

# *‘Equity does not act in vain’: An analysis of futility arguments in claims for injunctions\**

Normann Witzleb\*

---

## *Abstract*

A court exercising equitable jurisdiction can deny specific relief if the order is likely to lack practical effect. This article examines the application of the doctrine of futility to injunctive relief. It will first consider the validity of futility arguments in Australian and UK domestic litigation and then analyse international litigation, where futility is often coupled with jurisdictional questions. The article will argue that the success of futility arguments depends on the likelihood that the order will lack practical utility for the plaintiff as well as the strength of other discretionary considerations. In international litigation, concerns about comity can combine with futility to make it appropriate to deny the exercise of the court’s jurisdiction. The recent *Japanese Whaling Case* demonstrates that futility concerns are also relevant in the case of statutory injunctions. In that context, the question of futility is linked intimately with the objects of the statute in question. A court should not refuse to exercise its jurisdiction on the basis of alleged futility where the mere granting of an injunction promotes the objects of the statute even if the likelihood of enforcement is small.

## **I Introduction**

In a number of recent decisions, courts have confronted the argument that an injunction should not be made because it would be futile. In *Mosley v News Group Newspapers Ltd*,<sup>1</sup> the tabloid *News of the World* published on its website a surreptitiously filmed video clip showing the plaintiff engaging in sexual activities. In just 2 days, the clip was accessed over 1.4 million times and copied onto numerous other websites. Eady J rejected an application to order the defendant no longer to publish the footage on its website. His Lordship considered that the footage had ‘entered the public domain to the extent that there is, in practical terms, no longer anything which the law can protect’ and that the ‘granting of an order ...

---

\* Senior Lecturer, Monash University School of Law. An earlier version of the article was presented at the Sixth International Remedies Discussion Forum, Université Paul Cezanne Aix-Marseille III, Aix-en-Provence (France), 5–6 June 2009. I would like to thank the participants of the Forum (in particular Professor Robyn Carroll), Mr Andrew Levy, Ms Vicki Vann and two anonymous referees for their feedback and constructive comments.

<sup>1</sup> [2008] All ER (D) 322; [2008] EWHC 687 (QB).

at the present juncture would merely be a futile gesture'.<sup>2</sup> The decision in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*<sup>3</sup> (the *Japanese Whaling Case*) contains the most authoritative discussion of futility in Australian law. In that case, an environmental organisation used the legal mechanisms of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') to promote its anti-whaling campaign. It sought an injunction and a declaration against a Japanese whaling company, which breached the EPBC Act by engaging in so-called 'scientific whaling' in the Australian Whale Sanctuary ('AWS'). At first instance, the action was regarded as futile because of 'the difficulty, if not impossibility, of enforcement of any court order' in the AWS, where Australia's sovereignty is internationally contested.<sup>4</sup> On appeal, a majority of the Full Court of the Federal Court regarded the potential difficulties of enforcement as insufficient reason to assume futility.<sup>5</sup> Black CJ and Finkelstein J also referred to the fact that an injunction, even if unenforceable, may advance the regulatory objects of the EPBC Act, for example, by having an educative effect.<sup>6</sup>

This article will examine these and other cases in which futility has been argued, with a view to developing a framework for assessing the validity of such claims. In its first part, the article will analyse the concept of futility and the reasons for which 'equity does not act in vain'. It will be submitted that courts are loath to be seen to make an order that has no real consequences or that cannot be enforced. The reason for this reluctance is a concern that doing so may undermine respect for the legal system and the administration of justice. If an injunction evidently has no practical utility for the plaintiff, the court will exercise its discretion to deny such an order. The second part of the article will focus on the practical relevance of futility arguments in Australian and UK domestic litigation. The relevant cases can be categorised into decisions where the subject matter of the claim can no longer sensibly be protected, where the defendant is unable to comply with the relief applied for, or where the defendant's compliance with the order cannot be enforced. The third part of the article will address how futility arguments affect judicial decisions in international litigation. The primary issue in these cases remains that the defendant will not obey the order and that the court lacks the ability to enforce compliance. However, futility issues in international litigation can combine with jurisdictional questions and concerns about comity, which raises further difficulties. In its final part, the article will examine the extent to which futility arguments in public interest litigation differ from those in general law proceedings for an injunction. Statutory injunction powers, such as those under the *Trade Practices Act 1974* (Cth) ('the TPA') or the EPBC Act, are not subject to the same discretionary considerations as equitable injunctions because these statutes also promote public interests. This affects the issue of when an order is no longer likely to be effective. The *Japanese Whaling case* highlights the remedial challenge for courts presented with futility arguments in public interest cases involving international litigation.

---

<sup>2</sup> Ibid [36]. See further below IIIA.

<sup>3</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425.

<sup>4</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [28] (Allsop J).

<sup>5</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [14]–[16].

<sup>6</sup> Ibid [22]. See further below V.

## II The Concept of Futility

### A What Does 'Futile' Mean?

A court exercising equitable jurisdiction has discretion to refuse relief where the order applied for is likely to be futile. While futility can be a discretionary consideration in applications both for specific performance and for an injunction,<sup>7</sup> this article will focus on injunctive relief. What does it mean for a particular order to be futile? In civil proceedings, an order is said to be futile when it would lack 'practical effect'<sup>8</sup> or when the 'plaintiff would not obtain any benefit from the decree'.<sup>9</sup> In other words, an order is futile when it is unable to protect the rights of the plaintiff.

The purpose of an injunction is to enforce the plaintiff's primary right; for example, the obligation of the defendant not to trespass onto the plaintiff's land or not to breach the plaintiff's confidence. A prohibitory injunction protects this right by restraining the defendant from acting in breach of this right. In its rarer mandatory form, an injunction requires the defendant to take positive steps to protect the plaintiff's entitlement. In both cases, the protection of the plaintiff's right is achieved through the threat of punishment for contempt of court should the defendant disobey the injunction.

An injunction will not be issued if it is not just in all the circumstances. Because the injunction is a discretionary remedy, the court may refuse the injunction even if the plaintiff establishes an infringement, or threatened infringement, of his or her rights. Importantly, an injunction to protect common law rights generally will not be ordered where damages would be an adequate remedy.<sup>10</sup> In deciding this, the court will make an objective assessment of the potential for an injunction to vindicate the plaintiff's rights. The nature of the plaintiff's right is an important factor in determining when it will be more adequately vindicated by injunction rather than by an award of damages. While a court will take the plaintiff's motivation and reasons for claiming the relief into account it will not be bound by the plaintiff's assessment as to whether an injunction or damages are more appropriate.

---

<sup>7</sup> The futility of the relief applied for can also be relevant in applications for declarations. In *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, 414 Lockhart J pointed out that a declaration 'must be directed to the determination of legal controversies ... and produce some real consequences for the parties'; otherwise the court may refuse it. Futility of relief is also of substantial significance in the review of administrative decision-making: Section 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) gives the court a discretion to refuse relief where a rehearing or reconsideration is or will be futile: *Lee v Minister for Immigration and Citizenship* (2007) 159 FCR 181, [44]–[48] (Besanko, Moore and Buchanan JJ agreeing). This is the case, for example, where the same decision would inevitably have to be made again: *Carlos v Minister for Immigration & Multicultural Affairs* (2001) 183 ALR 719, [57] (Merkel J).

<sup>8</sup> GE Dal Pont and DR Chalmers, *Equity and Trusts in Australia* (4<sup>th</sup> ed, 2007) [31.60].

<sup>9</sup> M Tilbury, *Civil Remedies vol I* (1990) [6042]. Emphasising the discretionary nature and flexibility of equitable relief, ICF Spry, *The Principles of Equitable Remedies* (8<sup>th</sup> ed, 2010) 128 states that an order will be refused because of futility 'where there [is not] a sufficiently high probability that the making of the proposed order will provide a sufficient benefit to the plaintiff to render that order just in all circumstances'.

<sup>10</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 408 (HL); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153.

An injunction has evident utility where its coercive effect is relied upon to protect or restore the primary right of the plaintiff. It is less clear whether an injunction is necessarily futile where the court could not coerce compliance when necessary. This depends on whether the order itself, regardless of enforcement, can have sufficient ‘practical effect’ and ‘benefit’ to justify granting it. There may be cases where the threat of coercion, even if difficult or impossible to follow through, appears sufficient to ensure voluntary compliance. In other cases, the plaintiff may argue that obtaining the order in itself provides him or her subjectively with a measure of relief. This issue may arise, for example, in the context of wrongs affecting dignitary interests, where the plaintiff may regard even an unenforceable injunction to restrain the defendant as an appropriate, and sufficient, affirmation of the plaintiff’s entitlement. However, courts have so far generally remained reluctant in private law proceedings to recognise such indirect effects as sufficient justification to grant an injunction.<sup>11</sup> The *raison d’être* of an injunction is its coercive character. Where an injunction is unenforceable, it is difficult to see that it has a greater vindicatory effect than an award of damages, or even a declaration. Nonetheless, the case law considered below will provide illustrations that the question of whether an injunction has sufficient practical utility can often be finely balanced and that subjective benefits may in some cases mean that an order should not be regarded as futile.<sup>12</sup>

## B The Rationale of Denying Futile Orders

Australian courts regard the granting of injunctions as an exercise of their inherent equitable jurisdiction even though superior courts also have statutory powers to grant injunctive relief.<sup>13</sup> In the exercise of its discretion, the court is guided by equitable maxims that have developed over many centuries. While not having the force of binding rules, these maxims are an expression of the received judicial wisdom of when the exercise of equitable jurisdiction will be appropriate. Although the principle that ‘equity does not act in vain’ is not part of the established canon of equitable maxims,<sup>14</sup> it appears to have a long pedigree and has found widespread acceptance.<sup>15</sup>

The reasons why a court generally will not make a futile order have not been well articulated. It may be that the courts consider the rationale for this principle to be self-evident. Two explanations appear to be particularly relevant. One possible rationale for refusing to make an order on the ground of futility is that it would be a waste of the court’s resources. In fashioning relief, courts are entitled to take

---

<sup>11</sup> Courts appear to be more receptive to such considerations in the context of statutory injunctions. See below V.

<sup>12</sup> See below III.

<sup>13</sup> For example, *Federal Court of Australia Act 1976* (Cth) s 23; *Supreme Court Act 1981* (UK) s 37(1).

