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TAB 13

The Six-Minute Debtor-Creditor AND INSOLVENCY LAWYER

Can I Freeze a Judgment Debtor's Assets? (Mareva Injunction in Aid of Execution)

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WHAT DO I TELL A CLIENT WHO ASKS: CAN I FREEZE A JUDGMENT DEBTOR'S ASSETS? (MAREVA INJUNCTION IN AID OF EXECUTION)

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INTRODUCTION

Mareva injunctions or Mareva orders are often considered a pre-judgment step taken by a Plaintiff in order to secure or protect certain assets in anticipation of an eventual judgment. While it is true that Mareva orders are most commonly sought as an interlocutory remedy, they are not restricted to the pre-judgment stage of a proceeding – Mareva injunctions are also available in aid of execution *post-judgment*. This paper provides an overview of the adoption of Mareva orders into Canadian law and their transition from an exclusively pre-judgment tool into a useful tool post-judgment. However, whether a Mareva order is issued pre-judgment or post-judgment, the purpose of such injunctive relief remains to preserve and protect assets. As a result, the jurisprudence developed with respect to standard interlocutory pre-judgment Mareva orders remain relevant and should be considered when seeking post-judgment relief.

SECTION 1 – HISTORICAL OVERVIEW

I. What is a Mareva injunction?

> "A Mareva injunction is an exceptional form of interlocutory relief designed to freeze the assets of the defendant, in appropriate circumstances, pending determination of the plaintiff's claim. Execution, on the other hand, refers to the process by which a successful plaintiff may enforce a judgment. It encompasses those remedies available to a creditor after a court has declared that a sum of money is immediately due and owing by a debtor. A party obtaining a Mareva injunction

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> is required to give an undertaking to pay damages in the event that any are suffered due to the defendant's inability to deal with the property. This is an irrelevant consideration insofar as an execution is concerned.[2]

Typically, this form of relief is sought by a party where there is a real concern that the defendant may willfully deplete, or remove from the jurisdiction, assets in order to avoid enforcement. Motions seeking a Mareva order are normally without notice to the affected party. As succinctly put in *Chitel v Rothbart*, a Mareva order is "ordering security before judgment".[3]

II. Origin

Mareva injunctions were formally adopted into Canadian jurisprudence in 1982 through the case of *Chitel v Rothbart* at the Ontario Court of Appeal after years of uncertain and inconsistent treatment in the lower courts. In *Chitel*, the judge presiding over the matter in the lower court referred the application for the Mareva order to the Court of Appeal on the basis that there was a divergence of authority as to whether or not awarding such relief was an appropriate use of his discretion at the pre-judgment stage of a proceeding. In *Chitel*, the application was flawed in several areas and ultimately did not succeed. Despite this, Justice Mackinnon seized the opportunity to clarify the law at the appellate level in order to provide better guidance for the lower courts.

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[2] *R v Fastfrate*, 1995 CanLII 1527 (ON CA) at para 130 [*Fastfrate*].
[3] 1982 CanLII 1956 (ON CA) at para 30 [*Chitel*].

The general rule in common law jurisdictions was that an interlocutory injunction would not be granted to restrict a defendant from dealing with their assets prior to judgment. It is often phrased as, "there shall not be be execution before judgment" and attributed to the old 1890 English case of *Lister & Co. v. Stubbs*. However, traditionally, there had been exceptions to the general rule and an interlocutory injunction may be appropriate to restrain a defendant from dealing with certain assets – e.g. where the subject matter of the litigation concerned the property over which injunctive relief was sought (see now Rule 45 of the *Rules of Civil Procedure*); or where there was a prima facie case for fraud or theft.

In *Chitel*, Justice Mackinnon reviewed a trilogy of English cases, namely: *Nippon Yusen Kaisha v Karageoris*[4]*; Mareva Compania Naviera S.A. v Int. Bulcarriers SA*[5]*;* and, *Rasu Maritma SA v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[6] that sought to expand the circumstances under which an interlocutory injunction could be granted. Initially, these cases sought to address a specific problem involving foreign shipping entities that could leave the jurisdiction and move any assets out of the jurisdiction upon being served with a claim. These three English cases, and some that followed, established that in the right circumstances, the court may grant injunctive relief restricting a defendant's ability to deal with its assets prior to judgment where assets existed within the jurisdiction, but there was a real risk of the removal of assets from the jurisdiction.

[4] *Nippon Yusen Kaisha v. Karageorgis et al.*, [1975] 3 All E.R. 282.
[5] *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.*, [1980] 1 All E.R. 213.
[6] *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [1978] Q.B. 644, [1977] 3 All E.R. 324.

