Neutral Citation No. [2009] IEHC 566

THE HIGH COURT

2008 10707 P

LOUIS DOWLEY AND ROBERT DOWLEY

PLAINTIFFS

AND
BREIFNE O'BRIEN

DEFENDANT

IN THE MATTER OF AN APPLICATION BY ANGLO

IRISH BANK PLC

Judgment of Mr. Justice Clarke delivered on the 21st of December, 2009

1. Introduction

1.1 The application to which this judgment relates arose from a number of injunctions granted on 15th December 2008 in the above action and in four related actions, being Daniel Maher v Breifne O'Brien, record number 2008 /10798P, David Bell and Paul Bell v Breifne O'Brien, record number 2008 / 10709 P, David O'Reilly v Breifne O'Brien , record number 2008/10710P and Evan Newell v Breifne O'Brien, record number 2008/ 10711P). In short, this court granted mareva type injunctions restraining the defendant, ("Mr O'Brien"), or his agents, from reducing his assets under the level of €20 million.

1.2 On 9th January, 2009, this court, (Kelly J), granted judgment in favour of the plaintiffs ("the Dowleys") in this case in the sum of €3,065,350 and granted further effect to the mareva injunction given on 15th December, 2008.

1.3 Anglo Irish Bank Plc ("Anglo"), who provided Mr. O'Brien with various loan facilities, sought to vary the terms of the injunctions previously granted in this action. Anglo wished to exercise various rights over assets of Mr O'Brien available to it in one way or another and to have such assets realised or otherwise applied in reduction of Mr. O'Brien's indebtedness to Anglo.

1.4 Having considered the matter it seemed to me that it was unnecessary to vary the terms of the injunctions previously granted in order that Anglo be entitled, in relation to Mr O'Brien, to exercise any rights which they might have and bona fide wish to exercise. I, therefore, gave a brief ruling in which I outlined that finding but further indicated that I would later give a judgment setting out my reasons for having come to that view. This judgment is directed towards setting out those reasons. In addition, as counsel for the Dowley's questioned the standing of Anglo to make this application, I also deal with that question at para. 5.19 below. It is necessary to turn, first, to the factual background.

2 Factual Background

2.1 From time to time since 1992, Mr. O'Brien was provided with a number of loan facilities by Anglo's Dublin and London offices in connection with various business activities and investments. Anglo now asserts that Mr. O'Brien has defaulted in repayment of all of his loans from Anglo which are now, it is said, repayable in full. The total indebtedness, under this heading, of Mr. O'Brien to Anglo, as of 9th February, 2009, was stated by Anglo as being €2,222,047.26 together with further interest on principal sums of €5,547.21. By letters of 6th February, 2009, Anglo called upon Mr. O'Brien to discharge the balances on the account in the outstanding sum but he has, it would seem, failed to do so.

2.2 Mr. O'Brien was also advanced £1,936,000 in order to buy property in Reading, London by Anglo's London branch in 2006. Mr. O'Brien has defaulted in the repayment of this loan which has been called in and the current balance outstanding on the account is said to be £1,935,781.88.

2.3 Various other loans, including renewals of existing facilities, were made by Anglo to Mr. O'Brien over the years under the terms of written facility letters accepted by Mr. O'Brien. Loans were made on the basis of Anglo's General Conditions for personal Loans. Paragraph 13 of the General Conditions deals with set-off and provides as follows:-

> *"Subject to Section 40 of the Consumer Credit, 1995, the borrower hereby agrees that the Bank may at any time notwithstanding any settlement of account or other matter whatsoever, combine or consolidate with any of the Borrower's then existing accounts in whatever currency such accounts may be denominated and whatsoever their nature whether subject to notice or not wheresoever situate and may set-off or transfer any sum standing to the credit of any one or more of such accounts in to towards satisfaction of any obligations or liabilities of the Borrower to the Bank whether such liabilities be present, future , actual , contingent, primary, collateral, several or joint. For this purpose the Borrower hereby irrevocably authorises the Bank to purchaser with the monies standing to the credit of such accounts such other currencies as may be necessary to effect such set-off or transfer at the prevailing spot rate exchange of the Bank as conclusively determined by the Bank."*

Anglo wish to rely on this provision in order to facilitate set-off of the amounts due and owing.

