

Mareva 50 years on

A joint presentation by the Supreme Court of Victoria and Commercial Bar Association

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Justice Craig

- 1 Alfred Thompson Denning, better known to us as Lord Denning, Master of the Rolls, was not a timid soul.
- 2 He was not, as we all know, a shrinking violet when it came to judicially inspired law reform.
- 3 He has been described as the twentieth century's pre-eminent exponent of the continuing creative potential of equity.
- 4 Whilst the force and impact of many of Lord Denning's creative excursions have waned with the passing of the years, one has endured and it must be said - flourished.
- 5 Tonight we reflect on 50 years of what has come to be known as the *Mareva* order.
- 6 It was on 22 May 1975, that a case came before the English Court of Appeal which started off what even Lord Denning unabashedly, and perhaps a touch immodestly, described as the 'greatest piece of judicial law reform in my time'.

¹ Justice of the Supreme Court of Victoria. Justice Craig would like to thank Tara Dakin, Bridget Pardy, Bethany Coldrey and Zephyr Hicks for their assistance with tonight's speech. His Honour would also like to acknowledge the following source material which has been drawn upon in compiling the text: Lord Denning, *The Discipline of Law* (Butterworths, 1979), Hector Sbert, 'Mareva Injunctions: 50 years of Freezing Assets', (Blog Post, 22 June 2025) <<https://hector-sbert.com/2025/06/22/mareva-injunction-50-years-of-freezing-assets/>>, Professor Gareth Jones, 'The Rise of the Mareva Injunction' (1980) 11(2) *University of Queensland Law Journal* 133, The Hon. Justice David Foxton, "'The Big Freeze": The Rise and Rise of the Mareva Injunction' (Speech, Manchester Business and Property Courts Forum, 30 October 2024), John Stevens, 'Equity's Manhattan Project: The Creation and Evolution of the Mareva Injunction' (1999) 14(1) *The Denning Law Journal* 25, The Hon. Justice Spigelman AC, 'Freezing Orders in International Commercial Litigation' (2010) 22 *Singapore Academy of Law Journal* 490.

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- 7 The facts were, in his own words, simple.
- 8 Japanese ship owners entered into charter parties with two Greek gentlemen. The slump in shipping overtook them. They did not pay hire fees. They then disappeared. Their office, in the port city of Piraeus was closed.
- 9 Yet they had funds with a bank in London.
- 10 The Japanese owners feared that the two Greek gentlemen would transfer those funds to Switzerland or some other country, so their solicitors served a writ for service out of the jurisdiction and immediately before service applied to the Commercial Court in London for an injunction to stop the funds being removed from outside the jurisdiction.
- 11 Justice Chapman, acting in chambers, and Justice Donaldson after him refused the application made *ex parte* on the grounds that an order of the kind sought could not be made in England.
- 12 The Japanese ship owners immediately approached the Court of Appeal and were granted the injunction.
- 13 The case was *Nippon Yusen Kaisha and Karageorgis* [1975] 1 WLR 1093 (*Karageorgis*).
- 14 In the Court of Appeal Lord Denning said as follows at 1094 -1095:
- We know, of course, that the practice on the continent of Europe is different. It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as that is asked for here.
- 15 As is plain, Lord Denning drew on overseas and continental legal traditions to assist this development. In continental Europe, pre-judgment asset freezing orders had long been part of the legal arsenal, so the idea of 'freezing' assets before judgment was not unfamiliar. Attachment of assets prior to the determination of legal proceedings on the part of unsecured creditors was well established in civil law jurisdictions. With apologies in advance for the pronouncement, the Germans called it *arrest*. The Italians called it *sequestio*. The French called it *saisie conservatoire*.

- 16 The Mareva injunction, therefore, represented what has been described as something of a common law catch-up with civil law traditions. However, it introduced some distinctive features of its own: for example, its *in personam* nature – binding the defendant and not the asset – and later its flexibility to apply to all kinds of assets, even those outside the jurisdiction.
- 17 According to Lord Denning, the granting of an order to restrict the funds from being removed from the jurisdiction was warranted by section 45 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK). It simply provided that the High Court may grant *mandamus* or an injunction or appoint a receiver by an interlocutory order in all cases in which it appeared to the court to be just or convenient to do so.
- 18 I emphasise those words ‘an injunction where it is just or convenient to do so’. That was all that was needed to give Lord Denning his launching pad.
- 19 According to Lord Denning, in *Karageorgis*, there was a strong *prima facie* case that the hire was owing and unpaid. If an injunction was not granted the monies may be removed out of the jurisdiction and the ship owners would have the greatest difficulty in recovering anything.
- 20 That was on 22 May 1975.
- 21 In Lord Denning’s words, news of that decision quickly got around the expert barristers of the commercial court and their efficient solicitors.
- 22 According to Lord Denning ‘the Temple buzzed with the news’.
- 23 Thus, it was not perhaps surprising when, the following month, Bernard Rix, later Sir Bernard Rix QC, applied for a similar order to prevent the proceeds of hire paid under a time charter for the vessel ‘The Mareva AS’ into a London bank account from being removed from the jurisdiction.
- 24 Justice Donaldson was again in the firing line.
- 25 His Honour thought the decision in *Lister v Stubbs* (1890) 45 Ch D 1 (*Lister*) precluded an order of this kind and observed that the Court of Appeal in the

Karageorgis case had not been referred to *Lister*. In *Lister*, Cotton LJ had said bluntly 'You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property'.