<sup>14</sup> It is not considered in the chapters on maxims in J McGhee (ed), *Snell’s Equity* (31<sup>st</sup> ed, 2005) ch 5; JE Martin, *Modern Equity* (19<sup>th</sup> ed, 2009) [1-024]–[1-036]; RP Meagher, JD Heydon and ML Leeming, *Meagher, Gummow and Lehanes’s Equity Doctrine and Remedies* (4<sup>th</sup> ed, 2002) ch 3; nor on the list contained in P Parkinson (ed), *The Principles of Equity* (2<sup>nd</sup> ed, 2003) [113] or specifically considered in GE Dal Pont and DR Chalmers, above n 8; M Evans, *Equity and Trusts* (2<sup>nd</sup> ed, 2009).

<sup>15</sup> *Sir Nicolas Browne-Wilkinson V-C in Attorney-General v Guardian Newspapers Ltd (Spycatcher case)* [1987] 3 All ER 316, 332 (ChD); *New Brunswick and Canada Railway and Land Co v Muggeridge* (1859) 4 Drew 686, 699; 62 ER 263, 268 (Kindersley LC); see also *Benson v Benson* (1710) 1 P Wms 130, 131; 24 ER 324, 325.

considerations of ‘judicial economy’<sup>16</sup> into account. However, a court will not save many resources if it refuses an injunction at the end of proceedings. Therefore, the main purpose of denying futile relief on an economic basis must lie in its pre-emptive educative effect. If potential litigants know that futile orders will be denied, they can be expected to refrain from applying for such relief. Also, if negative cost consequences flow from bringing unsuccessful proceedings<sup>17</sup> they will be further discouraged from bringing such suits.

The second, and probably more powerful, reason for denying relief on the ground of futility is that futile orders may undermine respect for, and confidence in, the legal system. It brings the administration of law into disrepute if a court makes an order that has no real consequences or that it cannot enforce.<sup>18</sup> As Lord Bingham remarked in *South Bucks District Council v Porter*, ‘the rule of law is not well served if orders are made and disobeyed with impunity’.<sup>19</sup> Even if courts refer to this rationale, they rarely assess whether making the order is indeed likely to undermine public respect for the administration of justice. It may be questioned whether this essentially *instrumental* concern with the administration of justice fits comfortably with denying relief where the law’s *corrective* aim of restoring the plaintiff’s rights cannot be achieved. There is, however, an undeniable link between both issues: that is, that a court should not exercise its powers when it is clear that it cannot achieve the objects for which those powers have been granted. If a court did not take account of the utility of its orders, it could appear to be disregarding the legitimate rights of the defendant or closing its eyes to the practical limits of its remedies. Both would be likely to undermine public respect for its work.

Arguments about futility are common:

- when the subject matter of the claim cannot or can no longer be protected through a judicial order;
- when the defendant is unable or unwilling to comply with the relief applied for; or

---

<sup>16</sup> *Pro Swing Inc v Elta Golf Inc* [2006] 2 SCR 612; 2006 SCC 52, [40].

<sup>17</sup> In Australian and UK civil proceedings, costs generally ‘follow the event’; ie, the unsuccessful litigant pays the costs of the winning litigant, generally limited to the costs ‘necessary or proper for the attainment of justice or for maintaining or defending the rights of a party’ (so-called party/party costs), see, eg, *Federal Court Rules* (Cth) O 62 r 19.

<sup>18</sup> In the seminal *Spycatcher* litigation, where a court was asked to maintain an injunction against newspapers proposing to publish government secrets after the information had become widely available through a book publication overseas, Lord Bridge pointed out that such a decision would be likely ‘to give rise to a degree of lack of respect for the court’ if it was ‘seeking to achieve the unachievable’: *Attorney-General v Guardian Newspapers* [1987] 3 All ER 316, 347 (HL); similarly, Sir Nicolas Browne-Wilkinson V-C considered that, in the circumstances, ‘[t]he maintenance of the ban will seem more and more ridiculous’: *Attorney-General v Guardian Newspapers* [1987] 3 All ER 316, 332 (ChD).

<sup>19</sup> [2003] 2 AC 558, [32]. McGechan J expressed it more drastically in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, [66], a case where news media applied to discharge injunctions restraining them from publishing details of the plaintiff’s convictions after they had been widely published by other media outlets: ‘Justice, as in the famous statue, certainly should appear blind, but should not appear stupid. It is all very well to contend that a Court should not allow the resumption of a wrong simply because other such wrongs have occurred meantime. That point has force, but the realities of the current situation must also be looked at’.

- when the defendant's compliance with the order cannot effectively be enforced.<sup>20</sup>

Each of these instances will now be considered in the context of domestic litigation. Later, the article will examine international litigation and public interest injunctions that require the court to take further considerations into account and therefore merit separate discussion.

### III Futility in Domestic Litigation

#### A *Futility on Grounds of Subject Matter*

A court is unlikely to make an order where it can no longer sensibly protect the subject matter of the claim. In other words, where an injunction would come 'too late'. This is a particularly common issue in applications for injunctive relief against the unauthorised publication of information. Where information has been disclosed in breach of an obligation of confidence and the information has reached the public domain, it will generally no longer be regarded as confidential.<sup>21</sup> The futility of ordering the defendant to respect the plaintiff's confidence will then be the reason for denying injunctive relief.<sup>22</sup> The same will apply generally to breaches of privacy.<sup>23</sup>

Before a court will deny relief on the because it has lost its confidentiality or privacy, the court will examine closely whether the information has indeed been disclosed so widely that it can no longer sensibly be protected through an injunction. It has been suggested that the 'the key determining factors are the type of the information (and nature of the confidentiality interest) and the nature of the likely "audience" for it'.<sup>24</sup> An injunction may still issue where the publication has been limited in scope, duration, format or recipients, and any prohibition of further dissemination still would have practical use for the plaintiff.<sup>25</sup> For example, an injunction may still be obtained if material was published in a newspaper and a plaintiff seeks to prevent the newspaper article being stored in a newspaper database, because this would make the information, through electronic search functions, more conveniently available, and accessible to a wider audience for a

---

<sup>20</sup> Futility is also the reason why transient interests will generally not be protected through injunctions or orders for specific performance. This is particularly an issue, where the defendant is able lawfully to affect the right that the plaintiff seeks to enforce; eg, to terminate a tenancy or partnership agreement (compare *Tito v Waddell (No 2)* [1977] Ch 106, 326) or to ratify an invalid act or decision (*Bentley-Stevens v Jones* [1974] 1 WLR 638). See further, ICF Spry, above n 9, 133–8.

<sup>21</sup> *Gilbert v Star Newspaper Co* (1894) 11 TLR 4; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *Berryman v Solicitor-General* [2005] 3 NZLR 121; *Douglas v Hello! Ltd (No 3)* [2006] QB 125.

<sup>22</sup> *Northern Rock plc v The Financial Times Ltd* [2007] EWHC 2677 (QB).

<sup>23</sup> *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [105].

<sup>24</sup> Paul Stanley, *The Law of Confidentiality — A Restatement* (2008) 38–9; cited with approval in *Barclays Bank plc v Guardian News Media Ltd* [2009] EWHC 591 (QB), [23].

<sup>25</sup> *Barclays Bank plc v Guardian News Media Ltd* [2009] EWHC 591 (QB) (publication on a newspaper website for 4 hours did not stand in the way of an injunction); *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444, 456 (newspaper publication of a photograph intended to be used as a cover for a music album for Oasis did not preclude interim junction against newspaper's offer of the photograph as a fan poster).

potentially unlimited period of time.<sup>26</sup> In *Douglas v Hello! Ltd (No 2)*, the Court of Appeal also suggested that the unauthorised publication of private photographs may raise different considerations to other breaches of privacy in as much as it conveys more than ‘information and intrudes on privacy by enabling the viewer to focus on intimate personal detail’.<sup>27</sup> However, it is not quite clear why only the republication of a private picture ‘will be a fresh intrusion of privacy when each additional viewer sees the photograph’.<sup>28</sup> The better view is that republication of any unauthorised private information tends to reach a new audience, to refresh the memory of an existing audience and therefore also increase the emotional distress felt by the victim. Where this is the case, an injunction still is likely to protect legitimate interests of the plaintiff and prevent further harm. On the other hand, where the confidential information is of a commercial character, different considerations will apply. In that case, an injunction may already be futile after a single publication, for example, if that publication led to the complete loss of the information’s commercial benefit for the plaintiff.

Futility in the context of actions for breach of confidence was most exhaustively discussed in the seminal *Spycatcher* litigation.<sup>29</sup> In this saga, Mr Wright, a former agent of the British Security Service intended to publish a book, entitled ‘*Spycatcher*’, about alleged irregularities within the service, in breach of his duty of confidentiality towards the Crown. The Crown obtained interlocutory injunctions against *The Guardian* and *The Observer* newspapers that had reported an outline of the allegations contained in the manuscript. The injunctions to restrain these newspapers from publishing any further material obtained from Mr Wright were made until trial, on the basis that such publication would disclose matters of national security. The Attorney-General obtained a further interlocutory injunction pending trial restraining *The Sunday Times*, which had purchased the *Spycatcher* serialisation rights, from publishing these serialised extracts. The book itself was subsequently published overseas and topped the bestseller lists in the USA and Canada. While not stocked in bookshops in the United Kingdom, thousands of copies had been privately brought into the country from overseas and no attempt to ban its importation had been made. Other British newspapers also published further material from the manuscript of the memoirs.

Following the book’s publication in the USA and the disclosure in other newspapers, *The Guardian* and *The Observer* applied to have the injunctions lifted. By a majority of 3 to 2, the House of Lords decided to leave the injunctions in place until trial. Their Lordships differed in the assessment of whether the injunctions would continue to fulfil a useful purpose. Lord Ackner, for the majority, conceded that ‘the injunctions are no longer effective to safeguard any national *secrets* that the book might contain’.<sup>30</sup> But his Lordship saw a difference

---

<sup>26</sup> Cf *Australian Football League v Age Co Ltd* (2006) 15 VR 419 (rumours in internet discussion fora of infringements of drugs policy by professional football players did not destroy confidentiality of drug test results); but see also *Re Stedman* [2009] EWHC 935 (Fam) (information was so widely disseminated by the media and discussed by the public that restriction of publication could no longer prevent harm).