Assets held by Anglo

2.4 Anglo holds security over various assets of Mr. O'Brien. The first asset is the current balance in an Anglo deposit account which, as of 22nd July, 2009, was in the amount of €545,683.14 (the "deposit account"). The credit balance in the account is the residual element of "block funds" held "back to back" with various loans advanced to Mr. O'Brien by Anglo. Mr. O'Brien was precluded from accessing the deposit account without the consent of Anglo. From time to time various accounts were substituted for, replaced or superseded the initial deposit account. Provisions for set-off were agreed in the following clause of a deposit agreement entered into between Anglo and Mr. O'Brien on 26th June, 2002:

> *"4. Set-off*
>
> *In addition to any right of set-off or any similar right to which the Bank may be entitled at law, in equity or otherwise howsoever arising, the Depositor hereby authorises the Bank to (but without obligation on the part of the Bank) and agrees that the Bank may at any time and from time to time and without the necessity to provide*

notice to the Depositor-

> (a) combine and consolidate all or any accounts of the Depositor with the Bank in any jurisdiction including, without limitation, the Depositor Account;
>
> (b) set-off and apply any credit balance in any currency standing upon any account of the Depositor with any branch of the Bank including without limitation, the Deposit Account (and whether such account is current or deposit or otherwise and whether or not any period of any such deposit , or by reference to which interest thereon is calculated, had elapsed) in or towards satisfaction of the Indebtedness or any part thereof (whether or not such Indebtedness or any part thereof is at such time, actual or contingent);
>
> (c) in the name of the Depositor the Bank to do all such acts and execute all such documents as may be required to effect such application."

2.5 The next item held by Anglo as security for Mr. O'Brien's liabilities is an investment property acquired by Mr. O'Brien in Monkstown Grove, Monkstown, Co Dublin with facilities provide by Anglo (the "Monkstown Property"). Anglo's security over this property is a Deed of Mortgage dated 24th March, 2006 between Mr. O'Brien and Anglo. The Monkstown Property was purchased by Mr. O'Brien with the assistance of a loan facility of €385,000 first advanced by Anglo under the terms of a facility letter dated 9th December, 2004. Anglo suggests that the current approximate value of the Monkstown Property is €400,000.

2.6 The next item which Anglo holds as security is a charge over 4066 shares in the issued share capital of Bank of Ireland and 440 shares in the issued share capital of AIB plc (together the "Bank Shares"). Anglo suggests that the value of the relevant shares is in the order of €6,299.60. The charge over these shares is dated 27th November, 2006.

2.7 Anglo further holds security over a share portfolio managed by a separate department in Anglo, Anglo Irish Private Banking, on behalf of Mr. O'Brien (the "Share Portfolio"). This portfolio consists of Mr. O'Brien's interests in a fund called Newbury Street Property Geared Fund, which was established by Anglo to allow for investment in mixed use properties in the Newbury Street area of Boston. Anglo holds security over this Share Portfolio by virtue of a charge instrument dated 27th November, 2006. The portfolio is currently valued at €1,468,862. As appears from the charge instrument, Mr. O'Brien has charged the Share Portfolio as security for the repayment of his liabilities and Anglo is given, in the event of delay of payment on demand, powers of sale and realisation of the Share Portfolio to apply the proceeds of disposal towards discharge of the relevant liabilities. In addition Anglo has a pledge and security agreement dated 27th August, 2007 over the assets held by a nominee consisting of the investment in the Newbury Street Geared Property Fund.

2.8 As set out in a facility letter of 20th April, 2006, Anglo also holds a charge over a property purchased by Mr. O'Brien at Broad Street, Reading, England with an approximate value of £1,275,000, (the "Reading Property") together with a charge over a deposit account with a minimum balance of £200,000.

2.9 Anglo further advanced loans, through its subsidiary, Anglo Irish Assert Finance plc, to Mr. O'Brien and Zollinger Investment Limited, a Jersey company linked to Mr. O'Brien, to acquire property on Rue de l'Université, Paris and the ASL Car Showroom, Munich, Germany (respectively the "Paris Property and the "Munich Property"). The facility letters relating to these loans date from 20th December, 2008 for the Paris Property, and 21st December, 2007 for the Munich Property. As security for these loans, Anglo was granted mortgages over these properties. The estimated value of the properties as of 13th July, 2008 was said to be €875,000 for the Paris Property and €8,000,000 for the Munich Property. The loans are, it is said, in default and the amounts currently outstanding are €875,000 and €7,857,863.59.