26 Donaldson J granted the order for a limited period, to allow the claimant to renew the application before the Court of Appeal.

27 Thus, on 23 June 1975, the case which gave its name to tonight's presentation and the order that we have come to know as the Mareva order arrived in the English Court of Appeal – *Mareva v International Bulkcarriers* (1975) 2 Lloyd's Reports 509.

28 Again the words of Lord Denning tell the story.

29 In that case ship owners had hired their vessel, the Mareva, to time charterers on terms which required the hire to be paid half monthly in advance.

30 The charterers defaulted on the third instalment, but there was money in a London bank in their name. It was money which could be used to pay the unpaid hire.

31 Lord Denning, on the *ex parte* application held at 510-511, that:

If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the Court has jurisdiction in a proper case to grant an interlocutory injunction so as to prevent him from disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction.

32 It is worth emphasising that those two cases, *Karageorgis* and *Mareva* were decided *ex parte*.

33 The defendants never applied to discharge the injunctions.

34 The reason, according to Lord Denning, was because the money was undoubtedly due, they submitted to the judgment and the funds in the bank were used to pay it.

35 The usefulness of the order had been proved and it would not be long before it made its way to Australian shores.

36 Some of you might have been wondering by now why it is that we are

commemorating the 50th year *Mareva* in its 51st year.

- 37 Well, with a small degree of quiet parochialism I am happy to tell you that that this Court, the Supreme Court of Victoria, and this bar – the Commercial Bar of Victoria – were what we would now call ‘early adopters’ of *Mareva*.
- 38 The first reported case in which the *Mareva* principle was canvassed on our shores was, in this Court – actually – 50 years ago. More precisely – 18 and 19 October 1976.
- 39 And on this occasion the interlocutory application was conducted *inter partes*.
- 40 In *Praznovsky v Sablyack* [1977] VR 114, Justice William Harris heard an application in which the late Alan Goldberg (later QC) of the Victorian Bar appeared for the plaintiffs against the defendant represented by the late Dr Cliff Pannam (later KC), both juniors at the time and as we all know, ultimately, giants of the commercial bar and commercial law in this State.
- 41 The plaintiffs had sued the defendants for damages for the tort of conspiracy in respect of a burglary of the plaintiffs’ house. The defendant, who was not known to have any other property in Victoria entered into a contract to sell her home.
- 42 The plaintiffs sought an interlocutory injunction to restrain the defendant from disposing of the property and the proceeds of sale pending the trial of the action.
- 43 Relying on *Karageorgis*, Mr Goldberg submitted to Justice Harris that *Karageorgis* provided an occasion – using the language of section 62 sub-rule (2) of the *Supreme Court Act 1958 (Vic)* – to make an order that was just and convenient.
- 44 Dr Pannam, appearing for the defendant, contended that the court had no jurisdiction to grant an interlocutory injunction in a case of that type.
- 45 Dr Pannam was on, what he might reasonably have thought was, pretty firm ground. Historically the court was thought to possess no jurisdiction in equity to award such an injunction. The fundamental objection to the award of such an injunction was the absence of any legal or equitable right on the part of the defendant protected by it. In their subsequent third edition of ‘Equity Doctrines

& Remedies', Meagher Gummow and Lehane did not mince their words stating 'in truth, there is no jurisdiction at all to grant a Mareva injunction'. The learned authors referred to *Mills v Northern Railway of Buenos Ayres Co* (1870) LR 5 Ch App 621 at 628:

The only remedy for a creditor in that case" (ie an unsecured creditor) "is to obtain his judgment and take our execution. It would be a fearful authority for this Court to assume" (ie to prevent a defendant from dealing with his assets) "for it would be called on to interfere with the concerns of almost every company in the Kingdom against which a creditor might suppose that he had demands, which he had not established in a court of justice, but which he was about to proceed to establish."

- 46 Like Lord Denning before him, Justice Harris of this Court, swept those concerns to one side.
- 47 His Honour noted the net proceeds of the sale of the defendant's property would be \$80,000 and with that sum in her possession, faced with a trial on a serious criminal charge, that is theft by force and without any other property in Victoria, the plaintiffs ran an appreciable risk that the defendant, if not restrained, may disappear with the proceeds of sale before trial and that the plaintiffs' action would prove fruitless.
- 48 On that basis, Justice Harris determined that this was an unusual case in which the plaintiffs had demonstrated that it was just and convenient that the interlocutory injunction should be granted to protect the plaintiffs' right, even though that was a right to a cause of action sounding in damages.
- 49 In those circumstances, the Mareva order, as it would become known, had landed successfully in Australia.
- 50 Word quickly spread and armed with the reports of *Karageorgis* and *Mareva*, a junior barrister relatively newly from England and later a giant of this bar, Alan Archibald (later KC) appeared before Justice George Lush in August 1977 in *JD Barry v M&E Constructions Pty Ltd* [1978] VR 185 to apply for an interlocutory injunction.
- 51 The facts of the case were as follows.

