

JERSEY / JUDGMENT

Matthews v Matthews [2001]

JCA 216 (26 October 2001)

[2001] JCA 216

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JUDGMENT

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Introduction

1. This is an appeal by the Second Defendants, the Trustees of the Lord Matthews Trust, from the interlocutory judgment of the Royal Court, Samedi Division, given on 28th June 2001, in so far as that judgment ordered that there be re-imposed an order in the terms of the order of the Royal Court dated 16 May 2001. The order of 16 May 2001 had been granted without notice, and had been discharged by the Royal Court in their judgment of 28th June, 2001 (that being a part of the order in respect of which there is no appeal by the Second Defendants). There is no cross appeal. 2. The Second Defendants at the time when each of the two orders were made were Mr Matthews, who is named as the First Defendant in his personal capacity, and Mr Coutanche. In addition to the appeal itself, there is an application for permission to introduce into the evidence the fact that Mr Matthews resigned as trustee with effect from 29 June 2001. There can be no objection to that fact being communicated to the Court. There is, however, an issue as to whether it is a change of circumstances at all, and, if it is, whether the possible consequences of it can properly be raised in this appeal without the Royal Court having first been given an opportunity to review its order in the light of this new fact. 3. The terms of the order of 16 May, 2001, which were re-imposed on 28 June, 2001, are as follows: Disposal of Assets (1) Until Judgment herein or further Order, service of this Order of Justice upon the Defendants shall operate as an Immediate Interim Injunction restraining the First and Second Defendants, as Trustees of the Lord Matthews Trust, whether by themselves or by their respective servants, agents or by any company or trustee acting on the Trustees' behalf without the leave of the Royal Court or the prior written consent of the Plaintiff's Advocate in writing from entering into any transaction whatsoever which shall have the effect of diminishing or passing out of the control of the Trustees all or any of the assets of the Lord Matthews Trust wheresoever and specifically as beneficial owner of Matthews Farm Limited restraining the Trustees from disposing of or charging howsoever the property Waverley Farm and/or the shares or stock in Matthews Farm Limited held howsoever by the Trustees. (2) Provided always that the prohibition

contained in paragraph 1 above shall not apply to the following: a. A payment to the First Defendant of a sum not exceeding £30,000 per month for his own living and legal expenses and such sum as is necessary to meet the costs of maintaining the children of the marriage of the Plaintiff and First Defendant. b. Such transactions as may reasonably be entered into in respect of the day-to-day running of any investment portfolio operated by the Trustees. c. Such transactions as may reasonably be entered into by way of a variation of any property investment (other than the ownership of Waverley Farm) held directly or indirectly by the Lord Matthews Trust. Provided always that no such transactions envisaged by paragraph 2 above shall have the effect of diminishing all or any of the assets or the value of the Lord Matthews Trust. VARIATION OR DISCHARGE OF THIS ORDER (3) The Defendants (or anyone notified of this Order) may apply to vary or discharge this Order (or so much of it that affects that person) but anyone wishing to do so must first give the Plaintiff's Advocate not less than 12 hours notice. 4. The matter has a complicated history, which is summarised by the Royal Court in paras 2 to 32 of their judgment which I gratefully adopt. (2) The Hon. Ian Matthews is the only son of Lord Matthews of Southgate who, before his death (on the 5th December 1995) lived as a "Section K" resident at Waverley Farm, St. Brelade. Lady Matthews predeceased her husband. On 9th March 1995, Lord Matthews made a will of realty. He gave his realty (if his wife should predecease him) to Matthews Farms Limited. On 1st August 1995, the Lord Matthews Trust was established. The original (and still the continuing Trustees) were Mr. Ian Matthews and Mr. Coutanche. (3) Matthews Farms Limited is a wholly owned subsidiary of Southgate Investments (1996) Limited and that company is beneficially owned by Mr. Matthews and Mr. Coutanche as Trustees of the Lord Matthews Trust. Southgate Investments (1996) Limited is the holding company of other property holding companies and of Matthews Breeding and Racing Limited which is a bloodstock and breeding racing company. There is no doubt that the Lord Matthews Trust is the ultimate controlling party of Southgate Investments (1996) Limited and of its subsidiary companies. The Directors of the companies are, or were, Mr. Matthews, Mr. Coutanche and Mrs. Matthews. Mrs. Matthews is not a beneficiary in the Trust. She is not named in it at all. The beneficiaries are Mr. Matthews and the three daughters of the marriage aged 12, 10 and 8. There is also a general charitable beneficiary. (4) As we have said, Lord Matthews died on 5th December 1995. Mr. and Mrs. Matthews and their family moved into Waverley Farm. Sadly, the marriage broke down irretrievably. In February 2000 Mr. Matthews went alone to a Health Centre in Florida where he entered into an adulterous relationship which he admitted to Mrs. Matthews on 11th June 2000. The relationship is a continuing one. (5) Mrs. Matthews petitioned for divorce on 7th August 2000 on the grounds of her husband's adultery. Before bringing her petition for divorce, Mrs. Matthews lodged a caveat or opposition with the Court against Mr. Matthews. Some exception has been taken to this "opposition" by the second defendants, although it only cited Mr. Matthews. It may well be that custom has enlarged the original concept that the caveat or opposition had for its purpose in the days of C. S. Le Gros. Nevertheless, as Mr. Hoy has pointed out, the opposition was duly registered and no steps were taken to set it aside. It stood unopposed from 17th August 2000 and was renewed on the same terms on 19th January 2001. (6) There

then occurred the first extraordinary event. Mrs. Matthews' lawyer was Advocate Voisin. He left the Island, having given instructions to his office that a decree absolute was not to be applied for. The clear object was that if a decree absolute were granted to Mrs. Matthews she would no longer be a "spouse" to enable the property to be transferred to her if such an order were made on the ancillary matters still awaiting adjudication. (7) There was what is called "an administrative error" and a decree absolute was applied for and granted on 15 th January 2001. On his return, there was a flurry of correspondence between Advocate Voisin and the Housing Law Officer. Occupation of Waverley Farm was secured when the Housing Committee gave permission for Mrs. Matthews with the children to reside there under Regulation 1(1)(g) (hardship). (8) Advocate Whittaker (who acted for Mr. Matthews in his divorce) was kept informed. Advocate Voisin issued a summons seeking an order that the decree absolute be set aside. This was due to be heard by the Royal Court on the afternoon of 30 th April 2001. (9) The will of realty of Lord Matthews had not been registered since his death on 9 th December 1995. Mr. Coutanche in his affidavit gave six main reasons for this.

