JUDGMENT : McDougall J : New South Wales Supreme Court : 18th June 2004

1 The plaintiff and the defendant are parties to a sub-contract dated 26 April 2002. Under that sub-contract the defendant undertook, among other things, to supply a refurbished tunnel boring machine and conveyor to the plaintiff for use in boring a cable tunnel from Alexandria to Ultimo.

2 The plaintiff and the defendant are in dispute. The defendant has obtained a determination by an adjudicator pursuant to s 22 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) in the sum of $1,207,913.42. The plaintiff has obtained an interlocutory order restraining the defendant from, in colloquial terms, enforcing that determination. The adjudicated amount has been paid by the plaintiff into an interest bearing account controlled by the solicitors for the plaintiff and the defendant.

3 The plaintiff has commenced these proceedings seeking to recover damages from the defendant in respect of the defendant's performance of the sub-contract. A number of defaults that the plaintiff alleges have been admitted. There is a dispute as to the amount of the plaintiff's claim. In addition, the defendant has filed a cross-claim.

4 Almost all the matters of which the plaintiff complains in these proceedings were raised before the adjudicator. He valued those complaints at, in round figures, $332,000 in total. That may be compared with the total amount claimed by the plaintiff in these proceedings: $2,577,766.60.

5 It appears from the determination of the adjudicator that he rejected the greatest part of the plaintiff's claim based on his assessment of what was, I think, relatively limited evidence. No doubt the state of the evidence before the adjudicator reflected, among other things, the speed with which, under the Act, adjudications are to be processed and determined.

6 The plaintiff by notice of motion filed on 23 April 2004 claims, among other things, relief in the nature of a Mareva order. Although the relief claimed by the notice of motion was not so limited, the argument before me proceeded on the basis that the real dispute was as to the adjudicated amount.

7 The defendant is an American corporation. Its headquarters are in Cleveland, Ohio. On the evidence, it has been in business (at least in Australia) for more than 40 years. It has a substantial business history and is currently involved in 12 major tunneling projects around the world.

8 The defendant's operations in Australia are presently conducted (for the want of a better word) through a subsidiary, Robbins Asia Pacific Pty Limited. That company has a contract with the Thiess Hochtief Joint Venture for the supply of tunnel boring machines, conveyors and associated spare parts and the like for the Parramatta Rail Link project. On any view that is a major project. The involvement of Robbins Asia Pacific in that project will last, on the evidence, for another 12 to 18 months. Robbins Asia Pacific is seeking another major contract in Queensland, the North South Bypass Tunnel in Brisbane. However, although it is involved in preliminary matters, it does not appear to have been awarded a substantial contract.

9 The defendant supplies equipment to Robbins Asia Pacific and Robbins Asia Pacific supplies that equipment to the Joint Venture. The defendant invoices Robbins Asia Pacific and Robbins Asia Pacific in turn invoices the Joint Venture as and when it is supplied to the latter. There is said to be at present some $7.3 million owed by Robbins Asia Pacific to the defendant in respect of goods so supplied. On the evidence, the only hope of payment is from money received by Robbins Asia Pacific from the Joint Venture.

10 As at 31 December 2003, Robbins Asia Pacific had made a substantial loss. That was not just a loss after taking account of all expenses: its income statement for the 12 months ending 31 December 2003 shows that it made a gross trading loss in excess of $200,000. The balance sheet as at the same date shows that, after taking the loss to account, there was a deficiency in shareholders' equity of, in round figures, $780,000.

11 The defendant has no assets in Australia apart from its shareholding in Robbins Asia Pacific, debts owed to it by Robbins Asia Pacific and the adjudicated amount.

12 It is not disputed that amounts owed by Robbins Asia Pacific to the defendant are remitted to the defendant in America as and when they are payable. (This, as I have said, assumes that Robbins Asia Pacific is able, by reasons of payment made to it by the Joint Venture, to make payment.) Nor is it in dispute that if the defendant were paid the adjudicated amount, it would repatriate it to America. I hasten to say both these matters would occur in the ordinary course of the defendant's business. They are not, by themselves, indicative of any scheme or intention on the part of the defendant to render itself judgment proof in Australia.

13 The defendant is a substantial corporation. As at 31 December 2003, it had total assets in excess of $US61 million and, after allowing for liabilities and minority interests, total shareholders' equity in excess of $US12 million. There is no reason to think that the defendant would not pay a judgment in these proceedings, if called upon to do so. However, there is every reason to think that the plaintiff could not satisfy such a judgment from assets in Australia if it were required to do so.

14 The question is, therefore, whether these facts reveal a sufficient basis for the grant of a Mareva order.

15 The relevant principles were stated by Gleeson CJ in ***Patterson, v BTR Engineering (Aust) Ltd*** (1989) 18 NSWLR 319 at 321 – 322: *"Whatever doubts there may previously have been about the matter, the High Court of Australia has now determined authoritatively, for this jurisdiction, that orders preventing a defendant from disposing of his assets so as to create a situation in which any judgment obtained against him would not be satisfied, commonly referred to as* ***"Mareva injunctions"****, are now* ***"accepted as an established part of the armoury of a court of law and***

equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction": … [omitting citations]

The remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied."