- 52 A contract between a contractor and the Melbourne and Metropolitan Board of Works for the laying of pipes, reserved to the Board a discretion to pay money directly to an approved sub-contractor, if it was established to the satisfaction of the engineer in chief of the board, that the contractor had defaulted in payment of monies due and payable to the approved sub-contractor. Money was owed by the Board to the contractor under the contract.
- 53 The plaintiff, a sub-contractor, represented by Mr Archibald, claimed to be entitled to payment for work done under the sub-contract and sought damages from the contractor and injunctions to restrain payment by the Board to the contractor of the money owing under contract.
- 54 The contractor disputed that it was liable to the plaintiff under the sub-contract and in addition complained that the plaintiff had breached the sub-contract and advanced a cross-claim for damages. The contractor – represented by Chris Canavan and the Melbourne and Metropolitan Board of Works represented by Dr Gavan Griffith (later AO KC) both opposed the granting of the injunction.
- 55 According to Justice Lush, *Karageorgis* and *Mareva* were decisions which showed that there were possibilities which had not previously been in the common contemplation of the profession.
- 56 After referring to *Karageorgis*, *Mareva* and *Praznovsky*, His Honour identified that in each of those cases there was an apprehension that monies or assets would be moved out of the jurisdiction and that there was an appreciable risk the defendants might disappear with the assets.
- 57 His Honour distinguished those cases from the case before him – noting that the sum of about \$20,000 was owed by the Board of Works to the contractor as a debt due in the ordinary course of business. His Honour identified that there was no evidence of any intention to remove money from the jurisdiction and that it was an inappropriate occasion on which to consider whether the rule in *Karageorgis* and *Mareva* was limited to the removal of money from the jurisdiction – recognising that all three cases were concerned with the fear that something might be done which could be described as disposing of assets with the effect of placing

them out of the reach of the plaintiff.

58 According to Justice Lush, if an injunction could be obtained in the present case, it would either be entirely ineffective to benefit the plaintiff because the money would stand held for the benefit of creditors generally, or the result would be that a plaintiff could require a defendant to set up a special fund to meet a debt not yet proved or the effect might be to give the particular plaintiff preference over other business creditors.

59 Justice Lush noted that no such use of the injunction had been pointed to in such circumstances and he was unable to take the view that in those circumstances it would be either just or convenient.

60 Mr Archibald's creative attempt to expand the operation of the *Mareva* order had been cut off at the pass.

61 Once the *Mareva* injunction had been brought into existence, the scope of its potential application was gradually enlarged. Initially it was thought to be confined to circumstances where the defendant was abroad, held assets within the jurisdiction which might be removed from it and in respect of proceedings which would be brought within the jurisdiction. However, as Millett LJ summarised in *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818 at 824:

It was progressively extended, in 1979 to English defendants, in 1982 by restraining defendants from dissipating their assets within the jurisdiction as well as removing them from the jurisdiction, and finally in 1990 by restraining defendants from dealing with their assets both inside and outside the jurisdiction.

62 As I have alluded to, in the early cases it was thought that a *Mareva* injunction was only available where it was felt that a defendant might remove his or her assets from the jurisdiction but that there was no jurisdiction to make an order which would restrain a defendant from disposing of his or her assets within the jurisdiction. In *Prince Abdul Ramin Bin Turki al Sudairy v Abu-Taha* (1981) WLR 1268 (*Prince Abdul*), Lord Denning expressed his opinion that a *Mareva* injunction should be available if there was a danger that the defendant would dispose of his assets within the jurisdiction. These comments were strictly obiter in *Prince Abdul* but the proposition was later accepted – thereby widening the scope of

circumstances in which a plaintiff could obtain injunctive relief (see for example, *Z Ltd v A-Z & AA-LL* (1982) QB 558). In *Derby & Co Ltd & Ors v Weldon* [1990] 1 WLR 1139, the English Court of Appeal concluded in 1990 that the Court possessed the jurisdiction to grant *Mareva* injunctions against foreign companies with no assets in the United Kingdom. All three members of the Court of Appeal stressed the evolving nature of the *Mareva* jurisdiction and their right to develop it so as to meet emerging commercial needs.

- 63 The *Mareva* injunction, as it was then called, first made its way to the High Court in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612.
- 64 In that case, an applicant for damages for breach of s 52 of the *Trade Practices Act 1974* (Cth) applied to the Federal Court for an order that the respondent pay \$3 million into court as security for the satisfaction of any judgment that might be entered against him in the application.
- 65 Having found that the applicant had a good chance of success, the judge ordered that the respondent provide security in the sum of \$3 million.
- 66 The Court held that as a general proposition it should now be accepted in Australia that a *Mareva* injunction can be granted if the circumstances are such that there is a danger of the defendant absconding, or a danger of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff if he (or she) gets judgment will not be able to get it satisfied.
- 67 In so doing, the Court cited from and approved Lord Denning's decision in *Rahman Prince Abdul v Abu-Taha* (1981) WLR 1268 at p 1273. Importantly, Deane J pointed out that whilst the general power of the English High Court of Justice to grant a *Mareva* injunction was initially seen as based on the provisions of s 45 of the *Supreme Court of Judicature (Consolidation) Act 1925 (UK)* and s 37 of the *Supreme Court Act 1981 (UK)*, that general power should, at least in Australia, be accepted as an established part of the armoury of a court of law in equity to prevent the abuse or frustration of its processes in relation to matters coming within its jurisdiction.