- (i) Emotional or sentimental. As Mr. Matthews was the sole heir, it appeared to Mr. Coutanche that it was "perfectly right and proper that Mr. Matthews should be the apparent owner of Waverley Farm". (ii) The registration of the will could have cost £15,000. That was an unnecessary expenditure. (We should mention that the Trust has assets in excess of £23M.) (iii) There was no practical reason (while the marriage remained stable) for the early registration of the will. (iv) There were technical reasons (concerning proposed housing legislation) why the position would be more favourable for the family if the property remained in Mr. Matthews' name.
- (v) There was, in Mr. Coutanche's words "a misunderstanding of the strict legal position on the part of Mr. Matthews" and (vi) "an element of oversight by the Trustees who either inadvertently or collectively in light of the matters above mentioned allowed the question of registration of the will to remain for future consideration". (10) We pause to remind ourselves that the sole Trustees were Mr. Coutanche and Mr. Matthews and some five years had elapsed since Lord Matthews' death. (11) In March 2001, Mr. Coutanche as Trustee was made aware of the granting of the Regulation "g" consent. That gave him some comfort as the main beneficiaries of the Trust were the three children. He revisited his position "as Trustee" and decided that he would register the will. It should be pointed out that Mr. Matthews was, like his late father, a person who had been granted consent under Regulation 1.1. K of the Housing regulations. (12) Mr. Matthews demurred. Mr. Coutanche insisted. The will was registered on 4 th April 2001. There was clearly some tension between Mr. Matthews and Mr. Coutanche. (13) Mr. Matthews' first affidavit makes mention of the fact. He said that Mr. Coutanche "knew that he should have registered the will sooner. He knew that if steps were taken by the Plaintiff in the divorce proceedings which would have the effect that Waverley Farm could not be vested in the Trust, he could be actioned for breach of trust". Mr. Matthews goes on his affidavit to say that "Unlike Mr. Coutanche, I am not a professional man with obligations owed to his partners. My inclination was to maintain the status quo. My thinking on this was that if Waverley Farm was not available to the Plaintiff

and the children in the long term then there existed the possibility that they would leave Jersey. Above all else, I wanted to avoid that situation occurring because I did not want the children to feel that I had driven them and their mother out of their home". (14) Mr. Matthews' affidavit evidence talks of the tension that gradually developed between himself and Mr. Coutanche. His remarks are somewhat critical. He says at one point, "I believe that Mr. Coutanche's concern had more to do with a failure on his part to vest Waverley Farm in the trust in the first place." No doubt Mr. Coutanche will draw comfort from the fact that he may be replaced shortly as a Trustee by Mourant & Co. Trustees. (15) Mr. Coutanche (and this Court is not in any way adjudicating upon his possible motives) eventually persuaded Mr. Matthews to put him in funds for the necessary stamp duty. On 4 th April, Mr. Coutanche registered the will. Mr. Matthews was out of the jurisdiction until 27 th April. (16) Before he left he swore his affidavit of means, assisted by Advocate Whittaker. In that affidavit under "Is property owned?" he wrote "sole name under intestacy of father (will not yet registered)" and noted that Waverley Farm had been purchased "by deceased parent" and inherited on 5 th December 1995. The will of realty of Lord Matthews was attached to the affidavit. (17) Mr. Coutanche wrote to Advocate Whittaker on 4 th April 2001 to say that he had registered the will. It was registered on that day. Advocate Whittaker wrote back to say that she would inform Advocate Voisin. (18) On th April the Royal Court sat to hear argument. Advocate Preston appeared to represent Mrs. Matthews - (Advocate Voisin was deeply involved in another matter in the Royal Court). Advocate Whittaker appeared for Mr. Matthews. At the hearing, the second extraordinary event occurred. No mention was made during the hearing by Advocate Whittaker (who had not earlier informed Advocate Voisin) that the will had been registered. Even when Advocate Preston referred to the opposition in place against Mr. Matthews as owner of the property, nothing was said. (19) When, on the evening of 30 th April, Advocate Voisin discovered that Waverley Farm was now owned by Matthews Farms Limited, it is fair to say that he was indignant. Suspicions began to grow. (20) It must be said that Mr. Matthews in his first affidavit alleges that he told Mrs. Matthews "during a family dinner at the Noble House Chinese Restaurant on th April 2001" that the will had been registered. Mrs. Matthews in her third affidavit (sworn on the day of the hearing before us) says "He told me casually in the car. Even so, I would not have understood the consequences for me of that action in the context of casual conversation during my daughter's birthday, without the benefit of on the spot legal advice". (21) This is not a hearing on disputed facts. The Court, now aware of the true situation, granted leave to the Petitioner to withdraw her application, ordered costs on an indemnity basis against the Respondent from 4 th April and noted an undertaking by the advocates to the Trustees of the Lord Matthews Trust (as beneficial owners of Matthews Farms Ltd.) that: "the company will not dispose of the property Waverley Farm, Le Mont Arthur, St. Brelade, nor will the Trustees permit the disposal, directly or indirectly, of the shares held in the company". (22) On st May a caveat or opposition was obtained against Matthews Farms Limited. That did not satisfy the Plaintiff entirely and on 1 st May and 3 rd May she swore affidavits to support an Order of Justice which would grant injunctive relief and which sought damages for the registration of the will which, it was claimed, was "effected in order to circumvent the caveat". (23) In her first