<sup>27</sup> [2006] QB 125, [105].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

<sup>30</sup> *Attorney-General v Guardian Newspapers Ltd (Spycatcher case)* [1987] 3 All ER 316, 363 (emphasis in original).

between tolerating the importation of casual copies and the mass circulation of the material contained in the book.<sup>31</sup> Lord Templeman identified as a further purpose of the injunction that it would prevent Mr Wright and the British newspapers from profiting from the unlawful conduct of Mr Wright.<sup>32</sup> Also, his Lordship did not want to create a precedent whereby an obligation of confidence could effectively be overcome by first publishing the information abroad.

Lord Bridge, in dissent, admitted to experiencing a ‘sense of indignation which all of us must feel that Mr Wright ... should have got away with it, worse still that he should make a profit from his breach of confidence’. However, in his opinion the ‘remedy for that wrong lies not in a futile injunction but in an action for an account of profit’.<sup>33</sup> Lord Oliver of Aylmerton, also dissenting, held that the injunction against *The Guardian* and *The Observer* involved a misuse of the injunctive remedy against them.<sup>34</sup> His Lordship stated:

I am as reluctant as any of your Lordships to acknowledge that the intention of the court has been effectively flouted by a public dissemination which the courts in this jurisdiction are powerless to prevent. But once that has occurred and the proscribed material is available for public ventilation and discussion by everybody except those subject to the existing restraint, I question whether it can be right to continue that restraint against parties in no way concerned with flouting the court’s orders and to interfere with their legitimate business of publishing and commenting upon matters already in the public domain for the purpose, not of preventing that which can no longer be prevented, but of punishing Mr Wright and providing an example to others.<sup>35</sup>

With respect, the view of the dissenting judges evinces a more realistic understanding of the limits of judicial power where confidentiality has effectively been lost. It avoids the making of pointless and ineffectual gestures that have the potential to undermine public respect for the administration of justice.

On occasion, the question arises whether futility will prevent an injunction where the defendant himself or herself caused the futility. In the context of confidential information, the issue is whether the obligation should come to an end even if it is the defendant who is responsible for the publication. This issue was not relevant in relation to *The Guardian* and *The Observer* because the secrecy of the material contained in Mr Wright’s memoirs was destroyed by the publication of the book overseas and, to a more limited extent, by other newspapers. However, this issue was considered when the *Spycatcher Case* reached the House of Lords a second time. That time, the Attorney-General appealed against the refusal to grant the Crown *permanent* injunctions to restrain future publication of information derived from Mr Wright’s book.

---

<sup>31</sup> Ibid 363; similarly at 349–50 (Lord Brandon).

<sup>32</sup> Ibid 357.

<sup>33</sup> Ibid 345.

<sup>34</sup> Ibid 373.

<sup>35</sup> Ibid 374. Deciding on the appeal against the refusal to grant permanent injunctions, Lord Goff agreed with this assessment: *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 292.



The Crown argued that *The Sunday Times*, which had bought the serialisation rights from Mr Wright's Australian publisher, was tainted with Mr Wright's breach of confidence and should not be allowed to serialise *Spycatcher* notwithstanding the fact that the material in question had entered the public domain. Most members of the House of Lords disagreed on the basis that once confidentiality was completely destroyed, an injunction would no longer serve a useful purpose.<sup>36</sup> They stated that, in those circumstances, the injured party needs to resort to compensatory or restitutionary remedies, in particular an account of profits.<sup>37</sup> Lord Griffiths, in dissent, rejected this approach because it would be 'unseemly for the law to permit a course of action which it deemed to be wrong on the condition that the wrongdoer paid a price for his wrongdoing'.<sup>38</sup> In his Lordship's view, the futility of seeking to protect the secrecy of the information was outweighed by the need to be seen to be upholding Mr Wright's obligation. Nonetheless, Lord Griffiths agreed that different considerations applied in relation to third parties not associated with the breach. This was because the law should not 'seek to deny to our own citizens the right to be informed of matters which are freely available throughout the rest of the world and ... in fact be seeking in vain because anyone who really wishes to read *Spycatcher* can lay his hands on a copy in this country'.<sup>39</sup> The decision of whether it is practical to give injunctive protection therefore requires a close examination of the facts of each case.

The issue of whether the injunction would still serve a legitimate and useful purpose continues to be the critical consideration in more recent case law. Indeed, it may be that with the increasing global availability of information, the problem of containing an unauthorised publication has become more acute. English citizens who were interested in reading of *Spycatcher* allegations needed to go abroad to buy a copy or have it sent through post from an overseas supplier. But today the internet will often ensure that wrongfully disseminated information is instantly available anywhere and anytime — regardless of whether the court enjoins the original publication.

In the recent English case of *Mosley v News Group Newspapers Ltd*,<sup>40</sup> already referred to above, the UK tabloid *News of the World* published a sensationalist story about Max Mosley, head of the Formula 1 racing organisation and son of the former British fascist leader. The tabloid reported that Mr Mosley had participated in a sadomasochistic sex party with prostitutes and falsely alleged that the party had a Nazi theme. On its website, the newspaper also published an edited video clip showing footage of the occasion, which was accessed over 1.4 million times in just 2 days. It was also copied onto other websites before the defendant voluntarily removed it from its site. In his decision to reject an application to order the publishers of *News of the World* not to republish the

---

<sup>36</sup> Similarly, the European Court on Human Rights has repeatedly held that further restraint of a publication may no longer be 'necessary in a democratic society' (ECHR art 10(2)) and therefore breach the European Convention on Human Rights if the information has reached the public domain: *Observer v UK* (1992) 14 EHRR 153; *Vereniging Weekblad Bluf! v Netherlands* (1995) 20 EHRR 189.

<sup>37</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] AC 109, 262 (Lord Keith), 266 (Lord Brightman), 286 (Lord Goff).

<sup>38</sup> *Ibid* 271.

<sup>39</sup> *Ibid* 272.

<sup>40</sup> [2008] EWHC 687 (QB).

footage, Eady J regarded it as decisive that the information had been disseminated so widely in the public domain that a prohibitory injunction would no longer have any practical effect. Eady J warned that:

[t]he Court should guard against slipping into playing the role of King Canute.<sup>41</sup> Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a *brutum fulmen*. It is inappropriate for the Court to make vain gestures.<sup>42</sup>

Futility generally is treated merely as an issue of fact. Questions of responsibility or authorship for an alleged breach of confidence are unlikely to sway the decision. In this sense, an injunction will not be granted *as a sanction* for a breach of confidence, after it has become ineffective to protect the plaintiff. If an injunction is no longer able to protect or restore the plaintiff's confidentiality, which is the plaintiff's primary right, the plaintiff must seek his or her remedy in substitutive relief, such as an award for damages, equitable compensation or an account of profits.

A similar stance was taken in the Australian case of *Cashman v Ackland*,<sup>43</sup> in which the defendant had published confidential information relating to the plaintiff company in the Australian legal news journal *Justinian*, which is available online by subscription. Because a major Sydney newspaper then republished the information, Hamilton J of the New South Wales Supreme Court held that an injunction had become futile. His Honour was not persuaded by the plaintiff's argument that an injunction nonetheless should be made considering it 'was the act of this very defendant that placed the matter in the public domain'.<sup>44</sup>

In deciding whether the order has become futile, it is important to consider exactly what interest the plaintiff seeks to protect. If confidential information has become freely available, then it may indeed become pointless to grant an injunction against the wrongdoer. Confidentiality obligations in relation to governmental or business secrets will often lose their point once information has reached the public domain. However, the interest in privacy goes beyond the protection of secrets and therefore raises different concerns. Privacy invasions affect the plaintiff's personality or dignitary interests. It is therefore appropriate not to take an unduly narrow view of when an order can still protect the plaintiff. In privacy cases, courts should acknowledge that a plaintiff may have a legitimate interest in a prohibitory order against the defendant even where a prior publication was widespread. This is likely to

---

<sup>41</sup> Canute (994–1035), King of England, Norway and Denmark, is famed to have unsuccessfully commanded the tide to retreat before him. However, his futile order to the sea was motivated not by hubris but by the desire to show his flattering courtiers that even a mighty king is powerless in face of nature and, ultimately, God.

<sup>42</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), [34]; applied in *Re Stedman* [2009] EWHC 935 (Fam). However, the difficulty of restraining internet publications was held not to be sufficient reason to generally deny relief in *Dow Jones v Gutnick* (2002) 210 CLR 575, [115] (Kirby J), [186] (Callinan J); *Barrick Gold Corp. v Lopehandia* (2004) 71 OR (3d) 416, [75] (Blair JA, Laskin JA agreeing).

<sup>43</sup> [2001] NSWSC 863.

<sup>44</sup> *Ibid* [6]. In interlocutory proceedings, Brereton J regarded the contrary position as 'seriously arguable': *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 292, [11].

be the case where a republication specifically by the defendant has the potential to cause further distress to the plaintiff. In *Mosley's* case, for example, the plaintiff would have had a legitimate interest in a republication ban against the defendant newspaper publisher, if he had established a practical benefit from preventing republication of the hurtful video footage specifically by the *News of the World*, notwithstanding the fact that the footage had in the meantime become widely available elsewhere. A useful guide to answering this question could be to ask whether a republication would be likely to cause new harm; for example, in the form of emotional distress, for which damages could not adequately compensate. A further argument for a more generous approach towards recognising such interests of the plaintiff can be found in the recent trend of the English law of torts in some circumstances to regard vindication of rights as a distinct purpose of legal remedies.<sup>45</sup>

### **B Futility on Grounds of Defendant's Inability to Comply**

An order to do something impossible will always be futile and hence be denied. While impossibility could therefore be regarded as a subspecies of futility, it is generally regarded as a distinct ground for refusing relief.<sup>46</sup> The issue of impossibility arises where the order cannot be complied with for legal or practical reasons. For example, it would be impossible for a defendant to return a horse to the plaintiff after the animal has died. Such orders would necessarily lead to breach and will therefore not be made.<sup>47</sup> Occasionally, the reasons why the order cannot be obeyed may lie in the person of the defendant. In these situations of 'subjective inability', it is not easy to draw the distinction between futility and impossibility. Defendants have sought to resist an order for mandatory relief on the basis that they are financially or otherwise unable to comply with a proposed order. This can arise in particular where the order would require considerable outlay and expense. In *Warrington Borough Council (Successor Authority to Cheshire County Council) v Hull*,<sup>48</sup> the operators of a landfill site were ordered to restore the site, which they had been operating in flagrant, persistent and serious breach of planning permission. The costs of restoration were likely to exceed the defendant's assets. They appealed the order on the basis that their lack of funds should be a bar to the grant of a mandatory injunction. Not surprisingly, the Court of Appeal dismissed the appeal and held that a defendant 'cannot avoid those consequences merely because his financial position is such that he cannot afford to take the steps

---

<sup>45</sup> *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, [22] (Lord Scott); Lord Scott, 'Damages' [2007] LMCLQ 46; David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 *Oxford Journal of Legal Studies* 73; Norman Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17 *Tort Law Review* 16.