- 68 As a consequence, the power to grant relief was comprehended by the express grant to the Federal Court under s 23 of the *Federal Court Act 1976* (Cth) to make orders in relation to matters of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate
- 69 The appeal was allowed because whilst *Mareva* relief was available – the preservation of assets went beyond simply restraining the defendant from disposing of significant assets until after judgment. The proper purpose of the order was not to create security for the plaintiff or to require a defendant to provide security as a condition of being allowed to defend the action, but to prevent a defendant from disposing of his or her actual assets so as to frustrate the processes of the Court. Understood in this way, the *Mareva* order was required to be framed so as to come within the limits set by the purpose which it could properly be intended to serve.
- 70 *Mareva* orders returned to the High Court in 1998 in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380.
- 71 In that case, copyright infringement proceedings were brought in respect of building plans against a company which carried out a housing construction business. The shares in the company were held by two individuals. Before judgment, the company declared and paid substantial dividends to the shareholders. The shareholders formed a new company which began a housing construction business using new plans and the respondent company's business name was transferred to the new company. Judgment was given for the applicant.
- 72 The applicant elected for an account of profits and applied for *Mareva*-type orders against the shareholders and the new company pending the taking of the account. Neither the shareholders nor the new company were parties to the proceedings. The Full Court of the Federal Court held that subject to certain specified exceptions, the shareholders of the new company should be restrained from disposing of or dealing with any of their assets until further order.
- 73 Now with the benefit of Gummow J on the Court, Gaudron, McHugh, Gummow and Callinan JJ emphasised the following matters.

- 74 First, in *Mareva* itself, Lord Denning had classified relief as injunctive on the footing that it went in aid of a legal right, namely the right of the plaintiff to be paid the debt owing even if the establishment of that right by the entry of judgment for it had not yet occurred. That position was foreclosed by the longstanding decision of Lord Hatherley in *Mills v Northern Railway of Buenos Ayres Co* (1869-70) L.R. 5 Ch. App. 621, which established that a simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please on the ground that they are diminishing the fund for repayment of the debt.
- 75 Second, the High Court pointed out that the Court had developed doctrines and remedies outside the injunction as understood in Courts of Equity to protect the integrity of its processes once in motion and that the *Mareva* order was a further development in that regard. The Court cited with approval the judgment of Brennan CJ and McHugh, Gummow and Hayne JJ in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 that the *Mareva* injunction is the paradigm example of an order to prevent the frustration of the Court's processes.
- 76 Third, as the High Court observed in *Cardile* at [50], there are significant differences between an order protective of the court's process set in train against a party to an action, including the efficacy of execution available to a judgment creditor, and an order extending to the property of persons who are not parties and who cannot be shown to have frustrated, actually or prospectively, the administration of justice.
- (a) The *Mareva* order does not deprive the party subject to its restraint either of title to, or possession of, the assets to which the order extends. Nor does the order improve the position of claimants in an insolvency of the judgment debtor.
 - (b) It operates *in personam* and not as an attachment. The granting of a *Mareva* order is bound to have a significant impact on the property of the person

against whom it is made: in a practical sense it operates as a very tight "negative pledge" species of security over property, to which the contempt sanction is attached.

- (c) It requires a high degree of caution on the part of a court invited to make an order of that kind. An order lightly or wrongly granted may have a capacity to impair or restrict commerce just as much as one appropriately granted may facilitate and ensure its due conduct.

77 Fourth, the Court also identified that where the attention of the Court was directed to orders against the *parties* to the proceedings and against whom final relief was sought, the focus was on the frustration of the Court's processes. If relief was available against *non-parties*, the Court identified that the focus must be on the administration of justice.

78 Fifth, the Court identified that to avoid confusion as to its doctrinal basis, it is preferable that references to *Mareva* orders be substituted for injunctions. This in turn can be seen in later intermediate appellate decisions which make clear that the balance of convenience is not a mandatory factor (although I hesitate to add that delay in making applications is a relevant discretionary factor).

79 Sixth, that before the making of orders for final relief the *Mareva* order should, in general, be supported by an undertaking as to damages.

80 Turning then to third parties and the facts before the Court, their Honours identified the principles to guide the courts in determining whether to grant *Mareva* relief in a case such as where the activities of third parties were the object sought to be restrained. Their Honours identified that such an order *may* be appropriate in circumstances in which: the third party held, or is using, or exercised or is exercising the power of disposition over, or is otherwise in possession of assets, including claims and expectancies of the judgment debtor or potential judgment debtor; or, some process ultimately enforceable by the courts is, or may be, available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor pursuant to which whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third

party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.

81 Freezing orders are now made in this Court made pursuant to order 37A of the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) which was introduced in 2006. The order is intended to be the same as the harmonised freezing order rules adopted by the other states and territories under the auspices of the Australian Council of Chief Justices.

82 The *Mareva* injunction has become a standard weapon in the armoury of commercial litigation. In *Bank Mellat v Nikpour* [1985] FSR 87, Donaldson LJ went so far as to describe the *Mareva* injunction as one of the two ‘nuclear weapons’ of the law. Just four years after its birth, by 1979, Mustill J observed that ‘applications are being made at the rate of about 20 per month’ and ‘almost all are granted.’ In 1986, Mr Justice Bingham lamented:

It was not so very long ago since *ex parte* applications for injunctive relief were infrequently made and even more exceptionally granted...The advent of the *Mareva* injunction has, as is notorious, led to such applications becoming commonplace, hundreds being made every year and relatively few refused.