2.10 It is next necessary to turn to the relevant procedural history.

3 Procedural history

3.1 A notice of motion was filed on 23rd September, 2009 by Anglo. The notice of motion sought variation of the terms of the injunctions granted on 15th December, 2008 in order to permit the reduction of loan liabilities owed to Anglo by Mr O'Brien by the following operations:-

> a) Set-off of the Deposit Account;
>
> b) Realisation of the Bank Shares;
>
> c) Realisation of the Share Portfolio held by Anglo;
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> d) Exercise of rights of mortgagee to sell the Monkstown Property;
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> e) Exercise of power of sale of the Reading Property ; and
>
> f) Realisation of security held by Anglo Irish Asset Finance plc over the Paris Property and the Munich Property.

3.2 Notice of the injunctions, given on 15th December, was served on Anglo by the solicitors for the Dowleys by letter of 17th December, 2008. By letter of 13th November, 2009, the solicitors for the Dowleys notified the solicitors for Anglo of their intention to object to the application to vary the terms of the injunctions. The letter set out that, in particular, the plaintiffs questioned the level of rents being received on the Paris and Munich Proprieties. The Dowleys' solicitors also sought an updated valuation of the Share Portfolio.

3.3 A letter from Mr O'Brien to Anglo's solicitors, dated 13th November, 2009, was included in the papers handed into court by Anglo. In this letter, Mr. O'Brien, who at the present time has no legal representation, requested that the Court's attention be drawn to his assertion of the following, viz that:-

> a. The Reading Property, the Paris Property and the Munich Property were each producing an income in excess of their servicing costs with this rental going directly to Anglo,

b. The Monkstown Property is also the subject of a lease with the rent currently going to an account in National Irish Bank,

c. Mr. O'Brien disputes the values placed on the Reading Property and the Monkstown Property by Anglo. Mr O'Brien claims that Anglo undervalued the capital values of these properties by at least €4.78 million;

d. Mr O'Brien met with certain creditors in January 2009 and handed over his financial statements to an accountant.

e. Mr. O'Brien further set out that his creditors would be best satisfied if his entire asset portfolio held at Anglo was disposed of in an orderly fashion without the sale being the subject of a court order.

Mr. O'Brien did not appear in person during the heading of this motion.

4. Submissions of Anglo and the Dowleys

4.1 Anglo submitted that by virtue of the provisions of paragraph 13 in their General Conditions of loan and clause 4(b) of the deposit agreement, they have a contractual right to apply the credit balance in the deposit account in reduction of Mr. O'Brien's various liabilities.

4.2 Anglo submitted that circumstances have arisen entitling them to liquidate the securities charged by the various charge instruments granting security over the various assets of Mr. O'Brien, as listed above, and to apply the proceeds in reduction of Mr. O'Brien's liabilities to Anglo. Anglo further claims that it is entitled to a banker's lien over securities which are held by it for Mr. O'Brien and that Anglo is then entitled to realise those securities and apply them in reduction of the liabilities owed to it by Mr. O'Brien.

4.3 Anglo submitted that, while it may be entitled to act to enforce its securities without any variation in the relevant injunctions, it had brought this application in case a variation was necessary.

4.4 The Dowleys argued that a variation in the injunction already in place was neither necessary nor appropriate. Attention was drawn to the fact that in a previous application brought by a separate financial institution this Court (Kelly J.) had declined to make the variation sought. Against that background it was necessary to consider the position of third parties in respect of mareva injunctions. I now turn to that question.

5. Third Parties and Mareva Injunctions

5.1 In general terms, a mareva injunction, such as has been granted in these proceedings, affects the assets of the party against whom it is granted, so as to prevent that party from placing such assets (save for assets in excess of any value threshold specified in the relevant order) beyond the reach of the court in the event of a successful action. In O'Mahony v Horgan [1995] 2 IR 411, the Supreme Court, per Hamilton CJ, held that a mareva injunction will be granted only if the plaintiff establishes that, (a) he has an arguable case that he will succeed in the action, and (b) the anticipated disposal of the defendant's assets is for the purpose of preventing a plaintiff from recovering damages and not merely for the purpose of carrying on a business or discharging lawful debts. As such, a mareva injunction will not ordinarily prevent the defendant concerned from continuing his lawful business and a defendant is usually allowed to apply his assets to pay his ordinary business debts in the same way as he would if not restrained by injunction.

