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The Mareva Injunction: An Extraordinary Remedy

If done right, a Mareva injunction can be a powerful tool to protect the moving party's interests. On the other hand, it can be a time consuming and expensive exercise, which can ultimately be refused or set aside if the test for a Mareva is not met or the moving party has failed to give full and frank disclosure to the Court.

Here are some things to consider when seeking or responding to a Mareva injunction, to help you better navigate this extraordinary remedy:

What Is A Mareva Injunction?

A freezing order, or a Mareva injunction which takes its name from the English case of *Mareva Compania Naviera S.A. v. International Bulkcarriers Ltd*, 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. Mareva injunctions are typically granted in fraud cases.

The Legal Framework

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

- a) show that he or she has a strong prima facie case;
- b) make full and fair disclosure of all material matters within his or her knowledge;
- c) give particulars of the claim against the defendant, stating the grounds of the claim, the amount thereof, and the points that could be fairly made against it by the defendant;
- d) give the basis for believing that the defendant has assets in the jurisdiction;
- e) give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction, or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and
- f) give an undertaking as to damages.

While Courts have indicated that these factors are essential for

a Mareva injunction to issue, they have also consistently emphasized the importance of considering what is just and equitable in the circumstances of a given case.

What To Consider When Seeking A Mareva Order?

Moving for a Mareva is a significant step that will require a high level of participation and commitment from both client and counsel.

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 that will not be granted in the ordinary course. Ask yourself whether there is a reasonable risk that the respondent will try to dissipate assets and whether you have evidence to support the risk of dissipation. Will another remedy like a certificate of pending litigation suffice?
- The substantive claim – Does your client have a strong claim? When applying for a Mareva, the Court must consider the merits of the claim. It is important to formulate the claim as complete as possible and to have the 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.
- Beware of the undertaking as to damages – Understand the nature and effect of the undertaking and ensure that the moving party is both able and prepared to agree to pay any damages arising out of the Mareva injunction in the event a 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 weakness of your case?

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

The benefits are not unlimited however. Although the Mareva injunction freezes assets, it operates on an *in personam* basis; it does not attach to a particular asset nor 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 to be made against a party. Their assets are frozen and they must now seek permission from the Court for both living and legal expenses. A sworn asset statement is usually required and cross-examination will be permitted on that statement. A careful review of the record is crucial in order to determine whether the order should have been granted at all.

Although the order was made without notice, it is likely time limited and should contain a term specifying a return date. Whether at that date or a later one, the responding party has the opportunity to argue that the Mareva order should be set aside or varied.

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

- Was the test for the Mareva met? Is there a strong case and have they established a risk that assets will be dissipated?
- Was there full and frank disclosure? Counsel should highlight any missing material facts that were not highlighted to the Court as well as any facts that are substantially different than what was presented at the initial hearing. Will a cross-examination on the affidavits in support of the motion demonstrate that there was material non-disclosure?
- Does the order need to be varied to allow for payment of ordinary and reasonable expenses and legal fees? Should there be a cap on the amount frozen?

Living Expenses & Legal Fees

An important first step for the respondent is gaining access to living expenses and legal fees. In many cases, the parties agree that specific amounts can be unfrozen to allow access for these purposes. If it is not agreed, 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 that he has no other assets other than those frozen by the injunction?

- If so, has the defendant shown that there are assets caught by the injunction that is from a source other than the plaintiff, and therefore not subject to a proprietary claim by him?
- Has the defendant exhausted non-proprietary assets before looking to proprietary assets to pay expenses?
- If the defendant has met the previous three tests above 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 funds may be withdrawn.