<sup>46</sup> *M Tilbury, Civil Remedies vol I* (above n 9) at [6041]–[6042]; PW Young, C Croft and ML Smith, above n 14, [17.400]–[17.410]; Meagher, Heydon and Leeming, above n 14, [20-140]–[20-144] (in the context of specific performance).

<sup>47</sup> *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, 181 (Lord Evershed MR); *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, 154 (Lord Hatherley LC); *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301; Meagher, Heydon and Leeming, above n 14, [20-144] (in the context of specific performance).

<sup>48</sup> [1999] Env LR 869 (CA).

necessary to remedy his earlier wrongs'.<sup>49</sup> This case shows that an order will not be regarded as futile merely because the defendant lacks the funds to comply with it.<sup>50</sup> The order may still be presently useful for the plaintiff because it puts the plaintiff into a position to take enforcement action after the defendant's fortunes have changed, without need for a further trial.<sup>51</sup> In the meantime, the defendant's interests are sufficiently protected if his or her impecuniosity is taken into account in the enforcement proceedings.<sup>52</sup>

The decision of *Wookey v Wookey; In re S*<sup>53</sup> raised the issue of whether an injunction should be denied when the defendant's mental capacity makes it impossible for the defendant to comply with the injunction. In *Wookey v Wookey*, a wife was seeking a non-molestation order against her husband of 40 years. The husband was diagnosed with early dementia and pathological jealousy after he had threatened and attacked his wife with a knife. The court found that an injunction ought not to be granted against a person who is found to be mentally incapable of understanding what they were doing or that what they were doing was wrong since an injunction could then neither achieve its desired deterrent effect nor operate upon that person's mind so as to regulate their conduct. Furthermore, any breach of the order could not be effectively enforced because the mental illness would provide a defence in committal proceedings for contempt.<sup>54</sup> The court found additional support for its decision from the admission and detention powers under the *Mental Health Act 1983* (UK), which provided an alternative, and more suitable, avenue for obtaining care for the husband and protection for the wife.

These cases highlight that the decision of whether to grant an injunction will often be highly fact-specific. This is illustrated further by the Australian decision of *Vincent v Peacock*,<sup>55</sup> which concerned a nuisance action between neighbours. When inebriated, Mr Peacock had for a number of years created such noise and other offence that he unreasonably interfered with the Vincents' use and enjoyment of their family home. The trial judge nonetheless refused to grant an injunction because it would not have a practical effect, apparently on the basis that the disturbances only occurred when Mr Peacock was affected by alcohol and that he was, by his own admission, an alcoholic. On appeal, the New South Wales Court of Appeal held that an injunction should have been ordered. The court acknowledged the established principle that where the plaintiff proves that the defendant wrongfully interfered with his or her proprietary rights, an injunction can be denied only in special circumstances,<sup>56</sup> such as where it would cause extreme hardship to

---

<sup>49</sup> Ibid 878 (per Jonathan Parker J, Beldam and Buxton LLJ agreeing); see also *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146, 154 (Lord Hatherley LC).

<sup>50</sup> In a similar way, a court will not refuse to make a monetary award against an insolvent defendant.

<sup>51</sup> *Tozier v Hawkins* (1885) 15 QBD 680 (sufficient that the order may become effectual in the future).

<sup>52</sup> Where an order is apt to cause personal hardship, on the other hand, these matters have to be considered at the injunction stage as well as the enforcement stage: *South Bucks District Council v Porter* [2002] 1 WLR 1359, [38] (Simon Brown LJ); endorsed on appeal [2003] 2 AC 558, [53] (Lord Steyn), [88] (Lord Hutton) [103] (Lord Scott) (injunction under *Town and Country Planning Act 1990* (UK) s 187B).

<sup>53</sup> [1991] Fam 121.

<sup>54</sup> On the mental capacity required for contempt, see also *P v P (Contempt of Court: Mental Capacity)* (1999) 2 FLR 897.

<sup>55</sup> [1973] 1 NSWLR 466.

<sup>56</sup> *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149, 181 (Lord Evershed MR).

the defendant. The court further accepted that imposing an injunction, when it is impossible for the defendant to comply with it, can occasion such hardship.<sup>57</sup> However, the court did not see sufficient evidence that the defendant's addiction to alcohol was so severe that it would be impossible for him to abstain from the conduct causing the nuisance. The court was therefore not persuaded that an injunction would be futile in the sense of not being able to affect the defendant's conduct. It further held that it was not grounds for refusing an injunction that it will have no practical effect, when the lack of effect results from the failure of the defendant to obey the injunction.<sup>58</sup>

### *C Futility on Grounds of the Defendant's Unwillingness to Comply*

Injunctions and other coercive orders act *in personam*, which means that they bind the person against whom the decree is made and require them to act accordingly. The effectiveness of the order depends upon the defendant's willingness to comply with the order and, if the defendant does not comply, the degree of control that the court is able to exercise over the defendant. A court will ordinarily expect and assume that the defendant will obey its orders.<sup>59</sup> If a plaintiff has established an interference with a legal right the court will not normally refuse an injunction just because the defendant is likely to disobey the order.<sup>60</sup> The reason for this was succinctly stated by Lord Bingham in *South Bucks District Council v Porter*:

Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent.<sup>61</sup>

A breach of the order will expose the defendant to liability for contempt of court. But before making the order, a court needs to be satisfied that it is just and appropriate to enforce the order, with imprisonment if necessary.

A lack of suitable enforcement options can be problematic where injunctions are sought against minors. In *Re S*,<sup>62</sup> a young woman sought an injunction restraining her brother S, a boy aged 15, from committing assault and battery against her. The trial judge refused to grant an injunction on the ground that it was likely to be ignored by the minor and could not be effectively enforced against him. This decision was upheld on appeal on the basis that an injunction against the boy would be practically unenforceable. While an injunction could generally be enforced by committal to prison, by sequestration of property or by fine, there was no power to commit a minor under the age of 17 to prison and the

<sup>57</sup> [1973] 1 NSWLR 466, 468.

<sup>58</sup> This ground will be further examined in the following section.

<sup>59</sup> *In re Liddell's Settlement Trusts* [1936] Ch 365, 374 (Romer LJ); approved in *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 574 (Lord Scarman); *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65, 81; *South Bucks District Council v Porter* [2003] 2 AC 558, [32] (Lord Bingham).

<sup>60</sup> *National Australia Bank Ltd v Dessau* [1988] VR 521 (mareva injunction); cf *Wookey v Wookey*, *In re S (a minor)* [1991] Fam 121.

<sup>61</sup> [2003] 2 AC 558, 580 (Lord Bingham).

<sup>62</sup> *Wookey v Wookey*; *In re S (a minor)* [1991] Fam 121; see also *London Borough of Harrow v G* [2004] EWHC 17.

unemployed S had neither property worth seizing nor money to meet a fine. Again, the court used as an additional argument that there was a more suitable alternative in dealing with the problem, and protecting the safety of S's sister, namely recourse to care proceedings in the juvenile court or the criminal process.

The decision in this case deserves careful scrutiny. There was no indication that the plaintiff's decision to opt for civil proceedings against her brother was ill-considered. She may well have had good reason to believe that an injunction would be sufficient to defuse the situation, provide her with a measure of protection, and make it unnecessary to invoke the alternative measures referred to by the court. It appears unfortunate to refer the plaintiff to making 'a complaint to the police of a criminal act, such as assault occasioning actual bodily harm' where an injunction may have had the potential to avert such an offence. It may also be asked whether the court has shown sufficient understanding for, and sensitivity towards, the difficult situation the plaintiff found herself in, where family loyalty and need for protection came into conflict. An issue that may require the attention of Parliament, rather than the court, is to ensure that the sanctions for contempt are apt also to deter juveniles in the position of the applicant's brother. There is no reason in principle why the sanctions should differ from those that can be imposed on juveniles for other criminal offences, including forms of juvenile detention or community orders.<sup>63</sup> Lastly, surmising that S would disobey the order also went against the general trend of courts not assuming that their orders will be disobeyed.

### D Conclusion

Futility arguments can arise in a large number of contexts. In summary, an order becomes futile where it is not able to protect a right of the plaintiff. When there is no doubt about futility, the court will generally refuse an injunction and leave the plaintiff to a monetary remedy; for example, where it is impossible for the defendant to comply with the injunction. In other cases, the likelihood of the order's futility will be considered together with all other factors that affect the court's decision whether to grant an injunction. The main rationale for denying futile relief is that a court is reluctant to act in vain; in particular, where this has the potential to bring the judicial process into disrepute. However, the review of the case law has demonstrated that this rationale is rarely considered expressly. Instead, the focus is usually on the more practical issue of whether the order is likely to have sufficient benefit for the plaintiff so that it can, in all the circumstances of the case, be regarded as just and equitable. This is appropriate because an order that is likely to protect rights of the plaintiff against wrongful acts of the defendant is unlikely to bring the administration of justice into disrepute, provided the order is just in all circumstances of the case. While courts carefully balance the conflicting considerations, there are some situations where courts should adopt a more plaintiff-focused perspective on whether an order still has utility for the plaintiff. This applies particularly to the area of privacy protection, which has recently developed dramatically in England, and cases where there is a choice between an injunction and an alternative process through which the plaintiff could protect his

---

<sup>63</sup> On the relationship in the UK between civil injunctions and Anti-Social Behaviour Orders against children under the *Crime and Disorder Act 1998* (UK), see *London Borough of Harrow v G* [2004] EWHC 17.

or her interests. Finally, the defendant's refusal to comply with the order will generally not be sufficient reason to deny relief. Unless other discretionary considerations favour denying an order, a court will make the order and sanction non-compliance as a contempt of court. However, where the usual enforcement mechanisms of a fine, committal to prison or sequestration of assets are bound to fail, an order will usually be denied. In this situation, it is evident that otherwise a court would be acting in vain.