5.2 A third party who, knowing of the terms of a mareva injunction, willfully assists in the breach of that injunction, or in its frustration, is liable for contempt of court. However a third party, such as a bank, may have a legitimate right to deal with an asset covered by a mareva injunction and such rights have been the subject of some debate. In Z Ltd v A –Z and AA-LL [1982] QB 588, Lord Denning M.R. suggested that, whenever an asset was subject to a mareva injunction, a third party who held the asset ought not to dispose of it at all. This view was subsequently rejected by the Court of Appeal in The Law Society v Shanks [1988] 1 FLR 504, where Sir John Donaldson M.R. found that handing to a defendant an asset that belonged to him did not amount to assisting in dissipation or disposal unless it was known that the purpose of the handing over of the relevant asset was to facilitate a dissipation of that asset. In relation to the relevant paragraph in Z. Ltd, Sir John Donaldson M.R. stated:-

> *"I know of no authority other than this particular passage for the proposition that it prevents anybody handing the asset over to the owner of the asset, in this case the defendant. That does not of itself amount to dissipation or a disposal of any kind whatsoever. In special circumstances, where it is known that the sole purpose of requiring the asset to be handed over to the defendant is to facilitate a dissipation of that asset, different considerations may arise, but that is not suggested in this case. That would be a very peculiar case indeed.*
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> *So, while I quite understand the attitude of the Ministry based on these two passages, and whilst they are entitled to the greatest possible respect as coming from Lord Denning, they do not, in my judgment, represent a general statement of the law which is applicable in any ordinary case."*

5.3 In Bank Mellat v Kazmi [1989] Q.B. 541, Nourse L.J. accepted that Sir John Donaldson's view represented the correct approach, stating at page 547 of his judgment that:-

> *"I respectfully agree that mere notice of the existence of a Mareva injunction cannot render it a contempt of court for a third party to make over an asset to the defendant direct. Otherwise it might be impossible, for example, for a debtor with notice to pay over to the defendant even the most trivial sum without seeking the directions of the court. A distinction must be drawn between notice of the injunction on the one hand and notice of a probability that the asset will be disposed of or dealt with in breach of it on the other. It is only in the latter case that the third party can be guilty of a contempt of court."*
>
> *It would appear that no general test has been formulated for determining what constitutes 'notice of a probability that the asset will be disposed of or dealt with in beach of the order'. Each case will, therefore, turn on its own facts.*

5.4 In Oceanica Castelana Armadora SA v Mineralimportexport [1983] 1 W.L.R. 1294, it was held that the function of a mareva injunction was not to interfere with the exercise of non-party banks to their own right of set-off in respect of any facility which it had given to the party against whom the injunction has been granted. Referring to the ordinary business proviso, Lloyd J. stated at page 1300:

> *"It is now firmly established that a defendant who is subject to a Mareva injunction can apply to the court to vary the injunction, so as to enable him to pay his ordinary debts as they fall due. If the defendant can thus, in a suitable case, draw on his bank account to pay his ordinary creditors, notwithstanding a Mareva injunction, why should he not be free to pay his bank? Why should the bank be in a worse position than other ordinary creditors, just because it is the bank which holds the funds in question?"*

5.5 Since Oceanica Castelana Armadora SA, it is no longer necessary in the United Kingdom for a bank to apply to court to confirm a right of set-off of loans made by the bank concerned to a defendant against the sums affected by a mareva injunction, as the standard form mareva injunction in the United Kingdom now specifically exempts set-off by banks from the effect of the injunction. There is no such standard form in operation in this jurisdiction.