83 In this Court, at least 25% of urgent applications heard by the Commercial Court’s duty judges in 2025 were applications for freezing orders. It is of course, an area of practice in which all of us have had to become familiar.

84 But in looking back, it is important to remind ourselves of how the *Mareva* order came about.

85 It was response by the legal profession – lawyers expert in commercial law and the judiciary – to an *emerging* problem. Junior commercial barristers were at the forefront in advocating for change.

86 As Chief Justice Spigelman noted when writing extra-judicially:

Changes in the economy, in technology and in public policy, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden. Driven by the needs of their commercial clients, English lawyers developed ideas, new to common law system, which they successfully urged on English judges in the mid-1970s by way of adaptation to these new challenges to the enforcement of commercial promises.

- 87 Our challenge – as a commercial court and barristers of the commercial bar – is to remain alive to the fact of change and the need for adaptation in our legal response to that change – so as to ensure that our legal system remains one in which people of commerce have utmost confidence and so that they and their commercial undertakings are able to flourish.
- 88 Now, enough of the history.
- 89 It is time to look at the key features of the *Mareva* principle as it stands today. It gives me great pleasure to welcome Dr Oren Bigos KC and Colette Mintz to address us for that purpose.

Colette Mintz – Elements of the cause of action

- 90 Turning to the specific matters to be demonstrated, to obtain a freezing order. Here I am focusing on what must be demonstrated to obtain a freezing order against a judgment debtor or prospective judgment debtor (I will deal with freezing orders against third parties a little later).
- 91 The cases indicate that the issues to be considered on an application for a freezing order as follows (see, eg, *Gecko Australia Pty Ltd v Montagnese* [2022] FCA 488 at [17]).
- (a) First, whether the applicant has a good arguable case on their cause of action against the respondent.
 - (b) Second, whether there is a danger that a judgment debt or prospective judgment debt will be wholly or partly unsatisfied because of the removal by the defendant of their assets from the jurisdiction, or their dissipation within it.
 - (c) Third, the exercise of the discretion. The Court retains the discretion to refuse relief even if the power is enlivened.
92. Now, to flesh these elements out just a little:
- (a) An applicant has a ‘good arguable case’ if they have a ‘reasonably arguable

case on legal as well as factual matters': *Cardile* at [68].

- (b) It has been said that a 'good arguable case' is one 'which is more than barely capable of serious argument, and yet not necessarily one the judge considers would have a better than fifty per cent chance of success': *Curtis v NID Pty Ltd* [2010] FCA 1072 at [6] (citing various cases).
 - (c) When a freezing order is sought on the basis of a danger of dissipation of assets, it is not necessary for the Court to be satisfied that the risk of dissipation is more probable than not. Nor is it necessary for the applicant to adduce evidence of an intention on the part of the respondent to dissipate assets.
 - (d) The *risk* of dissipation — and it is a risk, *not* a certainty — must be demonstrated by evidence.
93. In some cases, this will be easier to demonstrate than others. It has been said that the risk of dissipation of assets to avoid judgment may be evident in some cases from the applicant's or plaintiff's strong prima facie case of the defendant having fraudulently misappropriated assets or of serious dishonesty: *KTC v Singh* [2018] NSWSC 1510 at [8] (White J).
94. In addition to persuading the Court that a freezing order is appropriate, an applicant must also persuade the Court as to the amount of the freezing order. In simple terms, if an applicant has a claim for \$1 million, they cannot expect to obtain a freezing order over \$2 million worth of assets. For this reason, the applicant must usually articulate, based upon evidence, the amount of their claim, and the value of the assets covered by the proposed freezing order, which should not exceed the likely maximum amount of the claim.
95. Finally, a freezing order will usually exclude from its operation dealings by the respondent with assets for certain legitimate purposes, such as payment of ordinary living expenses and reasonable legal expenses, ordinary bona fide dealings in the respondent's business and the like.
96. That said, the position is different where the applicant has a proprietary claim in

respect of the frozen assets.

97. In *National Australia Bank v Human Group (No 2)* [2020] NSWSC 1900, Henry J said this:

[109] When freezing orders are made in relation to non-proprietary claims, the usual position is that defendants generally have an entitlement to use their assets for legitimate purposes, such as to pay their ordinary living and business expenses and their reasonable legal expenses in defending the claims made against them...

[110] In contrast, there is no reason, in general, why defendants should be permitted to use property or money belonging to another in order to pay their legal costs or other expenses. There is an obvious risk of injustice if assets the subject of the proprietary claim are used to finance the defendants' litigation as the money is not the defendants' at all but represents money which is held on trust for the plaintiff...

[111] In cases concerning proprietary claims, a "careful and anxious judgment" is required whereby the Court must assess whether any injustice to a plaintiff ... would be outweighed by the potential injustice to the defendants...

98. Accordingly, when seeking a freezing order, exceptions for legitimate expenses are common, but one needs to evaluate carefully if that is appropriate where there are proprietary claims.

Dr Oren Bigos KC – Risk of dissipation

99. I would like to pick up on Colette's observations about risk of dissipation. This lies at the heart of a freezing order. The harmonised rules relevantly refer to 'a danger that a judgment will be unsatisfied because assets are removed or disposed of, dealt with or diminished in value.'
100. The degree of risk has been expressed in different ways by the courts.
101. The Victorian Court of Appeal, in *Rozenblit v Vainer*⁴ and in *Rasia Group v Crawford*⁵ expressed it as:

a reasonable possibility, not necessarily more than a 50 per cent chance, that assets may be disposed of or dealt with or diminished in value if an order is

⁴ [2019] VSCA 164 at [19(4)] (McLeish and Niall JJA).