Justice Mackinnon continued to review the evolution of the Mareva injunction in the English cases, which had evolved beyond its application to foreign defendants but to domestic defendants as well, and confirmed its use in Ontario.

SECTION 2 – JURISDICTION AND THE TEST

I. *Courts of Justice Act* and *Rules of Civil Procedure*

In Ontario, jurisdiction of the Court to grant injunctive relief is codified in section 101 of the *Courts of Justice Act*. Section 101 gives a judge jurisdiction to grant an interlocutory injunction where it appears "just or convenient to do so".[7] Rule 40 of the *Rules of Civil Procedure* sets out the procedure for seeking an interlocutory injunction and specifically, codifies many aspects of the common law test.[8] Rule 40.02(1) limits any injunction or mandatory order obtained without notice to a period of 10 days. An extension must be obtained on notice to all affected parties, unless the judge is satisfied that a party is evading service, or there are other exceptional circumstances that warrant an extension without notice.[9] Rule 40.03 requires that, unless the court orders otherwise, the moving party undertake to abide by any order concerning damages resulting from an injunction or mandatory.[10]

II. Common Law Test

[7] RSO 1990, c C. 43.
[8] RRO 1990, Reg 194.
[9] *Ibid*, s 40.02(2).
[10] *Ibid.*

The criteria specifically for a Mareva order are not enumerated in statute and have been developed from the common law in both English and Canadian courts. It is well established that a successful Mareva application meets the following five-part test as set out and confirmed in *Chitel,* summarized as follows:

a) the plaintiff must make full and frank disclosure of all material facts within his/her knowledge;
b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;
d) the plaintiff must 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; and
e) the plaintiff must give an undertaking as to damages.[11]

In addition, with respect to the nature of the claim against the defendant, the plaintiff is required to show a strong *prima facie* case.

SECTION 3 – MAREVA IN AID OF EXECUTION

I. Foundational Case Law

[11] *Coast to Coast Against Cancer v Sokolowski,* 2016 ONSC 170 at para. 6 [*Coast to Coast*].

As previously discussed, a Mareva order is a form of interlocutory injunctive relief and is available to a plaintiff prior to judgment, provided the five-part test is met. A Mareva order can also be obtained by a creditor post-judgment, provided the same five-part test is met, except that one part of the test (the strong *prima facie* case requirement) may be elementary since the granting of a judgment will satisfy this requirement in and of itself. Moreover, the concern expressed by Justice Mckinnon in *Chitel v. Rothbart,* that the Mareva injunction is not used and does not become a weapon in the hands of a plaintiff to force inequitable settlements, is largely inapplicable where a judgment has already been granted to a plaintiff.

It is worth noting that in order to obtain a Mareva post-judgment, a creditor need not have applied for a Mareva at an earlier stage in the proceeding.[12] It does not matter if an application was made earlier in the proceedings and was successful or unsuccessful. An unsuccessful Mareva application at an earlier stage of the proceedings is not determinative on the question of whether a Mareva should be granted in aid of execution. What is important is that a creditor meets the five-part test. This was determined in the 1999 case of *Lamont v Kent*.[13] However, from a practical perspective, the fact that a Mareva had been ordered earlier will certainly be a factor that could increase the likelihood of a post-judgment Mareva order.

In *Lamont* the issue was framed not as whether or not the five-part test was satisfied on the part of the creditor, but rather as whether an interlocutory order could be granted post-judgment. The debtor's position, in that case, was that an interlocutory order could not be granted by the court post-judgment as interlocutory orders normally merge with final orders. In rejecting this argument, the court relied on section 101 of the *Courts of Justice Act*[14], in addition to the English decision

[12] *Lamont v. Kent,* [1999] OJ No. 277; 30 CPC (4th) 168 (Ont Gen Div) at 8 [*Lamont*].
[13] *Ibid*.
[14] *Supra* note 7.

Smith v Cowell[15], as adopted in Ontario in *Bee Chemical Co. v. Plastic Paint & Finish Specialties Ltd.*[16] to find that an interlocutory order is any order other than a final order, meaning that an interlocutory order can be made both pre and post-judgment.[17] Accordingly, it was determined that a Mareva was available post-judgment.

