NSWSC 351, [20]–[26]. Exceptions include cases brought by a professional liquidator, who cannot be expected to hazard his own assets, and by litigants on legal aid, who, if the undertaking were called upon, would be exposed to being in contempt of court because of their lack of assets.

No matter how difficult the particular circumstances may be, it is always quintessentially necessary for the Court to take into account the fact that the giving of the usual undertaking as to damages is the price paid by the plaintiffs for obtaining the very significant relief constituted by the grant of an interlocutory injunction and *most particularly* by the grant of a Mareva injunction. Not only does the extraction of such an undertaking enure to protect the defendants to the proceedings, but at least in the State of New South Wales, the undertaking enures for the benefit of non-parties who may be very significantly affected by the order in a fashion by definition often, indeed usually, not able to be foreseen at the time the Court pronounces the order.¹⁰²

Thus a practice, which only provides for non parties when at the application particular loss to them is foreseen, is defective. It is a premature, summary denial of justice, without them being heard.

Consideration should be given to making it obligatory under the CPR, in the absence of express contrary direction from the court, for the applicant to give that usual undertaking in damages in specified situations, for example, in return for an interim injunction, a search order, an order under the Torts (Interference with Goods) Act 1977, s 4, and an order for delivery up or preservation of property or evidence, whether or not to be “executed” at someone’s premises. A widely formulated usual undertaking would be appropriate because it would place the onus on the applicant to persuade the court to accept a narrower undertaking, rather than leaving the non party to seek protection subsequently, when it may be too late. There should also be addressed the position where an undertaking to the court is given so as to avoid the granting of such an order. It would also be helpful to have a rule that the applicant is to be understood to have given that undertaking, unless the court has made a contrary direction, or the applicant has informed the court that he is not willing to give that undertaking. The example orders and approved forms would be modified at the same time. The aim would be to have a procedure which would apply in the Queen’s Bench Division and the Chancery Division, was not restricted to an order for an “injunction”, and which would require and put in place, subject to contrary direction by the judge, undertakings, giving fair protection for defendants and others liable to be caused loss or expense by an interim order, and which could be released or not enforced, if the justice of the case so required.

102. *Donald Wilfred De Boer and others v. Williams* [2004] NSWSC 351, [26] (Einstein J).