affidavit Mrs Matthews asks the Court not to order fortification of her undertaking in damages as she was not in a financial position to support such fortification. The Order of Justice convened Mr. Matthews, the Trustees of the Lord Matthews Trust, Southgate Investments (1996) Limited and Matthews Farms Limited but it only enjoined the two Trustees. The injunction was wide ranging. It allowed Mr. Matthews a monthly sum of £30,000 but it was an order that would, if granted, preclude any assets from moving out of the control of the Trust. (24) As a result of the actions taken by Mr. Matthews and the other parties, the Plaintiff feared that "they may be intending to transfer or otherwise dispose of other assets situate in Jersey or elsewhere or, alternatively, that the Trustees of the Lord Matthews Trust may otherwise be intending to dispose of assets within the Lord Matthews Trust, in any such case to the detriment of the Plaintiff in any claim which she may make in respect of ancillary relief". (25) It may be that Mrs. Matthews was concerned about a sentence in Mr. Matthews' affidavit (paragraph 17) which reads:- "it is clear that the Plaintiff is looking to the Trust Capital to set her up in the lifestyle to which she has become accustomed. We do not know, and in this hearing we do not need to know, what motivated the parties. (26) Advocate Preston attended ex parte upon the Deputy Bailiff to obtain injunctive relief. The Deputy Bailiff indicated to Advocate Preston that he approach the Trustees with a view to "obtaining such undertaking from the Trustees so as to prevent any diminution in the value of the trust which would have the effect of supporting or compromising Mrs. Matthews' claim for ancillary relief since her divorce". (27) Correspondence was exchanged. Draft undertakings were submitted. It all came to nought. In the general context of professional mistrust an unanswered telephone call took on what might now seem an unmerited importance. (28) On 5 th May 2001, in the course of these abortive negotiations, Mr. Coutanche wrote (on his firm's notepaper) and said: "The obtaining of ex parte injunctions would be totally unjustified and could cause untold damage. You should therefore treat this letter as notice that if there is to be any application for injunctive relief I would wish to be heard through my legal representative. Such injunctive relief would be totally unjustified". (29) The terms of the Order of Justice were amended slightly, correspondence (including the letter of 8 th May) was enclosed in a bundle and the learned Deputy Bailiff also asked Advocate Hoy, who was now handling the matter, to give a "full and proper explanation as to why he considered it necessary to apply for injunctive relief". (30) That affidavit was sworn on 20 th June. The Deputy Bailiff signed the Order of Justice granting the injunction on 16 th May. The injunction, as we have said, only injuncts the Trustees. (31) Since the injunctions were imposed, the Trustees have sought permission from Advocate Hoy to sell two properties. Permission was sought on 4 th June. Consent (subject to the terms of the injunction that the sale proceeds remain with the Trust and subject to the injunctions) was given on the same day. (32) Both properties were in London. One was to be sold for £3.3M, the other for £1.5M. Those sales have only fuelled Mrs. Matthews' suspicions, particularly when she says that her former husband has applied for a "green card" as a U. S. resident alien. We do not speculate on unsubstantiated motives. We note that the Trustees, one of whom is the senior partner of one of Jersey's largest law firms, are within the jurisdiction of the Court. 5. The ancillary matters referred to in paras 6,

34 and 43 of the judgment of the Royal Court are the claims of Mrs Matthews which are conveniently to be found in her affidavit of means. These include: (a) " the ownership of Waverley Farm so as to provide a home for myself and the children of the marriage; ... (d) the ownership of the apartment in Spain and the car kept in Spain; (e) a cash sum to enable me to purchase and furnish a three bedroom flat in London which will be particularly required when the children undergo secondary education in England; (f) a cash sum of £6,000,000 so as to provide during my lifetime for my anticipated living expenses as set out in the schedule to this affidavit; (g) a further cash sum to reflect my past contribution to the marriage in support of the Respondent and for my responsibilities in caring for and bringing up the children of the marriage; (h) such further or other sums as the Court may consider appropriate in the circumstances; or that the Royal Court should make such order as may be appropriate in respect of a variation of the Lord Matthews Trust so as to satisfy any award made to me as set out above." 6. By an Order of Justice dated 7 th August 2001 the hearing of the ancillary matters has been fixed to take place for two weeks in April 2002. The trustees have been convened as third parties. At the present time, Advocate Robinson has told us, the trustee has not yet decided what his stance should be with regard to these claims. 7. We have also been told that the Royal Court has yet to rule upon the final relief claimed in the Order of Justice of 16 May. It follows that we can take no view on whether the will was registered lawfully. The claim has not been struck out. The relief claimed includes a prayer that the Royal Court may... (2) Make such Order as may be appropriate with reference to the breach by the First Defendant of the caveat or "opposition"; (3) Make such Order as may be appropriate with reference to the First Defendant executing an Affidavit of Means on the 30 th March 2001 which failed to disclose his then presumed intention; (4) Make such Order as to damages and/or Order that the registration of the Will of the Late Lord Matthews be declared void ab initio and should be set aside... 8. The grounds of appeal are three: (i) The Royal Court misdirected itself in holding that the test to be applied in determining whether to re-impose the injunction was one of balance of convenience; (ii) The Royal Court erred in failing to consider adequately or at all the risk of dissipation of assets when deciding to re-impose the injunction; (iii) The Royal Court failed to consider adequately or at all the fact that the Trustees of the Lord Matthews Trust are obliged to protect the interests of the minor beneficiaries. 9. The approach of this Court to an appeal from the making of an interim injunction of this kind is set out, as is common ground between the parties, in the judgment of Southwell JA in *A E Smith & Sons Limited v L'Eau des Iles (Jersey) Limited* 1999 JLR 319 at 321-322. "The starting point in relation to this application for leave is that the Royal Court has exercised a discretionary power in refusing to order the provision of security for costs. The approach to be adopted by the Court of Appeal when hearing an appeal from such an exercise of a discretion by the Royal Court was spelled out by this court in *Abdel Rahman v Chase Bank Trust Co. (C. I.) Ltd* (1984 J. J. at 133-134). The court's exercise of its discretionary power is to be set aside only where the court (a) has acted on a wrong view of the relevant principles of law;