16 In ***Frigo v Culhaci*** (CA 40414/98, 17 July 1998, unreported), the Court of Appeal said the following at 9: *"A Mareva injunction is an exceptional interlocutory remedy. Its function is to minimise the possibility of an unscrupulous defendant seeking to render himself or herself 'judgment proof' by taking steps to ensure that no asset within the jurisdiction can be found on the day of judgment ... ".*

17 Their Honours, having referred to ***Jackson v Sterling Industries Ltd*** (1987) 162 CLR 612, 622 noted that the order "is a drastic remedy which should not be granted lightly". They then said at 10: *"A Mareva injunction is an interlocutory order which, if granted, imposes a severe restriction on a defendant's right to deal with his or her assets. It is granted at a suit of a plaintiff whose status as a creditor is in dispute and who need not be a secured creditor. Its purpose is to observe the status quo, not to change it in favour of the plaintiff."*

18 Referring with approval to the judgment of McPherson J in *Abella v Anderson* [1987] 2 QdR 1 at 2-3, their Honours said that the function of the order was not to "provide a plaintiff with security in advance for a judgment that he hopes to obtain and that he fears might not be satisfied; or to improve the position of the plaintiff in the event of the defendant's insolvency".

19 Finally, for present purposes, their Honours cited the remarks of Gleeson CJ in *Patterson* that I have already set out.

20 The nature of the remedy was considered by the High Court in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. Their Honours emphasised the limited and protective nature of the jurisdiction to grant Mareva orders. Specifically, at 403 [51], they agreed with what the Court of Appeal said in *Frigo*, to which I have already referred. At 404 [52], [53], they referred to the need to take care in exercising the power to grant a Mareva order and to weigh discretionary considerations carefully.

21 The issue between the parties focused on what eventually appears to be a narrow question is: the power to grant a Mareva order enlivened by problems of enforcement within the jurisdiction, or is it enlivened by problems with enforcement generally? To put it another way, where there is evidence that assets are being removed from the jurisdiction, but no evidence of a specific intention to thwart enforcement, and also evidence that the respondent to the application possesses substantial assets outside the jurisdiction, does the Court's power extend to the grant of a Mareva order relating to assets within the jurisdiction?

22 The defendant pointed to the decision of Megarry V-C in ***Barclay-Johnson v Yuill*** (1980) 1 WLR 1259, 1265, where his Lordship said: *"It must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default."*

23 The plaintiff pointed to the decision of Gleeson CJ in *Patterson* and, in particular, to what his Honour said (in the first paragraph that I have already quoted) as to the "injunction" being accepted as part of the armoury of the Court to prevent abuse or frustration of its process in relation to matters coming within its jurisdiction.

24 The enforcement of a judgment given by a court is ordinarily a matter within the "jurisdiction" of that court. It is an integral part of the process of enforcement of obligations that, in a general sense, are within the jurisdiction of the court. For that reason, perhaps, the authorities focus on removal from the jurisdiction as part of, or an element in, frustration; and the need to find something more (danger of default, in the words of Megarry V-C) may be explained as focusing on the presence of other assets within the jurisdiction rather than on the ability of a plaintiff, if successful, to enforce its judgment outside the jurisdiction.

25 For present purposes, I regard the issue as decided in favour of the plaintiff by what the Court of Appeal said in ***Frigo,*** where their Honours referred to an unscrupulous defendant *"taking steps to ensure that no assets* ***within the jurisdiction*** *can be found on the day of judgment"* (my emphasis). That, I think, is consistent with the proposition that the power to grant a Mareva order is part of the court's armoury to prevent frustration of its processes and the proposition that those processes include enforcement within the jurisdiction of its own judgments.

26 I therefore conclude that the issue of principle should be resolved in favour of the plaintiff. But that does not end the matter.

27 I have referred to the observations of High Court in ***Cardile,*** and the Court of Appeal in ***Frigo,*** as to the drastic nature of the remedy and as to the need to take care in granting relief. I have also referred to some of the other discretionary considerations that the High Court emphasised in ***Cardile.***

28 The defendant submitted that the plaintiff had not acted expeditiously. However, I do not think there is any evidence of significant delay. That is particularly so since, as the debate evolved, the dispute is limited in reality to the adjudicated amount. There was no basis upon which the plaintiff could move for Mareva relief in respect of the adjudicated amount until the adjudicator had given his determination. The determination was provided on 20

April 2004; as I have noted the plaintiff approached the Court within four days. In any event, on the question of delay, there is no evidence, nor any other basis to think, that the defendant has in some way acted or refrained from acting in some material fashion because of such delay as may have occurred.

