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Freezing your own funds: How to vary your Mareva injunction

What happens when you take the unusual step of freezing your own assets with a Mareva injunction, but later find you need to access the funds? In *Yan v. Chen*, 2015 ONSC 4149, the Ontario Superior Court considered an unusual request — a motion by the plaintiffs to vary a Mareva injunction they obtained in respect of their own bank account.

The two couples involved in the action - the plaintiffs, Yan and Wang, and the defendants, Chen and Szeto - each alleged that the other defrauded them of millions of dollars. The dispute gave rise to multiple criminal, quasi-criminal and civil proceedings.

In December 2013, the plaintiffs applied for injunctive relief in respect of accounts owned by them and the defendants. Based on the evidence, the defendants had access to the plaintiffs' account and had attempted, albeit unsuccessfully, to transfer funds from that account into their own. To prevent future attempted transfers, the plaintiffs included their account as part of the Mareva injunction. The Court granted the injunction, freezing that account, as well as various assets and accounts owned by the defendants.

The plaintiffs subsequently brought a motion to release funds from their frozen account to pay legal fees. The defendants brought a cross-motion to release funds from their own account for the same reason.

The test to be applied in varying a Mareva injunction to permit frozen funds to be used for living and legal expenses is set out in *Waxman v Waxman*, 2007 ONCA 326. However, the Court determined that different considerations apply when it is the plaintiff seeking the release of his or her own frozen funds. The plaintiff must first establish that he or she has a proprietary right to the funds. If the plaintiff satisfies this burden, the Court will go on to consider such factors as why the monies were frozen in the first place, the status of the action, the proposed use of the funds, and any competing claims to the funds.

Here, the Court granted both motions, finding that each party had established a proprietary right to the funds in their respective accounts. However, given the credibility issues and the particular circumstances of the litigation, the Court released only a portion of the funds requested by the parties and ordered

that the money was to be held in trust by their respective solicitors, to be used only for legal fees. The Court also specifically ordered that the funds were not to be used by the defendants to pay any costs awards to the plaintiffs.

In addition, the Court stayed all civil proceedings between the parties pending a determination of the issues in the action. The Court noted that the plaintiffs had access to significant funds to pay legal expenses. However, instead of proceeding with the action, they launched a series of other proceedings, both civil and criminal, incurring significant legal fees and requiring motions for access to additional funds to pay the fees.

This case, while peculiar, provides an important lesson: if you freeze your own bank account, keep your litigation costs under control and avoid engaging in multiple lawsuits. Otherwise, you may not be able to fund your own lawsuit.