⁵ [2025] VSCA 310 at [93] (Lyons JA and Kenny AJA).

- not made.
102. The degree of risk was expressed by the Full Federal Court, in *Zirk-Sadowski v University of New South Wales* as a:⁶
- risk or danger [that] must be real or substantial, as opposed to a remote, speculative or theoretical possibility.
103. There may be little, if any, difference. Meagher JA of the NSW Court of Appeal once described differences between various formulations of the risk as a ‘sea of semantics’.⁷
104. As Justice Jack Forrest observed,⁸ there is rarely direct evidence of conduct deliberately designed to frustrate the Court’s processes. The Court frequently relies on inferences.
105. In practice, an inference of a risk of dissipation is typically based on evidence of one of two things.
106. *First*, evidence of recent action by the relevant respondent (whether the defendant or a third party respondent) to dispose of substantial assets, where the inference is open that the disposition is motivated by the claim against the respondent rather than as part of their ordinary affairs.
107. It all depends on the context. This is demonstrated in the recent decision of the NSW Court of Appeal in *Aqualand*.⁹ A development company had sold 121 units out of 125 and distributed the profits. The primary judge found, and the Court of Appeal agreed, that if it sold the remaining 4 units and distributed the profits before defects claims were resolved, the claimant would be denied any remedy.
108. This gave rise to a risk of dissipation. It was not helpful to ask whether the distribution of remaining profits was in the ordinary course of business or was something that was “extraordinary”. The proceeds of sale of the last 4 units would be the only source available to the developer to meet the claims, so it was

⁶ [2025] FCAFC 64 at [46] per Snaden J, Wheelahan and McElwaine JJ agreeing.

⁷ *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 327.

⁸ *Deputy Commissioner of Taxation v AES Services (Aust) Pty Ltd* [2009] VSC 418 at [35].

⁹ *Aqualand North Sydney Lavender Development Pty Ltd v The Owners, Strata Plan No. 102081* [2025] NSWCA 143.

reasonable to infer that, unless restrained, it would continue to distribute those profits from the sale of the remaining units. It may have been different if say 60, or 80, or 100 units out of the 125 had been sold, as in that context the sale of a further 4 units and distribution of profits would not deny the claimant available assets against which to enforce.

109. The second type of evidence from which an inference of a risk may be inferred is a prima facie case of serious dishonesty or serious wrongdoing by the defendant.
110. Where the court makes a finding of a good arguable case of serious dishonesty or serious wrongdoing (the first limb or element of a freezing order), then that in itself may be a basis for the court to infer a risk of dissipation (the second limb or element), on the basis that the defendant is the sort of person who would dissipate their assets to avoid enforcement of a judgment debt. The leading case is *Patterson v BTR Engineering*.¹⁰
111. Many such cases involve the misappropriation or misapplication of assets, but the inference is not confined to them, as demonstrated in *Rasia*.¹¹ There the Court of Appeal inferred a risk of dissipation from a seriously arguable case that the defendant was involved in a malicious prosecution of a winding up petition; this constituted serious dishonesty and/or serious wrongdoing.
112. There are suggestions in first instance cases in WA and Queensland that the gravity of the conduct from which an inference may be drawn may be less than serious dishonesty or serious wrongdoing.¹² Whether that is developed and accepted, and how far courts are prepared to go, remains to be seen.
113. Two more points may be made about the risk of dissipation.
114. First, a complex corporate structure involving multiple entities in multiple jurisdictions does not, by itself, establish a risk of dissipation.¹³ However, it is a

¹⁰ *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319, 325 (Gleeson CJ).

¹¹ At [106].

¹² *RHG Mortgage Corporation Ltd v Kelly* [2016] WASC 169, [38]; *Parbery v QNI Metals* [2018] QSC 107; (2018) 358 ALR 88; (2018) 127 ACSR 582 at [38].

¹³ *Holyoake v Candy* [2018] Ch 297; [2017] EWCA Civ 92 at [59].

matter that the Court can take into account, in connection with other factors, as supporting an inference of a risk of dissipation, which the Court of Appeal did in *Rasia*.¹⁴ As Justice Peter Biscoe observed, in his leading text on this subject,¹⁵ the courts may need to consider whether there is use of the corporate veil for a purpose which may be foreign to its creation, or whether there is use of ‘shadowy offshore structures’. Adding trusts to the mix makes things even more challenging.

115. Second, where a respondent refuses or declines to provide any undertaking to the applicants not to dissipate assets, that is not by itself sufficient to give rise to an inference.¹⁶ However it may be a factor to be taken into account which makes an inference more readily available, in combination with other factors.¹⁷
116. As I have mentioned a number of appellate decisions on freezing orders, I wish to add that the decision to grant or to refuse a freezing order is an interlocutory one involving practice and procedure, so appeals are infrequent. Clearly the ultimate decision whether to grant a freezing order attracts the *House v King* standard of appellate review.¹⁸ The Court of Appeal has expressed a preliminary view that the intermediate decisions – whether there is a good arguable case and whether there is a risk of dissipation – are assessed according to the correctness standard, because the legal criterion to be applied demands a unique outcome.¹⁹

Colette Mintz – freezing orders against third parties

117. In the High Court in *Cardile*, the plurality, Justices Gaudron, McHugh, Gummow and Callinan, found that a freezing order may permissibly be granted – there under s 23 of the *Federal Court of Australia Act 1976* (Cth) – to restrain the activities of a third party.
118. The plurality identified that the focus of the jurisdiction to make a freezing order

¹⁴ At [97], [113(a)].