- (b) has taken into account immaterial matters or failed to take into account material matters;

- (c) has reached a plainly wrong decision;
- (d) has been unable to take into account a material change of circumstances occurring after the court reached its decision; or
- (e) has reached its decision in a manner which will result in injustice to one of the parties. It is for Smith to show that one or more these grounds for interfering with the Royal Court's exercise of its discretion exists in the present case." Whether the Royal Court misdirected itself on the test to be applied in re-imposing the injunction. 10. In considering whether to re-impose the injunction the Royal Court referred (at para 40 of the judgment) to s.37 of the Matrimonial Causes Act 1973 of England and Wales, and noted that there was no equivalent jurisdiction in Jersey. The Royal Court then stated that 'there is ... a well worn path way of inherent jurisdiction', a proposition that is not in dispute. The Royal Court directed themselves as to their inherent jurisdiction by reference to the inherent jurisdiction of the court in England and Wales, as set out in *Khreino v Khreino* (No 2)

[2000] 1 FCR 80, and *Shipman v Shipman*

[1991] 1 FLR 250. At para 43 of the judgment the Royal Court said: 'When the ancillary matters come for adjudication the Greffier will no doubt take into close account the provisions of Articles 28, 29 and 29A of the Matrimonial Causes Law. Whether or not Mr Matthews has, by virtue of his interest under the "ultimate trust" in Clause A7 of the Trust sufficient interest to enable the Court to order the sale of property "in which or in the proceeds of sale of which either or both the parties to the marriage has or have a beneficial interest, either in possession or reversion" remains to be seen'. 11. The provisions of the Matrimonial Causes (Jersey) Law 1949 (as amended) referred to by the Royal Court give to the Court power to order transfer or settlement of property, financial provision for a party to a marriage in cases of divorce and sale of property. They are articles which will be relevant in considering the financial relief which Mrs Matthews claims. 12. The submissions of both parties are made on the basis that the English authorities set out the ambit of the inherent jurisdiction under Jersey law. 13. In *Khreino* at p84h Thorpe LJ said: '... Family Division judges day in day out exercise the inherent jurisdiction to grant injunctions to ensure that one spouse does not selfishly or irresponsibly salt away, squirrel away or spirit away family assets which may be in his name but which must be carefully preserved pending the ultimate judicial determination as to what proportion of that asset must be either transferred to or made available for the benefit of the applicant spouse. The power is so widely used that it is perhaps not entirely surprising that there is little direct authority other than those cases to which I have referred [ie *Shipman v Shipman* , *Roche v Roche*

(1981) Fam Law 243 and *Harrow London BC v Johnstone*

[1997] 2 FCR 225 ,

- [1997] 1 All ER 929]. It is often the way that the more widely used is a power and the more widely it is recognised the less easy it is to find specific authority that establishes its existence'. 14. Although Thorpe LJ refers to the freezing order in that case as a 'Mareva injunction', it is to be noted that he does not cite as authority for the jurisdiction of the Family Court the very well-known line of case commencing with *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 508; [1980] 1 All ER 213n. A consideration of the other cases Thorpe LJ does cite shows that this is because the jurisdiction of the Family Court was exercised before 1975, and so is independent of the Mareva jurisdiction strictly so called. It is a fact that the expression 'Mareva injunction' has commonly been used for any freezing order, including orders to restrain a breach of trust, which have nothing to do with the Mareva decision itself. So we attach little significance to the use of that expression by Thorpe LJ. For the same reason we attach no significance to the fact that, at para 1 of the judgment, the Royal Court also referred to the injunction in this case as a Mareva injunction. 15. In *Roche Ormrod* LJ said : 'Apart from s.37 [of the Matrimonial Causes Act 1973 of England and Wales] and its predecessors the court has jurisdiction to preserve specific assets which are the subject matter of proceedings pending the determination of the issues involved, for example an injunction restraining the other party from removing out of the jurisdiction liquid assets pending a hearing - for the obvious reasons that he or she could put the assets somewhere where they cannot be reached. Another example is in the Married Women's Property Act 1882 proceedings, where an interest is claimed in a house or chattels. It is common form to apply to the court for an order to preserve chattels or preserve the matrimonial home pending the hearing of proceedings. With respect to the learned judge, I think he was wrong in thinking that this was an application under s.37. It seems to me that it was an application under the general powers of the court to preserve specific assets which are the subject matter of proceedings pending the determination of those proceedings. *Smith v Smith* [(1973) SJ 525] was also such a case ... It is interesting to notice that on April 6 1973 Faulks J - a very experienced Judge in this Division - gave a wife leave to apply out of time for a lump sum order and granted interim injunctions restraining the husband from dealing with the £2,500 which his solicitors were then holding - an award of damages to him following a car accident in a car driven by his wife'. 16. In *Shipman* Anthony Lincoln J dealt with the matter as follows at p 252: "The question then arises whether the court has an inherent jurisdiction to order a freeze, and, if so, whether it should do so. In *Roche v Roche*
- (1981) 11 Fam Law 243 the Court of Appeal exercised such jurisdiction, taking the view that such injunctive power was available, notwithstanding the enactment of s.37 of the 1973 Act ... *Roche v Roche* is binding on this court ... It was followed by Sheldon J in *Walker v Walker*
- (1983) 4 FLR 455, and I propose to do the same. For these reasons I hold that I have an inherent jurisdiction to restrain the husband... Counsel for the husband urges me to have regard to the many restrictions and safeguards surrounding the use of worldwide Mareva injunctions, and to assimilate the use of, and procedure for, injunctions in the Family Division to those in commercial law. In my view the matrimonial field calls for a different

approach...". 17. We did not call upon Advocate Hoy in oral argument. In his written Contentions he accepted that Shipman is not authority for the proposition that the test is simply one of balance of convenience. But he did submit that guidance could be obtained from cases based on trust claims. He referred to a case where an interim order was sought to preserve a fund which was claimed to be subject to a trust, resulting from the defendant having received it knowing it to be a trust fund which was being misapplied ("knowing receipt"): *Polly Peck International plc v Nadir (No 2)*