#### IV Futility in International Litigation

This part of the article will examine the effect of futility arguments in cross-border litigation. An order of the court in international litigation can be futile for all the reasons that arise in domestic litigation discussed above. To that extent, the considerations on when an order should be denied still apply. However, in cross-border litigation it is more frequent than in purely domestic disputes that a defendant will wilfully disobey an order in the knowledge that it will, for legal or practical reasons, be unenforceable. Where the unenforceability is a result of the international nature of the proceedings, a court may be inclined not to exercise its jurisdiction over the matter, rather than deny injunctive relief after substantive proceedings.

Under the rules of court in many jurisdictions influenced by the English common law tradition, a court can assume personal jurisdiction over a defendant that is neither present nor consents to the court's jurisdiction, provided the defendant has been served with the originating process through an authorised service outside the jurisdiction.<sup>64</sup> These rules will generally require that the proceedings have a connection with the jurisdiction; for example, they may concern a wrong that the defendant, while resident abroad, has allegedly committed within the jurisdiction or committed against the plaintiff who is resident in the jurisdiction.

In principle, if a court exercises jurisdiction in these circumstances it does not interfere with the jurisdiction of a foreign court. An injunction made against the defendant will have effect merely *in personam*. This is also the case where the defendant is ordered to perform an act outside the jurisdiction.<sup>65</sup> Extra-territorial jurisdiction against such non-resident defendants is nonetheless regarded as 'exorbitant'.<sup>66</sup> Considerations of comity require a court to respect the authority and jurisdiction of other states, suggesting that the discretion to allow proceedings should be exercised with caution where the proposed action could or should be dealt with by a court of the jurisdiction in which the proposed defendant resides. Furthermore, where a court accepts that it has jurisdiction against the non-resident defendant, problems of enforceability may arise if the defendant is not amenable to the court's enforcement mechanisms.

---

<sup>64</sup> These statutory rules modify and expand the common law and equitable principles governing the establishment of jurisdiction: see M Keyes, *Jurisdiction in International Litigation* (Federation Press, 2005) 50. In the UK, the Brussels Regulation and the Brussels and Lugano Conventions determine when domestic courts have jurisdiction over matters falling within the scope of these instruments: see further, L Collins et al (eds), *Dicey, Morris and Collins on the Conflict of Laws* (14<sup>th</sup> ed, 2009) ch 11.

<sup>65</sup> *Lord Portarlington v Souby* (1834) 3 Myl & K 104, 108; 40 ER 40, 42.

<sup>66</sup> *Amin Rasheed Corporation v Kuwait Insurance* [1984] AC 50, 65 (Lord Diplock).

A plaintiff may be unable to enforce a judgment in a domestic court if the defendant is not available within the jurisdiction nor has assets in the jurisdiction that could be made the subject of local enforcement. It may then be necessary for a plaintiff to enforce the locally obtained judgment in a foreign jurisdiction. This requires that the judgment be recognised and enforceable in the foreign jurisdiction under the foreign jurisdiction's local laws. Problems concerning the latter can arise, in particular, in the case of non-money judgments which the common law has traditionally been reluctant to enforce. Before granting an order that would require enforcement in a foreign jurisdiction, the court will consider the 'general principle of the law as to injunctions that the court should not put itself in the position of making orders which it cannot enforce against the person or assets of a defendant'.<sup>67</sup> There are two junctures in the proceedings at which a court could act to avoid making a potentially unenforceable order. First, the court could refuse to grant leave to serve the originating process in the foreign jurisdiction. Second, the court could, in exercise of its jurisdiction and discretion over the subject matter of the proceedings, decline to make the order applied for by the plaintiff.

As indicated, an order may remain unenforceable in the domestic forum where the defendant is neither located in the jurisdiction nor has assets there, and it may remain unenforceable in a foreign forum where that forum refuses to enforce domestic orders. Each situation may lead to the court's order becoming futile: this will now be examined. The article will then address the special problems posed by Mareva orders, where considerations about futility may combine with concerns about comity.

## A *Problem of unenforceability*

### 1 *Defendant not in jurisdiction*

With the steady increase in international exchange and commerce, courts have not surprisingly become more willing to allow proceedings against a foreign resident. In the 1861 case of *Norris v Chambres*, the English purchaser of a coal mine in Germany brought an action in England against a German resident who had allegedly purchased the land with notice of the prior sale to the plaintiff. The plaintiff argued that this had created a lien on the land and sought to enforce it through the proceedings. In denying relief, Lord Campbell LC stated the broad principle that 'an English Court ought not to pronounce a decree, even in personam, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen*'.<sup>68</sup> Other early English cases<sup>69</sup> concerned alleged trade mark infringements in England, where the defendant's only place of business was outside England. In these cases, the courts did not accept jurisdiction because injunctive relief, if granted, could not be locally enforced against the defendants. In contrast, a plaintiff successfully applied for leave to serve a writ in Scotland, where the defendant was a Scottish company with branch offices in England and an injunction could thus be enforced by sequestration against the property situated in England.<sup>70</sup>

<sup>67</sup> *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657, 665 (Mustill LJ).

<sup>68</sup> (1861) 3 De GF & J 583, 584–5; 45 ER 1004, 1006.

<sup>69</sup> *Marshall v Marshall* (1888) 38 Ch D 330; *Kinahan v Kinahan* (1890) 45 Ch D 78.

<sup>70</sup> *In re Burland's Trade-mark* (1889) 41 Ch D 542.



In these cases, the issues of futility and jurisdiction are intertwined because the court refused to exercise jurisdiction when its judgment had to be enforced outside the jurisdiction to be effectual. In modern times, most jurisdictions have been much more willing to enforce foreign judgments, either because of domestic law reform or because of multilateral conventions.<sup>71</sup> The more likely it is that the defendant's local court would enforce a foreign judgment, the less likely it is that the courts in the plaintiff's forum will refuse to exercise their discretion to grant leave for service abroad on the ground of futility.

## 2 *No assets in jurisdiction*

If a defendant has assets within the jurisdiction, a judgment will not depend on foreign enforcement, even where the defendant is outside the jurisdiction and thus not personally amenable to contempt proceedings. For example, in a case concerning a matrimonial property settlement where one party to the marriage had left the jurisdiction, Scarman J identified as the relevant principle that where the spouse 'is neither domiciled nor resident in England the court may, nevertheless, exercise its jurisdiction to order a settlement if the property to be settled is within the jurisdiction so that it may be the subject of an effectual order of the court'.<sup>72</sup> On the other hand, where the defendant is neither resident nor has assets in the jurisdiction, a court is likely to decline jurisdiction if it thinks the order will be wholly ineffectual or would constitute an infringement of the authority of the foreign court.<sup>73</sup>

The defendant's absence from the jurisdiction, personally or through its assets, was also at the heart of *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,<sup>74</sup> the *Japanese Whaling Case* referred to above. In this case, the defendant whaling company's ships regularly entered the Australian Whale Sanctuary (AWS), which under Australian law is part of Australian territory notwithstanding the fact that Japan (and most other nations) do not recognise this territorial claim. As a result, the defendant had, from time to time, assets within the Australian jurisdiction. However, the Australian Government has so far not been prepared to exercise power over the AWS so as to enforce Australian domestic laws in this maritime area. Therefore, even though the territorial jurisdiction of an Australian court is unaffected by questions of sovereignty over the AWS, the lack of effective enforcement of Australian law by the government to date meant that the defendant's presumed non-compliance became relevant for the court's decision whether to grant the plaintiff leave to serve outside the jurisdiction, or indeed to grant final relief. Reversing the decision at first instance, the Full Court of the Federal Court regarded the potential difficulties of enforcement not as a sufficient reason to refuse leave to serve outside the jurisdiction.<sup>75</sup> Importantly, this decision

---

<sup>71</sup> In the United Kingdom and other EU member states, Community law such as the Brussels Regulation Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') further facilitates, and unifies the law on, the enforcement of foreign judgments.

<sup>72</sup> *Hunter v Hunter and Waddington* [1962] P 1; applying *Tallack v Tallack and Broekema* [1927] P 211.

<sup>73</sup> *Carmell v Carmell* [1965] P 467.

<sup>74</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425.

<sup>75</sup> This issue will be further discussed, below V.

also confirmed the principle that the court will presume that the defendant has assets within the jurisdiction unless there is evidence to the contrary.<sup>76</sup>

(a) *No enforcement of domestic non-money judgment in foreign jurisdiction*

Where a defendant is not resident and has no assets within the jurisdiction, a plaintiff may need to enforce the judgment in a foreign court to make it effectual. The question of enforceability of a foreign judgment is usually posed from the perspective of the court that is asked to enforce an existing judgment by a foreign court. The rules on enforcement of foreign judgments are part of the domestic legal order of each jurisdiction. However, these domestic rules may be affected by international conventions and, for most EU member states, the Brussels Regulation.

If a defendant seeks to resist a court's jurisdiction, or substantive order, with the argument that any judgment will not be enforceable against him or her, the question of enforceability becomes relevant at an earlier stage and for a different court. The question then has to be addressed by the court that is asked to make the order that will subsequently require enforcement outside the jurisdiction. In other words, the court is asked to anticipate (and, possibly, speculate on) the enforceability of its own judgment in a foreign jurisdiction.<sup>77</sup>

As far as enforcement of foreign judgments in common law jurisdictions is concerned, a distinction is generally drawn between money and non-money judgments.<sup>78</sup> Traditionally, only final money judgments could be locally enforced. This orthodoxy has recently been challenged. In *Pro Swing Inc v Elta Golf Inc*,<sup>79</sup> the Supreme Court of Canada decided to abandon the traditional common law rule against recognition and enforcement of foreign non-money judgments in favour of a more flexible approach. Deschamps J, who wrote the judgment for the majority, proposed an approach that would examine three criteria: first, the judgment must have been rendered by a court of competent jurisdiction; second, it must be final, rather than interlocutory; third, it must be of a nature that the principle of comity requires the domestic court to enforce.<sup>80</sup> If this new approach found acceptance in other common law jurisdictions, non-monetary orders could be more readily enforced in foreign jurisdictions. As a result, there would be fewer cases in which the making of such orders, where they require foreign enforcement to be effective, had to be regarded as futile.