29 In my judgment, the plaintiff has made out a prima facie case in the substantive proceedings. It is to be noted, as I have pointed out, that the defendant has made substantial (and entirely proper) admissions of some of the matters alleged.

30 I do not accept that the determination of the adjudicator provides any convincing indication of the amount of the plaintiff's entitlement. In particular, I do not regard the determination as providing any convincing indication that the likely amounts of the plaintiff's claim will be much less than the sum claimed in its summons. I think that the inherent limitations in the adjudication process, and the interim nature of the procedure, mean that it could not be seen as an accurate predictor of the outcome of a fully prepared hearing.

31 As the courts have emphasised, it is always necessary to have regard to the impact a Mareva order might have, first, on rights of the defendant and, second, on the rights of third parties. There is not, in my judgment, any acceptable evidence in the present case that the continuation of the order (limited to the adjudicated amount) would cause any particular detriment to the defendant. Far less is there is evidence that, to use the terms in Meagher, Gummow and Lehane, cited by the Court of Appeal in ***Frigo***, it might cause havoc or ruin to the business of the defendant.

32 I am aware that Mr Ross Scrim gave evidence that the relief as sought might cause difficulties. However, in considering that evidence, it seemed to me that it was far too general to lead to the conclusion for which Mr Scrim contended. It is, in any event, based upon the mistaken assumption that the defendant, rather than Robbins Asia Pacific, has contractual obligations to the Joint Venture. The combination of that and the balance sheet of the defendant suggests to me that the defendant could comfortably continue to undertake whatever its obligation may be to Robbins Asia Pacific in respect of the Joint Venture without the aid of the adjudicated amount.

33 I note that the defendant, through Mr Scrim and through Mr Ian Robert Cahoon, proffered some sort of undertaking or guarantee on the part of Robbins Asia Pacific to meet any amount that might be awarded by the Court in favour of the plaintiff. I do not think that this is a factor that should dissuade me, if otherwise satisfied it is appropriate to do so, from granting relief. Firstly, the undertaking or guarantee has not been formalised. There is no evidence that what the gentlemen said was ratified or approved by Robbins Asia Pacific. Secondly, it would be a poor substitute for cash in hand given that the likely result would be further proceedings to enforce whatever right might be offered. Thirdly, and most significantly, the evidence shows that Robbins Asia Pacific simply does not have the financial capacity on its own to meet any such undertaking in any substantial amount.

34 The defendant submitted that I should find that its interests in Australia were such that I could comfortably conclude it could meet its legal obligations. In fact, its presence in Australia is now by proxy. In this context I regard as significant the failure of the defendant - subsisting for two months - to respond to the plaintiff's request for an undertaking. I refer to the letter dated 15 April 2004 from the plaintiff's solicitors to the defendant's solicitors inquiring whether the defendant would give an undertaking to have sufficient assets in the jurisdiction to satisfy any judgment and what arrangements the defendant would put in place to ensure this would be so. If the defendant was seeking to persuade me that its activities and interests were sufficient to show that it would meet its legal obligations, one might have expected it to provide assurances, in the intervening months, in response to that letter. It has not done so.

35 In all the circumstances I conclude that it is appropriate that the plaintiff should continue to have an entitlement to relief in the nature of a Mareva order. However, I think, that relief should be limited to the adjudicated amount. I say this not only because of the way in which the parties conducted the proceedings before me, but also because, on the evidence, I think there is a real possibility that an order in wider terms could cause substantial difficulty to Robbins Asia Pacific in relation to the Parramatta Rail Link. It is apparent that Robbins Asia Pacific, to meet its obligation to the Joint Venture, requires material to be supplied by the defendant. If the amounts owing by Robbins Asia Pacific to the defendant were frozen (even up to the limit sought, relating to the amount of the plaintiff's claim), then there must be a risk that the defendant in turn might not meet whatever its obligations were to Robbins Asia Pacific. In my view, there is both public and private interest in the Parramatta Rail Link and the Court should be very slow to grant relief that might impinge upon those interests.

36 I therefore direct the parties to bring in short minutes of order to give effect to these reasons. Those orders should, first, deal with examining the existing orders; second, deal with the money in the joint account; and, third, provide for a restraint in relation to adjudicated amount as I have indicated I will order.

37 I grant the defendant leave to file in Court its verified defence in the form initialled by me, noting the defence is verified by the affidavit of Mr Ross Scrim, sworn 16 June 2004. The short minutes are to provide that the exhibits may be handed out. I will order that the costs of the plaintiff's application for Mareva orders be the plaintiff's costs in the cause and the short minutes may so provide. Documents produced in answer to a subpoena by Robbins Asia Pacific Pty Limited may be returned to that company or its representatives.

G Inatey SC/D T Miller (Plaintiff) instructed by Corrs Chambers Westgarth
J J E Fernon SC/T J Dixon (Defendant) instructed by Watson & Watson