[1992] 4 All ER 769 . In that case there was both a knowing assistance claim (which is not a proprietary claim) and a knowing receipt claim (which is a proprietary claim). The following passages from the judgments in that case are of assistance. They clearly show the difference between, on the one hand, a true Mareva injunction (which is a freezing order in aid of a claim which is not proprietary) and on the other hand, an order to preserve property which is the subject of the action. Scott LJ said at p784c-785c: "In summary, therefore, it comes to this. PPI has a claim against the Central Bank that, although a possible one, is at present based on little more than speculation. A Mareva injunction will, inevitably, seriously interfere with the Central Bank's normal course of business and will, quite possibly, destroy the Central Bank; if the Mareva injunction is lifted, it is possible that a judgment obtained by PPI will be worthless. In my judgment, for two reasons the balance comes down against the continuance of the Mareva injunction. First, I regard PPI's present case against the Central Bank as no more than speculative. Second, it is, in my opinion, wrong in principle to grant a Mareva injunction so as, before any liability has been established, to interfere with the normal course of business of the defendant. To impose a Mareva injunction that will have that effect in order to protect a cause of action that is no more than speculative is not simply wrong in principle but positively unfair. I now come to the question whether a limited injunction preserving, pending trial, the £8.9m should be granted. This would not be a Mareva injunction. It would not be subject to provisos enabling the use of the money for normal business purposes, or for the payment of legal fees, or the like. There is, in general, no reason why a defendant should be permitted to use money belonging to another in order to pay his legal costs or other expenses. The objection in principle to the grant of the Mareva injunction to which I have referred does not apply to an injunction to preserve a fund that, in the contention of PPI, belongs to PPI . In deciding whether or not an interlocutory injunction to protect the £8.9m should be granted, the approach prescribed by *American Cyanamid Co v Ethicon Ltd*

[1975] 1 All ER 504, [1975]AC 396 should be followed. First PPI must show an arguable case. If an arguable case is shown then the balance of convenience should be applied. If the scale appears very evenly balanced it is then legitimate to take into account the strength or weakness of PPI's case. This is a case in which the balance of convenience does seem to be very evenly balanced. An order freezing £8.9m of the Central Bank's foreign currency reserves will, although not as devastating in its effect as an order freezing £23m-odd, none the less be likely to be damaging to the Central Bank's credibility as a bank. It is a sum

sufficiently large to put the Central Bank in difficulties if a run were to develop. On the other hand, if an injunction is not granted, the £8.9m may disappear as a traceable fund, leaving PPI merely with its claim for monetary compensation. ... In view of the present weakness of PPI's case of knowledge and in view of the late stage at which the tracing claim has been put forward, I would not be prepared to grant an injunction restraining the Central Bank from making any use of the £8.9m fund. I would, however, be prepared, in principle, to grant relief on these lines. The Central Bank should be required, first, to earmark the £8.9m in a separate account and, second, should be restrained from dealing with the earmarked fund otherwise than in the normal course of business and unless and to the extent that there are no other funds in England available to be used. The Central Bank should be required to inform PPI's solicitors in advance of any use proposed to be made of the £8.9m and, at the same time, to give details of all foreign currency reserves for the time being held in this country." Lord Donaldson of Lymington MR said, at p786j to 787b: "Accordingly, in agreement with Scott LJ and for the fuller reasons which he has so clearly expressed, I would discharge the injunction in so far as it is based upon the Mareva jurisdiction. That does not dispose of the matter, because in this court it has been sought to maintain the injunction, albeit for a reduced amount, on the footing that it will be possible to trace £8.9m remaining in the hands of the Central Bank as being in equity the property of the plaintiffs. This is a wholly different basis for an injunction, namely an application under RSC Ord 29, r 2 for an order for the interim preservation of property which is the subject matter of the cause or matter. If at the trial the plaintiffs can make good their tracing claim, they will be in the position of secured creditors to the extent, but very probably only to the extent, that the £8.9m has not meanwhile been removed from the jurisdiction. In this context, unlike that of a Mareva injunction, American Cyanamid principles do apply. Applying those principles I agree with the order proposed by Scott LJ for the reasons which he has given." 18. In my judgment the inherent jurisdiction of the Royal Court to grant freezing orders in matrimonial proceedings is not same as the inherent jurisdiction recognised in commercial cases starting with *Mareva Compania Naviera SA v International Bulk Carriers SA*

[1975] 2 Lloyd's Rep 508. In any event, commercial cases are not the same as family cases, and I adopt the view of Anthony Lincoln J that they 'call for a different approach'. Principles derived from contract or tort cases cannot be applied automatically to matrimonial cases. In some respects it may be possible to look to cases involving freezing orders in contract or tort cases for analogies with similar orders in matrimonial cases. But the exercise must be carried out bearing in mind the different features of the different types of case. 19. One principle that obviously must be borne in mind in all cases is that the court will not make an injunctive order in any kind of proceedings merely on the basis that it will do no harm. It follows that there must be some threshold threat or risk of some dealing with, or loss of, the assets sought to be frozen. The Appellant submits that there must be risk of dissipation. He submits that 'the test is whether the refusal of a Mareva injunction would involve a real risk that judgment in favour of the Plaintiff would remain unsatisfied', citing

Ninemia Maritime Corporation -v- Treve Schiffahrtsgesellschaft GmbH (The Niedersachsen)

[1984] 1 All ER 398, 419h. The test is formulated in that way because the claim in that case was for damages for breach of contract. In such claims the fact that a judgment will be unsatisfied will not dissuade the court from entering

judgment.