¹⁵ At [4.2].

¹⁶ *Tomasetti v Brailey* [2012] NSWCA 6, [18].

¹⁷ *Rasia*, [112].

¹⁸ *Rasia*, [88].

¹⁹ *Moore (a pseudonym) v The King* [2014] HCA 30; (2014) 419 ALR 169, [15] (Gageler CJ, Edelman, Steward, Gleeson and Beech-Jones JJ).

against a third party is ensuring the administration of justice.

- (a) This is a difference in framing of the purpose of the order, as compared to a freezing order against a judgment debtor or prospective judgment debtor.
- (b) In *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, Justice Deane explained why a freezing order was an appropriate order, comprehended by s 23, being an established part of the armoury of the court to prevent a defendant from disposing his actual assets so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment.
- (c) In *Cardile*, rather than express the purpose of a freezing order against a third party as being directed to that same end (prevention of frustration of the court's processes), their Honours describe the focus of the jurisdiction, as I have mentioned, as ensuring the administration of justice (as [42]).

119. The Rules of Court now make express provision for the possibility of freezing orders against third parties: see *Supreme Court (General Civil Procedure) Rules 2025* (Vic) r 37A.05(5); *Federal Court Rules 2011* (Cth) r 7.35(5).

120. The Rules relevantly provide that the Court may make a freezing order against a person other than a judgment debtor if the Court is satisfied, having regard to the circumstances, that either:

- (a) There is a danger that a judgment or prospective judgment will go wholly or partially unsatisfied because the third party holds or is using or has exercised or is exercising a power of disposition over the assets of the judgment debtor or prospective judgment debtor; or is in possession of or in a position of control or influence of those assets; or
- (b) A process in the Court is or may ultimately be available to the applicant under which the third party's assets may be disgorged to contribute towards satisfaction of a judgment debt.

121. Of course, the Rules do not cut down the full width of the Court's powers. But it would be appropriate to express an application for a freezing order directed to a third party in terms of either of these bases, unless some other special

circumstances apply.

122. There are myriad ways in which a third party freezing order might be sought or obtained. I am not going to canvass the range of possibilities. For present purposes, I would like to focus on one situation, and that is the situation in which freezing orders are sought over assets held by a third party trustee of a discretionary trust, in which the prospective judgment debtor is a beneficiary.
123. On Friday last week, the Full Court of the Federal Court handed down judgment in a case addressing this very issue: *Filippini v Keystone Asset Management Limited (receivers and managers appointed) (in liq)* [2026] FCAFC 71. It is a very useful case around which to address the making of a freezing order against third parties: in particular, against trustees of discretionary trusts.

Colette Mintz – freezing orders over discretionary trusts

124. Turning to *Filippini v Keystone Asset Management Limited (receivers and managers appointed) (in liq)* [2026] FCAFC 71.
125. The facts assume some importance, so I will describe them at a high level. Keystone, the respondent on the appeal and applicant at first instance, brought proceedings against the respondents alleging that one of the respondents, Mr Philippini, together with others, dishonestly misappropriated around \$158 million of Keystone's funds. Freezing orders were in place by consent for some time, over certain specified assets, comprising around \$108 million in value. Then, last year, Mr Philippini and his family members (who are all respondents) left Australia, taking with them several million dollars. In that context, Keystone applied for an order extending the existing freezing orders to all the Philippini family's assets within Australia, up to the value of \$158 million, which was the total value of the claim against them.
126. There were various issues raised before the primary judge with the freezing order Keystone proposed. One of those issues, and the key issue for present purposes, is that the Philippini parties contended that the freezing orders should expressly not extend to certain assets of three trusts, in the following undisputed circumstances:

- (a) The trustees were *not* parties to the proceeding in their capacities as trustees of the trusts;
 - (b) The relevant assets held in the trusts were acquired *before* the alleged wrongdoing;
 - (c) Keystone did *not* assert a proprietary claim over the relevant assets.
 - (d) Mr Filippini, the prospective judgment debtor, was a primary beneficiary in respect of each of the trusts.
 - (e) Mr Filippini was also the appointor under each trust deed.
 - (f) His wife, who was a party to the proceeding in her personal capacity, was the trustee of two of the trusts. Mr Filippini was the sole shareholder of the corporate trustee of the third.
127. Importantly, there were unchallenged findings of fact that Mr Filippini – the prospective judgment debtor – exercised extensive control over the trusts.
128. Over the objection of the Filippini parties, the primary judge ordered that the freezing orders should extend to the relevant trust assets. The Filippini parties appealed.
129. The key issue on the appeal was one of *power*: it was whether the Court has *power* to make a freezing order against third parties where the third parties are trustees of discretionary trusts, and where the prospective judgment debtor is a beneficiary under those trusts.
130. The Full Court concluded that the Court did have such a power. The reasons are detailed, but I wanted to highlight three key findings by their Honours.
131. First, the Court found that the power to make a freezing order against a third party is not limited to assets in respect of which the prospective judgment debtor has a legal or beneficial interest.
- (a) The appellants had argued that the assets to be frozen could only be assets in respect of which the judgment debtor has a legal or beneficial interest. The

Court rejected this as contrary to the text of the Rules, and high authority. It is enough that the prospective judgment debtor has a *mere expectancy* interest in the trust assets.

