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Keeping Assets on Ice: A Practical Guide to Mareva Injunctions

A *Mareva* injunction is an extraordinary and powerful legal tool that protects the moving party's interests by preserving the respondent's assets until the Court renders its decision. Seeking a *Mareva* injunction can be time-consuming and expensive, and the Court may refuse it or set it aside if the moving party fails to meet the legal test or overlooks key procedural requirements.
To help you navigate this extraordinary remedy, here are some things to consider when seeking or responding to a *Mareva* injunction.

What Is a *Mareva* Injunction?

A *Mareva* injunction (or freezing order) takes its name from the English case *Mareva Compania Naviera SA v International Bulkcarriers SA*. It is a type of extraordinary and equitable interlocutory relief that prevents a party from removing or dissipating assets in a given jurisdiction pending the outcome of a legal proceeding. The overall purpose of a *Mareva* injunction is to prevent a defendant from disposing of their assets in a way which may deprive the plaintiff of an effective remedy. Courts typically grant *Mareva* injunctions in fraud cases.

Courts most commonly grant *Mareva* orders in the context of an impending or ongoing proceeding; however, courts may also grant such orders after judgement to assist with the execution of that judgment.

The Legal Framework

The well-known requirements for obtaining a *Mareva* injunction date back to the Ontario Court of Appeal decision in *Chitel v Rothbart (1982)*. The plaintiff must:

- Demonstrate a strong prima facie case
- Fully and fairly disclose all material matters within their knowledge
- Give particulars of the claim against the defendant, including the grounds, the amount, and any points the defendant could fairly raise in response
- Identify the basis for believing the defendant has assets in the jurisdiction
- Establish grounds for believing there is a real risk the

defendant will remove the assets from the jurisdiction, dispose of them within the jurisdiction, or otherwise deal with them to prevent the plaintiff from satisfying a judgment

- Provide an undertaking as to damages

Courts treat these factors as guidelines rather than rigid criteria. While courts have indicated these factors are essential to granting a *Mareva* injunction, they consistently emphasize the importance of considering what is just and equitable in the circumstances of a given case. For example, where a respondent is properly part of a court's jurisdiction, courts have granted worldwide *Mareva* orders despite the respondent having no assets in the jurisdiction.

What to Consider When Seeking a Mareva Order

A decision to seek a *Mareva* injunction is significant and requires a high level of participation and commitment from both client and counsel at an early stage of the litigation.

Before seeking a *Mareva* order, counsel for the moving party should consider the following:

- Is a *Mareva* order the appropriate remedy? Remember, a *Mareva* is an extraordinary remedy the Court will not grant in the ordinary course. Ask yourself whether there is a reasonable risk the respondent will try to dissipate assets and whether you have evidence to support the risk of dissipation. Will another remedy such as a certificate of pending litigation suffice?
- Does your client have a strong claim? When applying for a *Mareva*, the Court must consider the claim's merits. It is important to formulate your claim as comprehensively as possible, and to have sufficient evidence to support your claim. Your affiant will need to be able to withstand cross-examination on a subsequent motion to set aside.
- What about third parties? There are often substantial costs and time commitments associated with obtaining and enforcing a *Mareva* order against third parties such as financial institutions.
- What about other pre-trial remedies? Determine whether other urgent relief (such as *Norwich* and *Anton Piller* orders) is necessary alongside *Mareva* injunctions in complex cases, particularly those involving fraud. They can serve different, but complementary, purposes in securing a plaintiff's potential claim by compelling third parties to disclose information or documents and allowing

for search and seizure of evidence when there is a real risk the defendant would destroy the evidence prior to trial.

- Beware of the undertaking as to damages. Understand the nature and effect of the undertaking and ensure the moving party is both able and prepared to pay any damages arising out of the *Mareva* injunction if the Court concludes it should not have been granted.
- Can the moving party get through the onerous disclosure hurdle? Are you prepared at this stage to identify the strengths and weaknesses of your case?

The benefits of a *Mareva* injunction are significant, but they are not unlimited.

If the defendants are at real risk of dissipating assets from the jurisdiction, a *Mareva* injunction may be the only way for the wronged party to prevent that from occurring. In addition, the *Mareva* injunction model order requires the defendants to disclose their assets and requires financial institutions to produce account information for the defendants subject to the *Mareva* order. This is powerful information to assist the moving party at the outset of any action.

Although the *Mareva* injunction freezes assets, it operates on an *in personam* basis; it does not attach to a particular asset or give the moving party any priority over it.

What to Consider When Responding to a *Mareva* Injunction

Let there be no doubt — a *Mareva* injunction is a significant order. It freezes the subject party's assets and requires that party to seek the Court's permission before spending on living and legal expenses. The Court typically requires a sworn asset statement, and opposing counsel may cross-examine on that statement.

Counsel responding to a *Mareva* application must carefully review the record to determine whether the Court should have granted the order at all.

Although the Court made the order without notice, it is likely time-limited and should specify a return date. Whether at that date or a later one, the responding party has the opportunity to argue that the Court should set aside or vary the *Mareva* order. Third parties may also apply to vary the order.

Counsel for the responding party should consider the following when trying to set aside or vary a *Mareva* order:

- Did the applicant meet the test for the *Mareva*? Did they demonstrate a strong case and establish a real risk of

asset dissipation?

- Did the applicant satisfy the onerous disclosure obligations, including full and frank disclosure? Counsel should identify any missing material facts the applicant failed to highlight as well as any facts that differ substantially from what the applicant presented at the initial hearing. Counsel should also consider whether a cross-examination on the affidavits in support of the motion demonstrates that there was material non-disclosure.
- Did the Court grant the *Mareva* on very specific terms? Does the order require variation to allow for payment of ordinary and reasonable expenses and legal fees? Should the Court cap the amount frozen or narrow the scope of the order to include specific assets?

Living Expenses & Legal Fees

Freezing orders should not be oppressive. The respondent's priority is securing access to funds for living expenses and legal fees. In many cases, the parties agree to unfreeze specific amounts for these purposes. Where they cannot agree, there may in some circumstances be a contested hearing. When determining whether to vary a *Mareva* order for ordinary living expenses and legal fees, Ontario courts consider the following factors:

- Has the defendant established they have no assets other than those frozen by the injunction?
- If so, has the defendant shown the injunction captures assets from a source other than the plaintiff and therefore not subject to a proprietary claim by them?
- Has the defendant exhausted non-proprietary assets before looking to proprietary assets to pay expenses?

If the defendant has met the previous three tests and requires living expenses and legal funds, the Court must assess the balance of convenience.

From a practical standpoint, the Court may also impose a reporting regime to monitor the source of funds for living expenses or specify an account from which the defendant may withdraw funds.