But that test will not be applicable where the claim is for an order of a kind which the court will not make if to do so would be futile. For example, Courts will not grant injunctions which are incapable of being performed. So a judgment for injunctive relief is unlikely to 'remain unsatisfied'. Similarly, an order for the transfer or sale of property is unlikely to be made if, were it to be made, it would remain unsatisfied because the asset had been dissipated. 20. So where a claim involves not debt or damages for breach of contract, or damages in tort, but some proprietary remedy, the basis of the Court's jurisdiction is not the Mareva line of cases at all. It is the much more ancient jurisdiction to 'preserve...the subject matter of proceedings pending the determination of the issues involved', to use the words of Ormrod LJ in Roche . The risk in ancillary proceedings on a divorce is not just that the Court will make an order that will remain unsatisfied. It is also the risk that the Court will not be able to make the appropriate order at all, because an asset which the other spouse did control at the start of the proceedings has been dissipated or has passed out of his or her control. 21. In his written Contentions, Advocate Hoy does not identify the test in question. He points to the way the Royal Court considered the matter, to support his submission that the test was satisfied. This approach is understandable. The matrimonial cases do not include a statement of what the test is in principle. Rather they include examples of where the test was applied, from which it is possible to infer what the test was that was being applied. 22. In Roche Ormrod LJ applied the test in this way. He said: "This is clearly a case where no hardship will be caused whatever to the husband by restraining him from disposing of part of the sum of damages, when he recovers them, provided the proceedings for ancillary relief are dealt with quickly. This court will take steps to see that that is done. I can see no reason why the court should not make such an order and the more the husband protests and refuses to give any assurance that he intends to leave some of this money in liquid form, the more anxious the court is bound to be. One wonders why all this fuss is being made about such an order". 23. In Shipman Anthony Lincoln J said this at p253: "As in all such cases of injunctive process, the balance of convenience has to be considered ... To my mind the circumstances here call for the injunction to continue. If it were discharged, the husband could well change his intentions, however genuine and well-disposed to the wife his present state of mind may be. Both he and the assets are out of the jurisdiction. Left without a job, and with new responsibilities, he will be faced with a temptation to eat into the whole of the fund". 24. In T v T and Others

[1996] 2 FLR 357 Wilson J gave judgment refusing to discharge an order that Jersey trustees be joined as parties to a wife's claim to freeze the assets of her husband. In the course of that judgment he described earlier proceedings in which he had granted the freezing order

against the husband. He said at p359: "When she launched her proceedings for divorce, the wife obtained, first of all on an ex parte basis and then on an inter partes basis continued consensually for a short period of time, a Mareva injunction restraining the husband from disposing of his assets, including the assets of the trust. On 31 August 1995 the matter came before me for consideration as to whether the Mareva injunction should be further continued. By that time there had been an exchange of affidavits. In her affidavit which had launched the interlocutory proceedings, the wife had asserted in terms that the husband exercised effective control over the settlement. By the consensual continuation of the Mareva order dated 26 July 1995, the husband had been ordered to serve an affidavit of means by 21 August 1995. He did serve an affidavit of sorts dated 30 August 1995. That, as his counsel was to concede on the following day, could not properly be described as an affidavit of means. Although he mentioned the setting up of the trust as being for family purposes and as a tax planning device, he did not in terms deal with the allegation which the wife had made in her affidavit that this was a settlement over which he had effective control. Indeed, as appears from a letter which the wife's solicitors wrote to the husband's solicitors on 30 August 1995 and which was never the subject of a denial, there had been a telephone conversation on that date - 30 August 1995 - between the solicitors in which the husband's solicitor had specifically asserted that the husband in no way accepted that he had any control over the assets of the trust or the actions of the trustees. When, on the following day, the matter came before me, Miss Bradwell, then as now appearing for the husband, on instructions was unable to depart from the stance which her instructing solicitor had there adopted: in other words, there was not only no concession of effective control over this fortune, there was a denial. In those circumstances I continued the Mareva injunction which had been made; but more relevantly, I made the order joining the trustees as second respondents which it is now sought to have set aside. ... The application by the trustees to set aside that order is opposed by the wife; but it is also opposed by the husband through Miss Bradwell, who adopts many of the arguments advanced by Mr Pointer against the setting aside. She contends that it is highly desirable that the trustees should remain as parties to these proceedings; should, insofar as they can, be bound by the outcome of them; should be subject to discovery; and should be given the maximum encouragement to come in and give evidence before me. I will be hearing this claim for ancillary relief, as I have said, in March 1996; and prior to that time it would be premature for me to express a view as to the motivation of the husband for instructing Miss Bradwell to take that line. Only at the end of the hearing in March 1996 will I be able to form a view as to whether the husband's stance in the matter today is cosmetic, designed to create in my mind, even at this interlocutory stage, a distance between himself and the trustees which may bear no relation to reality but which, as the husband might think, might serve his interests well in March 1996. ... I have already decided - and I am not urged to review this aspect of my decision on 31 August 1995 - that this wife should have what I then described as 'copper-bottomed security' for her claims. When I survey the nature of the other assets of the husband which I froze, so largely tied up in Bermuda, and even when I add whatever