II. Post-*Lamont v. Kent*

Following *Lamont v Kent*, post-judgment Mareva orders were sought and granted in *Hilltop Group Ltd. v. Katana,*[18] *O.K. Tire Stores Inc. v. Mclaughlin*[19]and *American Environmental Container Corp. v. Kennedy*.[20] In the *Hilltop* case, the Mareva order was again a continuation of an earlier, pre-trial order, and ordered to remain in effect pending a final determination of an appeal or further order of the Court of Appeal. In the *O.K. Tire* case, the judgment creditor sought a Mareva order over specific assets listed in an affidavit, as well as other property owned solely or jointly by the judgment creditors. The judge declined to extend the order to unspecified property and avoid generally restraining the defendants from otherwise dealing with their property not otherwise referred to in the motion.[21] Finally, in the *American Environmental* case, the court granted a Mareva order in relation to certain judgment debtors, but in the context of a new action against other related defendants, and only for the 10 day period as the motion was *ex parte*.

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[15] (1880), 6 Q.B.D. 75.
[16] [1979] O.J. No. 3126, 13 C.P.C. 131 at para 6.
[17] *Lamont*, supra note 13 at para 9.
[18] 2002 CanLII 9075 (ON SC).
[19] 2008 CanLII 6196.
[20] 2014 ONSC 4438.
[21] *O.K. Tires, supra* at para 16-18.

Two recent cases demonstrate that a Mareva in aid of execution remains a valid order available to judgment creditors. Both cases rely on *Lamont* and stand for the proposition that a Mareva is available post-judgment and can be tailored to meet the circumstances of a particular case.

In the case of *Coast to Coast Against Cancer v. Sokolowski*, the court relies on *Lamont v Kent* and affirms the availability of a Mareva post-judgment.[22] In this case, it was found that strong evidence of fraud could be used as a substitute for evidence indicating a risk of assets being removed from a jurisdiction.[23] *Coast to Coast* dealt with a non-profit charitable organization being defrauded in excess of $700,000 by one of its directors, Sokolowski, who was involved in the day-to-day operations of the charity.[24] It was discovered that Sokolowski had been misappropriating the charity's money for his own purposes after the organization conducted an internal audit. This was done largely through the use of a shell corporation (whom he was the sole director and officer) and co-defendant, Courtyard Group of Companies Inc.[25] Shortly thereafter, the charity commenced an action against Sokolowski and the other involved parties and given the appearance of fraud, the plaintiff moved swiftly for a Mareva injunction.

Justice Chiapetta gratned the first *ex parte* Mareva injunction, which was then extended by Justice Brown (as he then was) until trial[26] In addition to this relief, ancillary relief was granted requiring disclosures by third-party banks and an affidavit describing Sokolowski's assets.[27] This

[22] *Supra* note 11.
[23] *Ibid* at para 8-9.
[24] *Coast to Coast Against Cancer v Sokolowski*, 2015 ONSC 7388 at para 4.
[25] *Ibid* at para 4.
[26] *Ibid* at para. 5.
[27] *Ibid* at para 64.

order was varied slightly on consent to allow for Sokolowski to open an account for living/legal expenses in addition to releasing a hold placed on his mother's bank account.[28]

Following judgment, the plaintiff sought an order extending the existing Mareva injunction until such time as the plaintiff could cause the issuance of a writ of seizure and sale (and presumably, it's registration with the Sheriff), or the appointment of a receiver over the defendant's assets.[29] In other words, the Mareva order was sought to address a short period of time between judgment and enforcement of the judgment (either by writ of seizure and sale or by court-appointed receiver).

The plaintiff had little issue extending the Mareva order in aid of execution. Not only had the test been passed earlier in the proceeding in granting the initial Mareva, the order had subsequently been extended and now there was an actual judgment in place against Sokolowski instead of merely a strong *prima facie* case. While all of these factors played into extending the order post-judgment, the presiding judge pointed out that such a strong case of fraud could serve as a substitute for proof of judgment debtor's intent to deplete their assets:

> "While I was not specifically asked to make a finding that Sokolowski had or remains intent upon dissipating his assets, in my view the evidence of fraud was so strong that, even if the prior Mareva injunction had not been granted or extended, Sokolowski's fraud gave rise to an inference that there was a real risk that he would attempt to dissipate or hide his assets, or remove them from the jurisdiction."[30]

The post-judgment Mareva order in *Coast to Coast* was for a 6-month period to protect the judgment creditor until execution could be realized, without prejudice to the plaintiff seeking extensions.[31]

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[28] *Ibid* at para 56-57.
[29] *Coast to Coast Against Cancer v Sokolowski*, 2015 ONSC 7931 at para. 2
[30] *Coast to Coast* supra note 23 at para 9.
[31] *Ibid* at para 11.