---

<sup>76</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [15]; *Hospital for Sick Children (Board of Governors) v Walt Disney Productions* [1968] Ch 52, 71 (CA) (Harman LJ); *Oz-US Film Productions Pty Ltd (in liq) v Heath* [2000] NSWSC 967, [13] (Young CJ in Eq); *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822, [70]–[72] (Austin J).

<sup>77</sup> See, for example, *National Westminster Bank plc v Utrecht-America Finance Co* [2001] 3 All ER 733 (enforceability of anti-suit injunction in Californian court).

<sup>78</sup> For more detail, see Stephen GA Pitel, 'The Portability of Judicial Remedies at Common Law', paper presented at the Sixth International Remedies Discussion Forum, Université Paul Cezanne Aix-Marseille III, Aix-en-Provence (France), 5–6 June 2009; Kim Pham, 'Enforcement of Non-Monetary Foreign Judgments in Australia' (2008) 30 *Sydney Law Review* 663.

<sup>79</sup> [2006] 2 SCR 612; 2006 SCC 52.

<sup>80</sup> *Ibid* [31] (LeBel, Fish and Abella JJ concurring). The minority judgment by McLachlin CJ (Bastarache and Charron JJ concurring) also favoured a more flexible approach but proposed different criteria.

## B *Uncertainty about compliance and enforceability*

There is somewhat conflicting authority on how a court should deal with uncertainty about the defendant's willingness to comply with the order and the enforceability of the order in the case of non-compliance.<sup>81</sup> On the one hand, there are dicta to the effect that the court will be reluctant to put itself into the position of making an order it cannot enforce.<sup>82</sup> The suggestion that a court will not be likely to make an order unless there is 'a real possibility that the order, if made, will be enforceable by the process in personam'<sup>83</sup> appears to put the onus of establishing this possibility on the plaintiff.

However, the majority of cases reveal a more plaintiff-friendly approach of requiring the defendant to persuade the court, through suitable evidence, that granting the order will in fact amount to an empty gesture. For example, in *Re Liddell's Settlement Trust*,<sup>84</sup> a mother ordinarily resident in England had taken her four infant children to the United States, against the wishes of the father. The children were the beneficiaries of a trust and had therefore become wards of the court. The father obtained an order against the mother directing her to bring the children back to England. Romer LJ rejected the argument that the order should not have been made because it could not be enforced against the mother as long as she remained outside the jurisdiction. A writ was issued against the mother's assets situated in England, which were to be kept under sequestration until she returned the children to England and thus cleared her contempt of the court's order. Romer LJ of the Court of Appeal observed:

It is not the habit of this court in considering whether it will make an order to contemplate the possibility that it will be disobeyed.

Similarly, Slesser LJ stated that '[w]e are not to assume that the lady will necessarily disobey the court'.<sup>85</sup> This echoes the sentiment in the earlier case of *Tozier v Hawkins*,<sup>86</sup> in which the Court of Appeal accepted that English courts had jurisdiction to restrain an alleged libel of a plaintiff residing in England by granting an injunction against a defendant residing in Ireland. The defendant sought to argue that the High Court had no effective means of enforcing the injunction. But the defendant had failed to provide affidavit evidence that he never came to England. As a result, the Court of Appeal was content to assume that the 'the injunction can be enforced whenever [the defendant] comes within the jurisdiction'.<sup>87</sup>

While these cases are not very recent, they can be taken to suggest that a court will generally not be inclined to engage in speculation as to whether the defendant will disobey the order. Futility is only an exceptional ground for denying

---

<sup>81</sup> *Spry*, above n 9, 493 suggests that the probability of disobedience is a matter affecting the exercise of discretion.

<sup>82</sup> *Hope v Hope* (1854) De G M & G 328, 542; 43 ER 534, 542 (Cranworth LC); *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657, 665 (Mustill LJ).

<sup>83</sup> *Wookey v Wookey; In re S (a minor)* [1991] Fam 121.

<sup>84</sup> [1936] Ch 365, 374.

<sup>85</sup> *Ibid* 373.

<sup>86</sup> (1885) 15 QBD 680.

<sup>87</sup> *Ibid* 681 (Brett MR, Baggallay and Bowen LLJ concurring).

relief to a plaintiff who has established a wrong and is therefore occasionally described as a ‘defence’.<sup>88</sup> It is therefore appropriate that doubts about the usefulness of any order are resolved against the defendant.<sup>89</sup> Save unequivocal indications to the contrary, a court is likely to assume that a defendant will obey an order made against it or that the order will have utility for the plaintiff.

### C *Mareva Orders (asset-freezing injunctions)*

The issue of enforceability and disobedience in international litigation also arises in the context of asset-freezing injunctions (Mareva orders). These procedural orders restrain a defendant from removing or disposing of assets under its control so as to prevent the frustration of a judgment in the plaintiff’s favour. Section 25 of the *Civil Jurisdiction and Judgment Act 1982* (UK) (‘CJJ Act’) gives the court power to grant interim relief in aid of substantive proceedings overseas. However, the court can decline to exercise this power if the court’s lack of jurisdiction over the substantive proceedings makes it inexpedient to grant relief. The decision of the Court of Appeal in *Motorola Credit Corp v Uzan (No 2)*<sup>90</sup> contains a review of the circumstances in which the court is likely to decline interim relief in aid of foreign proceedings. In this case, the claimant sought worldwide Mareva injunctions from an English court to support proceedings in New York. The defendants, all members of the Uzan Family, were allegedly involved in an international fraud against the plaintiffs on a massive scale. They were Turkish citizens with substantial assets in Turkey and all but one were resident in Turkey, where they had also obtained anti-suit injunctions against both the New York and the English proceedings. In interim proceedings before an English judge, the applicant had obtained worldwide freezing orders against all four defendants. The defendants appealed on the basis that the English courts did not have jurisdiction to make the orders.

From the existing case law on the jurisdictional authority to grant worldwide Mareva orders, the Court of Appeal distilled five criteria that should be considered for the decision as to whether it is inexpedient to make an order. The first two of these criteria concern comity and seek to ensure that English freezing orders do not interfere with the management of the substantial proceedings in the foreign court and are compatible with any policy in that jurisdiction towards such orders. The third and fourth criteria require a consideration of potential conflicts with similar such orders in other jurisdictions or other potential conflicts as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. The fifth criterion is concerned expressly with potential futility and asks ‘whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order it cannot enforce’.<sup>91</sup>

---

<sup>88</sup> Young, Croft and Smith, above n 14, [17.400]. In the context of specific performance see Meagher, Heydon and Leeming, above n 14, [20-140] and Evans, above n 14, [23.34]–[23.35]. However, it is more appropriate to regard futility as a discretionary consideration, rather than a bar to relief: see also Spry, above n 9, 133–4.

<sup>89</sup> See also *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [15] (Black CJ and Finkelstein J).

<sup>90</sup> [2004] 1 WLR 113.

<sup>91</sup> *Ibid* [147].

After considering the five concerns, the Court of Appeal discharged the injunctions against the four defendants who were neither resident in the UK nor had assets there. All defendants had continuously rejected the jurisdiction of the English courts, so there was evidence that they would disobey the order. The defendants' absence from the jurisdiction and the lack of assets made it futile to continue with the injunctions because no real sanction existed. There was also potential for disharmony between the English order and Turkish orders relating to the Turkish assets. However, the Court of Appeal upheld the worldwide injunctions against the one defendant who was resident and had substantial assets in the UK and against a further defendant who, while resident in Turkey, also had substantial assets in the UK. The court referred to the principle espoused by Lord Donaldson MR in *Derby & Co Ltd v Weldon (Nos 3 and 4)*:

Only if there is doubt about whether the order will be obeyed and if, should that occur, no real sanction would exist ... the court should refrain from making an order which the justice of the case requires.<sup>92</sup>

In that case, the court accepted that an effective sanction need not involve specific enforcement of the order in the local or a foreign court. It may be a sufficient sanction to disallow a defence of the defendant in the event of non-compliance. It should be noted, however, that the question of enforceability is part of a wider enquiry and only one of a number of factors going to expediency. In *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA*,<sup>93</sup> Walker J held that the need for connection with the jurisdiction, in the context of orders under s 25 of the *CJJ Act*, should not be unduly narrowed just to considering whether the court would, if the order was disobeyed, have means to enforce it. While he recognised that the availability of mechanisms to enforce the order may be 'highly relevant or even determinative',<sup>94</sup> he stressed that these considerations are not conclusive and emphasised the importance of comity.

Considerations of comity can make it inexpedient to make a freezing order even where an order is unlikely to be futile. In *Mobile Cerro Negro Ltd*, the plaintiff was Venezuela's national oil company and applied for the setting aside of a worldwide freezing order against it in aid of overseas arbitration. The arbitration proceedings concerned the alleged expropriation without sufficient compensation of certain interests of Mobile Cerro Negro in Venezuela, under the nationalisation policy of the Chavez government. The plaintiff argued that the proceedings had insufficient connection with England and Wales because the plaintiff had no assets within the jurisdiction. The defendant argued that the plaintiff was nonetheless likely to comply with any order made by an English court because non-compliance, and a finding of contempt by an English court, would affect significantly its ability to do business in Western Europe. Walker J found that this argument put 'the cart before the horse'.<sup>95</sup> In his opinion, a commercial need for a defendant to comply with an order cannot overcome the lack of substantial connection between English jurisdiction for the Mareva order and the person or assets of the defendant. Where all of the defendant's assets are situated abroad and a defendant will comply with

---

<sup>92</sup> [1990] Ch 65, 81.

<sup>93</sup> [2008] EWHC 532 (QBD); [2008] 2 All ER (Comm) 1034.

<sup>94</sup> *Ibid* [116].

<sup>95</sup> *Ibid* [139].

the order merely out of practical necessity, considerations of comity; that is, respect for the jurisdiction where the substantive proceedings are brought or the assets are located, may become determinative. More regularly, comity and futility will combine to make an order inexpedient, in particular where a non-resident defendant is unlikely to obey a local order and a foreign court is in a better position to enforce compliance with a freezing order.