5.6 In Gangway Ltd v Caledonian Park Investment (Jersey) Ltd and Anor [2001] 2 Lloyds Rep 715, the court held that a bank has a right of set-off against a credit balance in an account covered by a mareva injunction where that right was granted to the bank concerned before the bank was notified of the injunction, and as set out in the guidelines to the standard form for mareva injunctions in the Civil Procedure Rules, it could exercise that right without the need to apply to the court for variation of the injunction. However, the court held that there was no similar right to realise tangible assets over which the bank had a charge granted before the notification of the injunction and, therefore, the bank must apply to the court as an intervener to obtain an order varying the injunction to permit disposal, as there was no provision in the relevant guidelines covering the realization of tangible securities. As a non-party to the injunction, a bank had, therefore, to apply to court for a variation of the injunction to enable it to exercise such rights. In reaching this decision, the court relied on the analysis of mareva injunctions in Z Ltd. As mentioned at paragraph 5.2, this analysis was subsequently disapproved in The Law Society v Shanks [1988] 1 FLR 504. It has been suggested that, because Shanks was not cited in Gangway, the view expressed to the effect that the bank, as a non-party, had to apply for a variation to enable it to exercise its own rights of security was incorrect.

5.7 The court in Gangway further held that the duty of a bank in relation to a disposal was no higher than to act in good faith in the ordinary course of business. It was said that a bank should not have to justify its commercial judgment to the court in the absence of evidence that the disposal was collusive or was aimed at circumventing the injunction in the interests of the defendant. The court held that to impose any more stringent fetter on the right of a bank to realise security would represent an unwarrantable interference in the management of the bank's security interest and would elevate the claimant's interest in property covered by such an injunction to one almost analogous to that of a chargee. It has been emphasised that a mareva injunction is not intended to give security to a plaintiff in advance of judgment, Polly Peck International plc v Nadir [1992] 4 All E.R. 769, cited with approval in O'Mahony v Horgan.

5.8 In summary, United Kingdom case law, which has not as yet been followed in this jurisdiction, sets out that a third party need not apply to court to have an order varied so as to exercise rights to set off, as it is provided for in the standard form mareva injunction. There is a debate as to the extent to which a bank may have a right extending to the realization of a tangible asset potentially covered by a mareva injunction. Finally, the duty of a third party realizing assets is not higher than one of acting in good faith in the ordinary course of business.

5.9 In identifying the position of a third party in this jurisdiction in relation to a mareva injunction it seems to me that it is important to note that, unlike in the United Kingdom, no guidelines are typically attached to a mareva type injunction. Any distinction which, at least on one view, may exist or may have existed in the United Kingdom between, on the one hand, a bank exercising a right of set-off and, on the other hand, a bank enforcing a security, which derives from the relevant United Kingdom guidelines, could, in those circumstances, have no application in this jurisdiction.

5.10 The starting point for any consideration has to be the fact that a mareva type injunction, in the standard form, simply does what the order says. It restrains the defendant from removing his assets from the jurisdiction, at least to the extent that assets remaining in the jurisdiction cannot thereby be reduced below a threshold normally estimated by reference to the claim in respect of which the plaintiff has established a prima facie case, together with costs. Strictly speaking, the injunction does no more than that. While such injunctions are frequently referred to as freezing injunctions, a typical mareva injunction does not, in fact, freeze the assets of the defendant concerned. Rather, it, as the terms of the order states, prevents the removal of assets from the jurisdiction such as to leave an insufficient sum of assets within the jurisdiction to meet the possible claim. As was made clear by the Supreme Court in O'Mahony v. Horga, a mareva injunction does not prevent a party using its assets in the ordinary course of business or paying its lawful debts provided that payments made are bona fide for the purposes of that ordinary business or the payment of those ordinary debts and are not a device for removing relevant assets from the jurisdiction of the Court.

5.11 In addition, it is clear that, strictly speaking, the only party bound, directly, by a mareva type injunction is the defendant or defendants named in the proceedings. A third party (such as a bank) is not directly the subject of the mareva injunction. In principle, therefore, any third party (including a bank) can only be affected by a mareva injunction if it could be said that an action taken by that party amounted to either aiding and abetting a breach of the order (of which the bank had notice) or frustrating the effect of such an order (again where the bank had notice). In passing it should be noted that, in cases where the relevant plaintiff claims an interest directly in funds standing to the credit of a defendant in a bank, different considerations apply. In those circumstances the plaintiff, if correct, owns the funds. It follows that it would be open to the plaintiff concerned to obtain a true freezing order in respect of the relevant funds for, if that plaintiff be correct, the actual funds standing to the credit of the defendant in a bank are properly the funds of the plaintiff. If the plaintiff is correct, then the bank concerned could not have any interest in the relevant funds for they are not the defendant's funds (who was the bank's customer) but rather the plaintiff's funds. However, the form of injunction which would ordinarily be granted in such a case would be entirely different from the form of injunction granted in a mareva type case and it is likely that the bank itself would be made a direct notice party as the bank would hold the funds which the plaintiff asserts to be its own.