might be the value of the Cheshire house and whatever might be the value of the investments and loans to the three private companies, I am not satisfied that there is the copper-bottomed security to which, for her protection, I aspire. ..." 25. Since the jurisdiction here in question relates to the subject matter of these matrimonial proceedings, and it is not known what the ultimate determination of the rights of the parties will be, the parties in these proceedings stand on a much more equal footing than the parties to a claim for debt or damages for breach of contract, so far as interim relief is concerned. In a contract claim, where a freezing order is granted, it interferes with property of the defendant in which the claimant claims no rights. It is no concern of the claimant how the judgment he obtains is eventually satisfied, so long as it is satisfied. The Court will not readily interfere with undisputed property rights, unless the risk of dissipation is proportionate to such an invasive measure. In a matrimonial case the court is often preserving assets which, if the claim succeeds, will be awarded to the claimant. There is therefore much less concern at the possibility of a wrongful interference with the Defendant's property rights. The risk is symmetrical. If the order ought to be, but is not, made, it is the claimant's property rights that will have been interfered with. 26. It follows that in matrimonial cases the threshold test for the risk of dissipation or loss of the assets sought to be frozen can justifiably be lower than would be the case in the Mareva cases. 27. From the matrimonial cases cited above, it appears that in matrimonial cases the English courts have not yet gone so far as to assimilate the test to the Cyanamid principle which was applied, in the case of *Polly Peck*, to a proprietary claim for knowing receipt. The courts appear always to have found some risk that, unless the order was granted, the assets in question might not be preserved until the court had had an opportunity to determine what, if any, order to make in favour of the applicant spouse. It seems to me that in matrimonial cases it is better to avoid the expression balance of convenience and speak instead of the balance of justice - compare *Francome -v- Mirror Group*

- [1984] 1 WLR 892,898, per Sir John Donaldson MR. The plaintiff spouse must at least show a good arguable case to assets to be frozen, or to a sum or sums of money equivalent in value to the assets to be frozen (as may be appropriate). If that test is satisfied, then the Court may make the order if it appears that there is a risk which is real (and not fanciful) that the assets may not be preserved until the final determination of the rights of the parties. The order must be one that is just in all the circumstances. The order must not be disproportionate to the object to be achieved. In many cases there will be a limit specified - that is a value below which the assets must not be reduced by the defendant. There may be other conditions to be satisfied, depending on the circumstances of the case. Whether the Royal Court failed to consider adequately the risk of dissipation 28. The relevant passages of the judgment of the Royal Court are paras 34, 45-51, which read as follows: Para 34 It is inconceivable that Mrs. Matthews will not, in due course, have an award for financial provision. She occupies a large house with three minor children and is still maintained by Mr. Matthews on a voluntary basis. Para 45 The main source of Mr. Matthews' wealth lies within a Trust in which Mrs. Matthews has no stated interest.

Whether or not some order will be made whereby Mr. Matthews will be held to have had effective control over the trust funds as a Trustee and/or income beneficiary is not for us to say. Para 46 Mr. Robinson has argued that we should not reinstate the Order, in any event. He argues most firmly that there is no "solid evidence" of the risk of dissipation of assets by the Trustees (Mr. Coutanche and Mr. Matthews) to warrant the making of the injunction against them and secondly he says that this is not an appropriate case for granting Mareva relief over assets held in the name of third party Trustees. Para 47 The situation has changed. We now have a third affidavit of Mrs. Matthews sworn on 22 nd June (the day of the hearing) and delivered to us during the hearing. The delay is explained by the statement that Mr. Matthews' affidavit dated 8 th June 2001 was only received by Michael Voisin & Co. during the morning of 19 th June 2001. It runs to fourteen pages and 48 paragraphs. Para 48 In her most recent affidavit Mrs. Matthews says this:- "Ian Matthews explains in his Affidavit (at paragraph 12) that the marriage broke down when he "met someone in the United States". At the time, my former husband had gone to the United States in order to attend a health clinic, called the Pritikin clinic, in Miami, Florida. There were then no difficulties in our marriage. During that extended trip abroad, Ian Matthews formed a relationship, which he still maintains. I was concerned at the time that Ian Matthews was in a vulnerable position in virtue of attending a health farm) and the abruptness of his affair caused me to question his emotional well being. I was concerned that he had become vulnerable to unscrupulous avaricious feminine advances. To have an affair was, in my view, completely out of Ian Matthews' character. He remained in the United States for an extended period of time with the woman that he met and with her family. During this period, I was concerned about attempts to dissipate assets. I knew, of course, that my former husband's principal assets were contained within the Trust. Since the injunctions, Ian Matthews has informed me on a number of occasions that he would resist any claim I made on the former matrimonial home, Waverley Farm, and that he required substantial funds with which to buy a property in the United States in order to be with Elizabeth Lehr in great comfort. Indeed, he told me that he was considering selling the London flat, owned by the Trust, and had been looking at substantial private houses in the United States, accompanied by Conrad Coutanche. He told me that I and the children would have to live elsewhere. I am unsure about the pressures Elizabeth Lehr has been exerting on Ian Matthews to take assets to the United States. Since Ian Matthews started his affair with Elizabeth Lehr, he has returned to Jersey and in turn returned to the United States, with little or no notice". Para 49 On 8 th May 2001, when the abortive negotiations were in train for a form of undertaking, there had obviously been a discussion about the sale of a property in Commercial Street. Since then the two substantial properties in London have been sold and Mr. Matthews has applied for a "green card" from the United States Immigration Department. We view with some cynicism the rush to register Lord Matthews' will of realty and with some disquiet the way that the two Trustees dealt with the matter. We have not seen any trust minutes but they might have eased our disquiet considerably. Para 50 The consent requested by Advocate Robinson in regard to the sale of the London properties was dealt with timeously (within

