

Focus BUSINESS LAW

The power and peril of a Mareva injunction



Monique Jilesen

All businesses, non-profits and government organizations are at risk of bad actors who commit fraud. When an organization discovers it is a victim of fraud, it must act quickly to pursue legal options for recovery. A Mareva injunction is a powerful remedy, but its risks must be carefully considered before embarking on this path.

The power of the Mareva injunction should not be underestimated. It gives notice to banks that assets must be frozen and it requires the defendant to deliver a sworn affidavit and to be examined under oath. It therefore not only preserves the assets, but also helps you find them — wherever they might be.

Because the relief obtained is so wide-ranging, the Mareva injunction is considered an “extraordinary remedy” and will only be granted where a stringent test is satisfied. One must demonstrate, among other things, a strong prima facie case against the defendant and a serious risk that the defendant will remove assets from the jurisdiction or dissipate assets prior to judgment.

As a result, in deciding whether to pursue a Mareva injunction, a party must first consider the strength of its case. In some instances, establishing a strong case will require a complex forensic analysis. Without this evidence, a party may be unable to satisfy the strong prima facie case element of the test. Such was the case in *Furrow Systems International Ltd. v. Island Pools & Landscaping Ltd.* [2014] O.J. No. 4354, where the plaintiff’s evidence of the alleged misappropriation of corporate trust funds did not extend beyond a bald allegation contained in an affidavit of the president of the plaintiff corporation.

Before seeking a Mareva injunction, a party must also consider whether it has sufficient evidence to satisfy the requirement of proving a “serious risk” of dissipation. Evidence that the defendant, at the time of the motion, has already taken steps to shelter or dispose of assets will satisfy this requirement. The risk of asset dissipation can also be inferred from the circumstances of the



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alleged fraud perpetrated against the plaintiff, as well as the defendant’s pattern of previous behaviour involving fraud or misrepresentations (*Quality Haulage & Farming Ltd. v. Karda* [2014] O.J. No. 1752).

There are many practical considerations involving the cost of obtaining, enforcing and maintaining a Mareva injunction. The costs of investigation and preparation for the injunction hearing itself and follow-up attendances will be substantial in light of the stringent legal test that must be met.

A moving party must give an undertaking as to damages. If the plaintiff is ultimately unsuccessful in his claim, he could be liable to the defendant for damages caused by the injunction. Accordingly, the moving party must be confident in the factual and legal basis for the injunction or risk being responsible for costs and damages.

Finally, it is not unusual that respondents to a Mareva injunction will obfuscate or ignore orders of the court, requiring multiple attendances and potentially contempt proceedings in order to enforce the Mareva, again significantly increasing legal costs.

In *Pronesti v. 1309395 Ontario Ltd.* [2014] O.J. No. 6088, a Mareva injunction was granted which provided for,

among other things, an examination under oath. One of the respondents refused to answer any questions. A re-attendance

was ordered. The court summarized the evidence on the re-examination as “an exercise in obfuscation.” As a result, the plaintiff brought a motion for contempt. In a footnote to the contempt decision, Justice Frederick Myers noted that “the court did note during an earlier hearing that perhaps a couple of nights in jail might improve the Balroops’ memories. Without taking credit, the court notes a vast improvement did in fact occur during the hearing of the motion.” In the contempt decision Justice Myers encouraged the respondents to consider purging their contempt prior to their motion to set

aside the Mareva order. It remains to be seen, despite the success of the plaintiff on each of the reported motions to date, whether the plaintiff will establish its claim against the respondents and if it does, whether the funds have already been dissipated beyond the reach of the court and the plaintiff.

In short, from a practical perspective, when considering whether to bring a Mareva injunction, the underlying question is whether the injunction will succeed in freezing assets valued in excess of the plaintiff’s costs in obtaining and continuing the injunction. Where the defendant has already spirited away the majority of his assets at the time the plaintiff discovers the fraud, a plaintiff’s success in obtaining a Mareva injunction may prove to be a pyrrhic victory. However, in appropriate cases, where the victim acts swiftly, a Mareva injunction can effectively secure the plaintiff’s remedy in circumstances in which the defendant may otherwise have rendered him or herself judgment-proof.

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Two drivers penalized for ‘icing’

Alcohol and advanced problem-solving can be a slippery slope, as two men found out recently. As reported by nbcnewyork.com, Brian Byers and Alexander Zambenedetti, both 20, were arrested in Sparta, N.J., for pouring buckets of water on a road in order to fabricate the cause of an accident. According to police, Byers allegedly blew through a stop sign in a relative’s car and smashed into a guardrail. He then drove home and, with the help of his friend Zambenedetti, drove back to the intersection and poured water on it, which quickly froze into black ice in the frigid cold. That plan began to unravel when police happened by and saw Zambenedetti standing outside without a shirt, Byers in the passenger’s seat and two buckets in clear view. Byers was charged with DWI, leaving the scene of an accident, and disorderly conduct for creating a dangerous condition by purposely icing the intersection. Zambenedetti was charged with DWI, careless driving, and failure to wear a seat belt. A half ton of salt was needed to make the intersection safe. — STAFF