The comment of Millett LJ (as he then was) in *Refco v Eastern Trading* provides a convenient starting point to examine the relationship of comity and futility. He stated that 'judicial comity requires restraint, based on mutual respect not only for the integrity of one another's process but also for one another's procedural and substantial laws'.<sup>96</sup> Comity is thus concerned with respect for the foreign court, and guarding against the risk of usurping that court's role or interfering with its laws and processes. In contrast, futility is concerned with a court's respect for itself, and the integrity and efficiency of its own processes. Following *Motorola Credit Corp v Uzan (No 2)*,<sup>97</sup> English courts will consider comity and futility as separate, but related, grounds for denying worldwide freezing orders in aid of foreign litigation. As in domestic litigation, a court will be unlikely to make an order that lacks utility for the plaintiff because the court is unable to enforce the order in case of non-compliance. Considerations of comity can reinforce this reluctance where the decision is likely to interfere with the substantial proceedings or the where plaintiff could apply for the order in a jurisdiction more closely connected with the dispute.

## D Conclusion

The preceding discussion shows that, in international litigation, a court can refuse to exercise jurisdiction or to grant injunctive relief where doing so is bound to be futile. As in purely domestic proceedings, futility means that the relief has no real utility for the plaintiff. In international cases, that will often be the case because the defendant is a non-resident who is unlikely to obey the order and the plaintiff would lack suitable means of enforcing compliance in a foreign forum. Concerns about comity can combine with futility to make it appropriate to deny the exercise of the court's jurisdiction.

The cases discussed so far concerned civil proceedings in which the plaintiff acted to protect his or her private rights. When assessing futility, the court will generally focus on the relationship between the litigants and, unless other discretionary factors come into play, an injunction will be issued where it is suitable to protect the primary right of the plaintiff affected by the defendant's current or proposed conduct. The next part will examine how courts deal with arguments of futility in the context of injunctive relief outside the core areas of private law. Where a court has statutory power to grant injunctions in order to protect private as well as public interests, the range of circumstances that a court will consider in the futility inquiry ought be wider. An order may be unable to protect private rights but nonetheless promote a public interest. Only where none of

---

<sup>96</sup> [1999] 1 Lloyd's Rep 159, 175.

<sup>97</sup> [2004] 1 WLR 113.

the legislative objects will be advanced sufficiently through the order would it be appropriate to regard the order as futile.

## V Futility in the Context of Statutory Injunctions

### A *The Japanese Whaling Case*

The *Japanese Whaling* case contains the most recent and most authoritative consideration of futility in the context of statutory injunctions. Between 2004–08, the environmental organisation Humane Society International ('HSI') was engaged in litigation in the Federal Court of Australia against a Japanese whaling company, Kyodo Senpaku Kaisha Ltd ('Kyodo'). The proceedings concerned Kyodo's so-called 'scientific whaling' activities in the Australian Whale Sanctuary ('AWS'). The AWS is part of a territory over which Australia makes an internationally contentious claim of sovereignty. HSI alleged that Kyodo had killed over 428 minke whales in the AWS in breach of ss 229–230 of the EPBC Act. Section 475 of the EPBC Act allows 'interested persons', including established environmental organisations, to bring civil proceedings for an injunction against person engaged in offences against the Act.

At first instance,<sup>98</sup> Allsop J accepted submissions made by the Australian Federal Government as *amicus curiae* that granting leave to effect service abroad 'may upset the diplomatic status quo under the Antarctic Treaty and be contrary to Australia's long term national interests, including its interests connected with its claim to territorial sovereignty to the Antarctic'.<sup>99</sup> Apart from the political sensitivities, Allsop J identified as a second reason for refusing leave that there was a 'lack of means of making any injunction effectual'.<sup>100</sup> This was because:

there is no apparent reason for any of the ships of the respondent ... to call into Australian ports and ... there is no place of business of the respondent in Australia. Also, as the issue is one for public law, it cannot be expected that Japanese courts would give effect to an injunction.<sup>101</sup>

In relation to the claim for a declaration, his Honour commented:

The making of a declaration alone (a course suggested by the applicant) might be seen as tantamount to an empty assertion of domestic law (by the Court), devoid of utility beyond use (by others) as a political statement.<sup>102</sup>

Allsop J regarded the case as an 'an unusual one, in which futility is deeply intertwined with powerful non-justiciable considerations, tending to make it inappropriate to exercise the discretion'<sup>103</sup> to grant leave to serve originating process outside Australia.

---

<sup>98</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510.

<sup>99</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [27].

<sup>100</sup> *Ibid* [33].

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* [34].

<sup>103</sup> *Ibid* [38].

On appeal, the majority of the Full Federal Court overturned the first instance decision.<sup>104</sup> The court unanimously held that the political considerations should not have affected the exercise of discretion and a majority also differed in their assessment of the futility argument. In relation to the diplomatic sensitivities, Black CJ and Finkelstein J, in a joint judgment, referred to the fact that the Act made ‘no provision for the exclusion of the general enforcement provisions of the EPBC Act to matters occurring within the [AWS], even where those matters related to conduct by foreign persons aboard foreign vessels’.<sup>105</sup> Black CJ and Finkelstein J took that as suggesting that it is not appropriate to take political and diplomatic issues into account.<sup>106</sup> The Australian academic commentary on the *Japanese Whaling Case* has focused on this aspect of the decision and its implications for environmental<sup>107</sup> and international law.<sup>108</sup>

While the court was thus unanimous on the justiciability issue, it was divided in relation to the futility argument. Black CJ and Finkelstein J disagreed with Allsop J’s approach on this issue. First, they found that it was premature to consider the practical enforceability at this stage of the proceedings. This was a question that should be decided only when the application to grant an injunction itself is heard and not when the court is deciding to grant leave to serve process.<sup>109</sup> Second, they considered that Allsop J’s approach effectively imposed upon the applicant the onus of demonstrating that an injunction would be a useful remedy, whereas it should be upon the respondent to show that this was not the case.<sup>110</sup> Third, in determining whether to grant an injunction, they held that the court should not necessarily contemplate whether it will be disobeyed.<sup>111</sup> While a judge may refuse to grant an injunction because the defendant is outside the jurisdiction and likely to ignore the order, it would depend upon the circumstances. Black CJ and Finkelstein J regarded these circumstances as yet unknown at that stage of the proceedings and did not share Allsop J’s view that an injunction would be necessarily futile.

A further consideration of their Honours was that different considerations apply to injunctions under the EPBC Act than to ordinary injunctions when determining whether an order would be futile. In particular, the majority expressed the view that it may be open to the court:

---

<sup>104</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425.

<sup>105</sup> *Ibid* [7].

<sup>106</sup> Moore J gave his own reasons for regarding the matter as justiciable: *ibid* [38].

<sup>107</sup> BJ Preston, ‘The Role of Public Interest Environmental Litigation’ (2006) 23 *Environmental and Planning Law Journal* 337; C McGrath, ‘Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest’ (2008) *Environmental and Planning Law Journal* 324; see also the contributions in (2008) 11 *Asia-Pacific Journal of Environmental Law* ‘Special Issue: Japanese Whaling in Antarctica’.

<sup>108</sup> N Klein and N Hughes, ‘National Litigation and International Law: Repercussions for Australia’s Protection of Marine Resources’ (2009) 33 *Melbourne University Law Review* 163; C Sim, ‘Non-Justiciability in International Private Law: A Lack of Judicial Restraint’ (2009) 10 *Melbourne Journal of International Law* 102; C McGrath, ‘Japanese Whaling Case Appeal Succeeds’ (2006) 23 *Environmental and Planning Law Journal* 333; Sam Blay and Karen Bubna-Litic, ‘The Interplay of International Law and Domestic Law: The Case of Australia’s Efforts to Protect Whales’ (2006) 23 *Environmental and Planning Law Journal* 465; R Davis, ‘Enforcing Australian Law in Antarctica: The HSI Litigation’ (2007) 8 *Melbourne Journal of International Law* 142.

<sup>109</sup> *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, [14].

<sup>110</sup> *Ibid* [15].

<sup>111</sup> *Ibid* [16].



to grant the relief sought by way of statutory public interest injunction even though there might be no prospect of the conduct being repeated by the respondent or even because there is no prospect of the injunction being enforced.<sup>112</sup>

In this context, Black CJ and Finkelstein J accepted that even an unenforceable injunction may serve the public interests objects of the EPBC Act by serving an educative purpose. While Moore J (in dissent) agreed that it would be inappropriate to adopt an unduly narrow view of the circumstances in which relief in public interest litigation can be granted, he regarded the proceedings as a ‘legal controversy in form but not in substance’ because any remedy that might be granted will be incapable of enforcement.<sup>113</sup>

After obtaining leave of the court, HSI served the originating process on Kyodo at its place of business in Japan.<sup>114</sup> At the trial, at which Kyodo did not appear, Allsop J granted the injunction and declaration sought by HSI.<sup>115</sup> HSI has since effected substituted service of the orders, preparing the ground for future proceedings for contempt<sup>116</sup> if Kyodo continues to whale in the AWS in defiance of the injunction.<sup>117</sup>

## **B The Wider Purposes of Statutory Injunction Powers**

The plaintiff in the *Japanese Whaling Case*, the environment organisation Humane Society International, was not acting to enforce a private right through an ordinary equitable injunction. It relied on the statutory injunction power contained in the EPBC Act. There are other important Australian regulatory statutes that give the court comparable powers to grant an injunction, such as the TPA s 80<sup>118</sup> and the *Corporations Act 2001* (Cth) s 1324.

---

<sup>112</sup> Ibid [26].

<sup>113</sup> Ibid [47]–[48].

<sup>114</sup> While the Japanese Ministry of Foreign Affairs declined the Australian Embassy’s request for assistance using the usual diplomatic channels, Allsop J allowed substitutes service to Kyodo by serving the originating process in person and through registered mail: *Humane Society International v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124.

<sup>115</sup> *Humane Society International v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

<sup>116</sup> See *Federal Court Rules* (Cth) O 40.

<sup>117</sup> On the difficulties of enforcing the injunction, see C McGrath, ‘Injunction Granted in Japanese Whaling Case’ (2008) 25 *Environmental and Planning Law Journal* 77.

<sup>118</sup> Section 80 relevantly provides:

- (1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute [a relevant contravention] the Court may grant an injunction in such terms as the Court determines to be appropriate.

...

- (4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

On appeal in the *Japanese Whaling Case*, Black CJ and Finkelstein J emphasised that the question of whether an order is futile is linked intimately with the object that the order pursues. They considered that the regulatory objects of the EPBC Act were expressed in the language of ‘promotion’; for example, the object of promoting the conservation of biodiversity.<sup>119</sup> These are clearly public functions that go beyond settling a dispute between private parties. In light of this, Black CJ and Finkelstein J held that an injunction, even where it cannot be enforced against the defendant, can serve an educative purpose by marking the court’s disapproval of the proscribed conduct and discouraging others from acting in a similar way.