5.12 However, it is clear that the obtaining of a mareva type injunction does not give the plaintiff in the relevant proceedings any particular interest in or charge over specific property of the defendant concerned. The purpose of the

mareva injunction is not to give security to the plaintiff. Rather it is to prevent the defendant from acting improperly so as to place his funds outside the control or jurisdiction of the court so as to frustrate execution of any judgment which might ultimately be obtained. However, a plaintiff who successfully obtains a mareva injunction and ultimately goes on to secure a judgment has no greater entitlement than any other party to assets which may, in substance, have been affected by the mareva order. The successful plaintiff who obtains a mareva injunction does not, by obtaining that injunction, move any further up the queue for payment. Such a plaintiff simply improves the chances of there being funds available, in the ordinary way, to meet any judgment which might ultimately be obtained. A plaintiff who obtains a mareva injunction does not, therefore, obtain any additional interest in any particular asset of the defendant.

5.13 It should also be noted that financial institutions have, over recent years, become understandably conservative about the way in which they are prepared to deal with accounts of persons in respect of whom mareva type injunctions have been granted and where the bank concerned has notice of the making of the relevant injunction. In such circumstances it has been the experience of the court that banks frequently are unwilling to release any funds held in accounts in the name of the defendant concerned without some form of court order. For example, addenda are frequently made to mareva injunctions specifically permitting a particular periodic sum to be paid for living expenses or for legitimate business purposes. The position of banks in such circumstances is understandable. The whole reason why a plaintiff, who successfully obtains a mareva injunction, may seek to give the defendant's bank notice of the making of that injunction is to put the bank on notice of the fact that the defendant concerned is constrained in the manner in which he can deal with his assets and also to preclude the bank (by reason of notice) from acting in any way that might be said to aid or abet a breach of the order or to frustrate its operation. In such circumstances it is understandable that banks will take a conservative approach. Where a defendant is (say) constrained by order from removing assets so as to bring their assets within the jurisdiction below €1m, a bank which has €500,000 in an account in the name of the defendant concerned would be understandably reluctant to allow that defendant, after notice of the order, to withdraw €250,000 because the bank might feel that it might be open to a suggestion that it had, thereby, knowingly facilitated a breach of the order if it should transpire that the assets were then moved outside the jurisdiction or otherwise placed outside the reach of the court.

5.14 The fact that a defendant can, undoubtedly, carry on its business in the ordinary way provided it does so bona fide and pay its lawful debts provided it does so bona fide, notwithstanding the existence of a mareva injunction, might provide some comfort to the bank concerned but only if the bank could be absolutely sure that no suggestion might be made that it had, by permitting a payment or withdrawal, have facilitated a breach of the court order rather than facilitated the carrying on of bona fide business or the payment of bona fide debts. Given that the bank may not have complete information about its customers' affairs, it is understandable that a bank may choose to err on the side of caution in such circumstances.

5.15 However, that analysis does not take away from the fact that it is not a breach of a typical mareva type injunction for a party to pay its debts or to make payments bona fide required for the ordinary carrying on of its business. The fact that there may be practical difficulties which may cause concern to third party financial institutions in having sufficient comfort that any relevant transaction is truly bona fide does not take away from the undoubted limits of the mareva injunction. In addition, it should be noted that a bank obtaining additional security or an additional contractual entitlement to set-off after it had notice of the making of a mareva type injunction would run the risk that any such transaction might itself be in breach of the mareva injunction such that it would be invalid and render reliance by the bank on the security or set-off concerned equally invalid. Where, however, a bank has already in place a right of set-off or security in advance of the notification of the existence of a mareva injunction against the bank's customer, then the mareva injunction concerned could have no effect on the validity of the right to set-off or security concerned.