- (b) An expectancy interest is a remote interest. It exists in relation to something else. A beneficiary of a discretionary trust does not have a legal or beneficial interest in the assets of the trust, but they have an expectancy that they *may*, in time, receive a distribution of income or capital from the trust. The Court held that that was enough.

132. The second is that the applicant does not need to prove that it will necessarily be able to enforce against the relevant assets in order to subject them to a freezing order. The appellant contended that an enforcement pathway would need to be shown. The Court rejected that, as a matter of power. That said, they appear to have accepted that it may be relevant to the exercise of discretion. Then again, the Court explained that the question of whether the assets might actually be available to satisfy a judgment debt involves complexities, which are unlikely to be able to be explored and conclusively determined in the context of an urgent freezing order application.

133. The third is this – and it goes beyond the question of power. As I have mentioned, Mr Filippini was not just a beneficiary under the trusts, he had extensive control over the trusts. For that reason, his expectancy interest in the trust assets had what the Court described as “real value” (at [97]) and was to be distinguished from the expectancy enjoyed by any person within the class of beneficiaries in a discretionary trust. This tends to suggest that although the Court has power to make a freezing order against a trustee when the prospective judgment debtor is merely a beneficiary, it may be unlikely to do so without something more; for example, evidence regarding control exercised by the prospective judgment debtor over the trustee or trust assets.

134. So, drawing that all together, the key takeaways are these:

- (a) When you are seeking or resisting a freezing order, take care to understand the character of the assets in question, and the relationship between the

judgment debtor and those specific assets.

- (b) Remember that the Court's powers in the Rules are very broad. Even then, the Rules do not limit the breadth of the Court's powers with respect to freezing orders.
- (c) It is at least clear that where a third party is in a position to control the prospective judgment debtor's assets, those assets may be subject of a freezing order. The prospective judgment debtor's interest in the assets in question includes a mere expectancy, which is a very remote form of interest.
- (d) If there is a question whether the assets may be able to be enforced against, that does not mean the assets cannot be frozen.

Dr Oren Bigos KC – carve out for legal expenses

135. It is usual for a freezing order to contain exceptions, including for living expenses, legal expenses and business expenses. I wish to say something about the exception for legal expenses. In framing this carve-out, the court balances:

- (a) On the one hand, the respondents' ability to defend the proceeding (and possibly other or related proceedings), given that a freezing order does not operate as a security interest over their assets;
- (b) On the other hand, the preservation of the respondents' assets to meet a judgment, so that the legal expenses do not become a means of dissipation of assets, frustrating the plaintiff's ability to enforce.

136. One method by which the courts can control legal expenses is to place a monetary cap. But in doing so, as Barrett J observed in *Westpac v McArthur*,²⁰ the court necessarily enters upon a difficult terrain. His Honour preferred to allow expenditure on "reasonable and proper" legal expenses without any cap, as it would be wrong to think that a client subject to a freezing order who incurs such legal expenses will somehow be more profligate and less vigilant than a client not subject to such an order. The money is, after all, the client's own money and

²⁰ *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347, at [52].

expenditure of it by way of payments to lawyers for services rendered cannot be seen as presenting some opportunity for indirect and improper dissipation in the face of the possibility of a future judgment. Although that was his Honour's view, there may be plaintiffs who, as a result of mistrust of the respondents and their lawyers, harbour a different view.

137. Judges of this Court have generally followed Barrett J's approach of allowing 'reasonable legal expenses' without imposing a cap.²¹
138. In the Federal Court it seems relatively common to specify 'reasonable legal expenses' up to a monetary cap, with liberty to apply to vary the cap.
139. Another method is "self-certification", periodic written certification by the respondents' lawyers as to the amount of the reasonable and proper legal expenses incurred. The lawyers, as officers of the court, would have obvious responsibilities in that regard.²² For example, in *Deputy Commissioner of Taxation v Bolland*s,²³ the Federal Court imposed self-certification, alongside a monetary cap, and liberty to apply to vary the orders.
140. Interesting issues may arise when the plaintiff comes to enforce a judgment and finds that the frozen assets are much smaller than they were initially, for example:
- (a) Can the plaintiff obtain discovery of the defendant's lawyer's invoices to test the reasonableness of the expenses?
 - (b) Does the plaintiff need to demonstrate that the amounts spent by the defendant on legal expenses are disproportionate to the work likely to have been undertaken?
 - (c) If the expenses are unreasonable, does the plaintiff have recourse against the defendant's lawyer? If so – is it for compensation or restoration of the defendant's frozen assets?

²¹ Eg Connock J in *Refuse to Lose Pty Ltd v Kostakis* [2025] VSC 438 and *Li v Liang* [2026] VSC 256.

²² This was referred to by the English Court of Appeal in *Halifax plc v Charlton* [2001] EWCA Civ 1750, and picked up by Barrett J in *Westpac v McArthur*.

²³ [2012] FCA 1050.

(d) Are there remedies that can be deployed under the *Civil Procedure Act*?

141. Hopefully at least some of these issues will be resolved before Mareva's 100th anniversary.