In doing so, their Honours drew support from case law on s 80(4) of the TPA, for which wider purposes than the protection of the complainant are also recognised, including:

- to mark out the court’s view of the seriousness of the defendant’s conduct;<sup>120</sup>
- as an additional sanction to a pecuniary penalty, for example to mark the court’s disapproval of the offending conduct by an injunction as well as a monetary remedy;<sup>121</sup>
- to reinforce to the marketplace that the restrained behaviour is unacceptable;<sup>122</sup> or
- to deter the defendant from repeating the offence by attaching to the repetition of the contravention the range of sanctions available for contempt of court.<sup>123</sup>

The purpose of a legislative scheme, and in particular the symbolic and educative effect of an injunction, has also been held to affect the choice of remedy in the context of anti-discrimination and anti-hate speech statutes.<sup>124</sup> In the influential decision of *Citron v Zündel*,<sup>125</sup> the Canadian Human Rights Tribunal held that the respondent had exposed the complainant to racial hatred and contempt by posting discriminatory and inflammatory material on his website. In determining the appropriate remedy, the tribunal was faced with the problem that mirror sites containing the same offensive material had already sprung up elsewhere and that an order against the respondent to remove the material from his website would not result in the material no longer being available on the internet. However, the

- 
- (5) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.[...]

<sup>119</sup> Section 3(1)(c).

<sup>120</sup> *Hughes v Western Australian Cricket Association (Inc)* (1986) ATPR ¶40-748, 48,135 (Toohey J).

<sup>121</sup> *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296, 300 (Toohey J).

<sup>122</sup> *ACCC v 4WD Systems Pty Ltd* (2003) 200 ALR 491, [217] (Selway J).

<sup>123</sup> *ICI Australia Operation Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, 268 (French J).

<sup>124</sup> See further, R Carroll, ‘The Ordered ‘Apology’ as a Remedy under Anti-Discrimination Legislation in Australia: An Exercise in Futility?’, paper presented at the Sixth International Remedies Discussion Forum, Université Paul Cezanne Aix-Marseille III, Aix-en-Provence (France), 5–6 June 2009.

<sup>125</sup> (2002) 41 CHRR D/274; followed in *Jones v Toben* [2002] FCA 1150, [110]–[111] (Branson J).

tribunal nonetheless made a cease and desist order against Zündel. It explained that its function was to determine complaints referred to it and that any further contraventions of the *Canadian Human Rights Act* C 1976–77 c H-6 by others could be dealt with on further complaint. More importantly, the tribunal emphasised that ‘preventions and elimination of discriminatory practices is only one of the outcomes flowing from an Order ... There is also a significant symbolic value in the public denunciation of the actions that are the subject of this complaint’.<sup>126</sup> The Human Rights Tribunal thus clearly recognised that the making of the order against the particular respondent can have vindicatory effect for the complainant as well as serve the wider purposes of the human rights legislation notwithstanding the fact that the objectionable speech itself may remain available from other sources.

A case under s 80 of the TPA, in which the issue of futility was relevant, was *Australian Competition and Consumer Commission v Chen*.<sup>127</sup> In that case, a United States resident offered services from websites located outside Australia but accessible to Australian consumers, which created the false impression that they were authorised by the Sydney Opera House. As s 6(2) of the TPA extends the application of the consumer protection provisions (pt V of the TPA) to conduct in trade or commerce between Australia and places outside Australia, the defendant was held to have engaged in misleading or deceptive conduct over the internet in contravention of s 52 of the TPA. The Federal Court granted injunctive relief under s 80 of the TPA despite the fact that it appeared difficult, if not impossible, directly to enforce any Australian court orders against an overseas resident. Sackville J considered that ‘the language of s 80(1) [TPA is not only] broad enough to permit the Court to prohibit or mandate acts abroad, but there is good reason to interpret it in this way’.<sup>128</sup> While the difficulty of enforcement weighed against ordering an injunction, his Honour considered it ‘appropriate to take into account not only formal enforcement mechanisms, but the likely response of administrative agencies in the foreign country’.<sup>129</sup> As the ACCC led evidence that it would bring any orders made by the court to the attention of its United States counterpart, the Federal Trade Commission, the court was prepared to assume that granting an order would increase the likelihood that the United States authorities would intervene to prevent the respondent from misleading and deceptive conduct against Australian citizens.

The *Japanese Whaling Case* widens the spectre of this latter decision by establishing that an educative effect can be sufficient to justify an order. Black CJ and Finkelstein J found a statutory public interest injunction may be appropriate ‘even though there might be no prospect of the conduct being repeated by the respondent or even because there is no prospect of the injunction being enforced’.<sup>130</sup> This raises the question, however, whether it would not be more appropriate in these circumstances to make a declaration rather than an injunction. This will be discussed in the next section.

---

<sup>126</sup> *Citron v Zündel* (2002) 41 CHRR D/274, [300].

<sup>127</sup> (2003) 132 FCR 309.

<sup>128</sup> *Ibid* [41].

<sup>129</sup> *Ibid* [57].

<sup>130</sup> *Ibid* [26].

### C *Declarations or Injunctions?*

A declaration is a judicial statement of the existence or non-existence of a substantive right or duty of a party. It is binding between the parties but, unlike an injunction or a judgment for damages, it does not contain an order that can, or would need to be, enforced. The remedial purpose of a declaration lies in pronouncing with finality on a legal dispute between the parties.<sup>131</sup> An injunction, on the other hand, vindicates the plaintiff's legal rights by imposing a binding obligation to act, or to refrain from acting, in a particular way. Where an Australian statute provides for injunctions, its purpose also includes the protection of the regulatory objects and the public interest. If an injunction can be granted notwithstanding the fact that the defendant does not intend to engage in the prohibited conduct again or has not previously engaged in that conduct; that is, even in the absence of any (further) infringement of rights, the remedial focus no longer primarily lies on creating an obligation between the parties that is enforceable with contempt proceedings. In those cases, the distinction between an injunction and a declaration becomes somewhat blurred.

In the *Japanese Whaling Case*, Allsop J granted both remedies HSI had applied for: a declaration of contravention and an injunction against future breaches of the EPBC Act, without further considering the relationship between both orders.<sup>132</sup> It could be contended that the declaration that the defendant had engaged in illegal whaling already largely fulfils the purposes of education, disapproval and admonishment, which Australian courts regard as legitimate further rationales for making statutory injunctions. This would mean that the injunction here, despite the potentially wider purposes for which such injunctions may be ordered, actually overlapped largely with the declaration. Its particular significance in this case was limited to very much the same purpose as an ordinary equitable injunction; that is, to provide a basis for sanctioning a further contravention as a contempt of court. The declaration as well as the injunction was likely to remain ineffectual because there was no indication that the defendant would cease its whaling activities as a result of them being declared unlawful or that the plaintiff would be able to enforce a breach of the injunction. If the concern against futile orders is that they affect respect for the court's authority, it can be argued that an injunction which will presumably remain unenforceable is unlikely to cause more harm to the court's standing than a declaration that is likely to be ignored by the defendant. Both remedies were therefore open to the same objection.

Notwithstanding the lack of enforceability, it was appropriate for the court to grant a remedy for the defendant's flagrant breaches of the EPBC Act. The plaintiff submitted that the court's disapproval expressed through its orders may at least have some indirect benefits for whale conservation and there was, in any event, no indication to the contrary. Despite the obvious overlap between the declaration and the injunction, it was also appropriate to grant both remedies. Making a declaration of past wrongdoing, but refusing an injunction against future wrongdoing against an intransigent defendant, may have appeared to the casual

---

<sup>131</sup> In the context of statutory declarations, plaintiffs will often have standing if they have a sufficient interest in the subject matter even if no legal right of the plaintiff is affected by the defendant's conduct.

<sup>132</sup> *Humane Society International v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, [54]–[55].

observer to be sending mixed signals and undermine the vindicatory effect of the declaration.

## VI Conclusion

This article has first examined the rationale of denying the plaintiff a judicial order on the basis that the relief would be futile and then the Anglo-Australian case law in which futility arguments have been made. It has been submitted that futility should be defined as the inability of an order to protect the rights of the plaintiff. One possible rationale for refusing to make futile orders is that they waste the court's resources. But the more powerful reason for denying futile relief is that it may undermine respect for the legal system if a court makes an order that has real no consequences or that it cannot enforce. This is what lies at the heart of the principle that 'equity does not act in vain'.

The case law shows that futility is a consideration in the court's decision on whether to grant the plaintiff the desired relief. In domestic litigation, futility will often be argued in applications for specific performance or an injunction where the subject-matter of the claim can no longer sensibly be protected, or where the defendant is unable to comply with the relief applied for, or where the defendant's compliance with the order cannot be enforced. In cross-border litigation, futility becomes a particular concern where a court is asked to assume jurisdiction over a non-resident defendant but the defendant is not amenable to the courts' enforcement regime and the order is also unlikely to be enforced by a foreign court.

The actual outcome of any futility argument depends on the likelihood that the order will lack utility for the plaintiff as well as the strength of other discretionary considerations. Where it is certain that the order applied for will not be of benefit for the plaintiff, an order will generally be denied. In other cases, the court will weigh the prospect of making a potentially futile order against all other relevant circumstances to determine whether it is still fair and equitable to make the decree the plaintiff applied for (or, where the issue is raised as a jurisdictional question, whether it is appropriate for the court to exercise its jurisdiction). While this balancing exercise will often raise complex issues, courts should be prepared to resolve doubts about the utility in favour of the plaintiff.

The analysis of recent Australian decisions on the courts' power to grant injunctions to enforce regulatory statutes demonstrates that futility is linked intimately with the object of the statute and the extent to which the proposed judicial order promotes the legislative scheme. Where the purposes of a regulatory statute go beyond the protection of individual rights, a court may be prepared to grant an injunction even if it is unlikely that the defendant will continue to interfere with the plaintiff's rights and even where there is no prospect of the injunction being enforced. A court should not refuse to exercise its jurisdiction on the basis of alleged futility where the mere granting of an injunction promotes the objects of the statute even if the likelihood of enforcement is small. The *Japanese Whaling case* is an example of a decision in which an injunction of this kind more closely resembles a declaration of an infringement but leaves open the possibility of enforcement should the circumstances change.