5.16 In what way, then, could the exercise by the bank concerned of its right to set-off or enforcement of its security be regarded as being impaired by a mareva injunction in typical form? The defendant concerned could not be said to be dissipating his assets in any way precluded by the order. The defendant is, in fact, taking no action at all, in that the bank is imposing on the defendant concerned a set-off or realization of security, because of the defendant's default. It seems to me to follow that a typical mareva injunction places no barrier in the way of a financial institution in making a bona fide exercise of any power of set-off or security realization which it may have had in place prior to it being notified of the existence of a mareva injunction. In order for the bank to exercise any such rights it is clear that same needs to be bona fide exercised. However, provided that such rights are bona fide exercised it does not seem to me that any mareva injunction places a barrier in the way of the bank concerned.

5.17 It was for those reasons that I indicated to the parties that it did not seem to me that it was necessary for this court to vary the mareva injunction in place in these proceedings so as to enable Anglo to exercise any bona fide entitlement which it may have to set-off or the realization of any security which it might hold in respect of Mr. O'Brien.

5.18 Before concluding this judgment however two further points need to be mentioned.

5.19 First there is the question of the jurisdiction of the court to entertain an application on the part of a financial institution, such as Anglo, who feels that it may be affected by a mareva injunction. It seems to me that, at the level of principle, the court has such a jurisdiction. The whole point of notifying financial institutions of the existence of mareva injunctions (which is a process almost always engaged in by plaintiffs who secure such injunctions), is that the bank concerned may be affected by the relevant order and may, therefore, feel constrained as to the manner in which it may deal with the relevant defendant's accounts. Where an injunction of any sort operates purely as between plaintiff and defendant, then it is difficult to see how the court would have a legitimate jurisdiction to entertain an application by any third party in respect of the injunction concerned. Where, however, it is asserted by a third party that it's legitimate interests are affected by an injunction granted in proceedings to which it was not a party, then it seems to me that basic rules of procedural fairness require that a party who claims to be so affected has the entitlement to invite the court to revisit the question of the terms of the relevant injunction. It seems to me, therefore, that any party who feels that it may be adversely affected as to its own interests by the existence of a mareva injunction has, prima facie, an entitlement to invite the court to vary the injunction concerned. It seems to me that plaintiffs who seek mareva injunctions cannot have it both ways. They cannot want to notify wide and far the existence of the mareva injunction so as to protect their interests by preventing third parties from dealing with the assets of the defendant concerned, while at the same time resisting the entitlements of those third parties to invoke the jurisdiction of the court to vary, in an appropriate case, the injunction concerned. I was, therefore, satisfied that, at the level of principle, Anglo was entitled to seek a variation of the mareva injunction. My reason for not varying the injunction was not, therefore, because Anglo was not entitled to seek to have it varied but rather because I was satisfied that Anglo was not affected by the mareva

injunction in the bona fide exercise of any legal entitlements which it might otherwise have.

5.20 The other matter on which I should comment stems from the fact that Anglo has put before the court very considerable detail as to the form of set-off or security realization which it would wish to enforce. It does not seem to me that it is any part of the function of the court to give a form of "pre-clearance" to the actions of financial institutions in the position of Anglo. If Anglo have a legally enforceable entitlement to do the things which they wish to do (which derives from the legal relationship between Anglo and Mr. O'Brien), if that entitlement pre-dates Anglo having any notice of the existence of the mareva injunction in these proceedings and if the purpose of Anglo in enforcing any entitlements which it might have is bona fide for its own interests and not in any way connected with facilitating Mr. O'Brien in acting in breach of, or frustrating the operation of, the mareva injunction, then it is clear that Anglo is, as a matter of law, entitled to exercise any such right of set-off or security realization. It is not for this court, on this occasion, however, to assess the bona fides of Anglo or its legal entitlements under any of the asserted headings. Anglo is in no different position to any other party wishing to enforce security in that regard. Provided Anglo does so bona fide (and only it can know its bona fides) and provided that it is legally entitled to do so (and any other party seeking to enforce security or set-off is subject to the same limitation), then it is free to do so unaffected by the mareva injunction in this case. I do not, therefore, make any comment on the precise entitlements which Anglo has asserted.

6. Conclusions

6.1 It was for those reasons that I indicated to the parties that it did not seem to me to be appropriate to vary the injunctions in place in this case. Provided that it act bone fide and have the legal entitlements which it asserted, Anglo is entitled to carry out those transactions and would not thereby be in breach of the injunction already in place.