three and a half hours) and we cannot see that the Trust has suffered. Its main intention is perhaps best explained in Lord Matthews' Letter of Wishes to his two Trustees. "The function of my Trust is to protect its capital for future generations and to protect my assets against certain unascertained liabilities of my heirs". Para 51 The injunctions will not, in our judgment, inconvenience the Trust. If there are any problems then the Trustees must return to Court. We are concerned to maintain the balance of convenience. 29. In the light of the test which I have held to be applicable to matrimonial cases, it is clear that no fault can be found with the approach of the Royal Court to this issue which would justify this Court interfering with the exercise of the discretion of the Royal Court. Whether the Royal Court failed to consider adequately the fact that the Trustees of the Lord Matthews Trust are obliged to protect the interests of the minor beneficiaries 30. The Royal Court noted at para 51 that the Trustees could return to the Court if they found themselves in difficulty on any particular matter. In para 31 the Royal Court noted that the Trustees had sought consent for the sale of two properties while the injunction was in force, and that permission had been given on behalf of the Plaintiff on the same day. Before us Advocate Robinson stressed the independence of Mr Coutanche, who is now the sole trustee. But the extent of any control that Mr Matthews has over the settlement is one of the issues in the ancillary proceedings. The Court cannot prejudge this. 31. The status of the Defendant is, of course, a relevant factor on an application for injunctive relief. But in order to reach the conclusion they did, the Royal Court did not need to conclude 'that Mr Coutanche would allow himself to be a party to any attempt to dissipate Trust Assets so as to render any matrimonial award in favour of Mrs Matthews nugatory'. I quote from the appellant's Contentions. I accept that it is proper to have regard to Mr Coutanche's position as a senior Jersey solicitor who is an officer of the court, and whose probity is not in question. But the fact that Mr Coutanche's duties are to protect the beneficiaries, who do not include Mrs Matthews, does not demonstrate any error on the part of the Royal Court. The Royal Court did have in mind the duties of the trustees. In para 43 of their judgment, they said: "Certainly Mr Matthews is the object of the Trustee's discretion and he and Mr Coutanche are the sole Trustees of a Trust which was set up basically for his and his children's benefit." I have already cited para 50 of the Royal Court's judgment which refers to this. And if the Royal Court is asked to vary this injunction the obligations of the trustee to the minor beneficiaries will be one of the factors that they will be bound to take into account. 32. I note the Appellant's submission that "the Trust has assets in excess of £23m. It is argued that dissipation of assets on a scale that would be detrimental to Mrs Matthews' matrimonial claims would mean that the Court considered that the Trustees, ... would wholly disregard the interests of the minor children of the marriage". But the submission is not well directed to the grounds of appeal. What the Second Defendants ask in their notice of appeal and what Advocate Robinson confirmed to us, is that the order should be set aside in its entirety. We are not asked to express a view as to whether the order may provide greater protection for Mrs Matthews than is just in the light of her claims to ancillary relief. We do not do so. New Evidence - the resignation of Mr Matthews as Trustee 33. Having regard to the circumstances of this case described above, and to the

matters which the Royal Court took into account in exercising their discretion, the resignation of Mr Mathews as trustee is not a material change of circumstance such as would justify this Court in interfering with the Order of the Royal Court.

Conclusion

34. For these reasons, I would dismiss this appeal. Post Script 35. I have referred above in paragraphs 1 and 3 to the form of the order of 28 June 2001. The following observations of Munby J in *Harris v Harris* unreported 27 April 2001 in the Family division in England are of importance in relation to the drafting of injunctions. It may be that the practice in Jersey ought to be reviewed, in so far as injunctions are drawn up, which refer to previous orders which have been discharged. Munby J said: 288 "It is an elementary principle of justice and fairness that no order will be enforced by committal unless it is expressed in clear, certain and unambiguous language. So far as this is possible, the person affected should know with complete precision what it is that he is required to do or to abstain from doing. The authorities setting out this sometimes overlooked principle are legion.... 289 A related principle is that an order should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation. ..." In *Rudkin-Jones -v- Trustee of the Property of the Bankrupt*
- (1965) 109 Sol Jo 334 the order as drawn read "It is ordered that an injunction be granted in the terms of Notice of Motion for Injunction", Lord Upjohn said: "I do want to protest as strongly as I can at the granting of injunctions in that form. It means then that the person against whom the injunction is granted ... has to look at another document in order to see what it is that he is enjoined from doing ... It cannot be too clearly understood ... that a person is entitled to look and look only at the order to see what it is that he is enjoined from doing. He looks at that order and finds out from the four walls of it and from no other document exactly what it is that he must not do." Authorities *Miler-v-Milner Laboratories*
- (2000) JLR 266 . *Khreino -v- Kreinho* [2000] 1 FCR 80: 184-189. *Shipman -v- Shipman* (1991) 1 FLR 250. *White -v- White* [2000] 1 All ER 1: 190-208. *Re First Express Ltd* [1991] TLR 439. *Trustee Co Ltd -v- Nurnberg Co Ltd* [1998] JLR N-13. *Ninemia Maritime Corporation -v- Trave Schiffahrtsgesellschaft m.b. H. und Co. K. G (The Niedersachsen)* [1984] 1 All ER 398. *B -v- B* (1982)3 FLR 298 CA. *Thomas -v- Thomas* [1995] 2 FLR 688. *T -v- T and Others (Joinder of Third Parties)*
- [1996] 2 FLR 357: 160-170. *Francome -v- Mirror Group* [1984] 1 WLR 892. *Abdel Rahman -v- Chase Bank (C. I.) Trust Company* (1984) JJ 127. *A. E. Smith and Sons Limited -v- L'Eau des Isles (Jersey) Limited*

- (1999) JLR 319 . Mareva Compania Naviera SA -v- International Bulk Carriers SA [1975] 2 Ll. R. 508 ; [1980] 1 All ER 213n. Harris -v- Harris (27th April 2001) Unreported Judgments of the High Court of England. Rudkin-Jones -v- Trustee of the Property of the Bankrupt (1965) 109 Sol Jo. 334. Le Gros "Droit Coutumier de Jersey" ; "De l'Opposition à la Passation d'un Contrat Héréditaire" : 20-22. Matrimonial Causes (Jersey) Law 1949: 23-31. American Cyanamid Co -v- Ethicon Ltd
- [1975] 1 All ER 504 : 37-45. Roche -v- Roche (1981) 11 FAM Law 243: 46-47. Polly Peck International Plc -v- Nadir and Others
- [1992] 4 All ER 769 : 129-147. Matrimonial Causes Act 1973: 209-218. Bank Mellat -v- Kazmi and Ors [1989] 1 All ER 925. Gee: Marevan Injunctions and Anton Pillar Relief (4 th Ed'n): Chapter 14. Archbold (2001 Ed'n): paras 28-30 to 28-59. Page Last Updated: 02 Nov 2015
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