Similar to *Coast to Coast*, the defendant in *Canadian Premier Life Insurance Co v. Ho*[32] was found to be in breach of a fiduciary duty to his employer in addition to being found liable for fraud in excess of $800,000.00.[33] In *Ho*, the defendant worked as a claims adjuster for the plaintiff. The scheme involved the defendant making weekly claims for unemployment benefits to an alias on a weekly basis over a span of nearly two years.[34] Prior to judgment, a Mareva order was granted and through ancillary relief accompany the Mareva, two CIBC bank accounts were discovered and frozen where the majority of the funds produced by scheme wound up.[35] An additional TD account was also discovered and frozen.[36]

However, unlike *Coast to Coast*, the judge in *Ho* had declared virtually all of the tangible property and funds identified in the Mareva process to be proceeds of the fraud and thus, the beneficial property of the plaintiff, and vested these proceeds and certain other property in the plaintiff.[37] Having done so, the judge questioned the need for a Mareva order. However, the judge felt it was appropriate to order a Mareva in aid of execution for just over a month following the date of judgment for the purpose of allowing the judgment creditor time to sort out what enforcement steps were appropriate without the risk of assets "falling between the cracks in the interim."[38]

In another relatively recent case, *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*[39], the Superior Court of Justice did not grant the requested post-judgment Mareva order. This case is contrasted with *Hilltop*. In *Hilltop*, there was an existing pre-trial Mareva

[32] *Canadian Premier Life Insurance Company v Ho*, 2016 ONSC 496 (CanLII) at para 46-47 [*Ho*].
[33] *Ibid* at para 50.
[34] *Ibid* at para 10-11.
[35] *Ibid* at para 33.
[36] *Ibid.*
[37] *Ibid* at par 46-50.
[38] *Ibid* at paras 46-48.
[39] 2011 ONSC 1305.

injunction, judgment had been granted then appealed, creating an automatic stay of the judgment (with respect to payment of money). In that case, the rationale for extending the Mareva order pending appeal was appropriate since pending appeal, in the presence of a stay of enforcement, the risk of dissipation continued.

However, in the *Bruno Appliance* case, there was no prior Mareva order. In addition, the plaintiff had earlier brought a motion to the Court of Appeal seeking an order lifting the automatic stay and requiring the defendant to pay security for the amounts awarded into court. That motion was adjourned and when ordering the adjournment, the judge permitted the judgment to be registered against certain lands, and the examination of one of the defendants. At a further hearing, the Court of Appeal also ordered payment into court of security and the filing of an undertaking by the defendant that he would not encumber or dispose of any land pending the appeal. The motion for a Mareva order was, therefore, seen as improper and any such relief should have been requested on the motion to the Court of Appeal, not in a separate motion to the Superior Court of Justice.

Although, the basis for denying the request for a Mareva was largely based on jurisdictional issues, the case highlights that even in cases involving fraud, a Mareva order will not be simply for the taking just because one may have a judgment.

III. Takeaway Features of Mareva Injunctions in Aid of Execution

A number features can be gleaned from the cases. First, although not a condition, a Mareva injunction may be more readily available post-judgment in instances where a Mareva injunction had already been issued pre-judgment. In one sense, the Mareva in aid of execution merely

continues the prior existing Mareva order and so long as the risk of dissipation continues to exist, the appropriateness of such an order is likely to continue exist as well. However, where a Mareva order had not been requested or issued pre-judgment, a court is apt to scrutinize the necessity for such extraordinary relief when other enforcement options exist. A Mareva order in aid of execution will not be simply "for the taking" even if a judgment has issued.

Second, the nature of a post-judgment Mareva order in aid of execution will often be temporary in nature, and only ordered to continue for so long as is necessary (normally, to take other enforcement steps). In other words, where a traditional interlocutory Mareva injunction is normally made pending a final disposition of the case, a Mareva injunction in aid of execution can be seen as being made pending execution of the judgment.

Third, the scope of the Mareva order should be limited to specific property not exceeding the value of the judgment. This would be the case for pre-trial Mareva orders as well but in the case of a post-judgment Mareva order, it will not be uncommon for the claim to have been crystallized, and perhaps less than what may have been claimed in the Statement of Claim. If assets are not specifically identified, courts may be wary of making blanket Mareva orders that may unduly restrict the defendant's use of its property.

CONCLUSION

Given that there has been a final determination of liability, it may appear at first glance to be easier to obtain a Mareva in aid of execution than a Mareva issued at an earlier stage during a proceeding. However, it is still important to note that this type of relief is granted only when "just and convenient" in the context of the circumstances of each case. Regardless of the fact that

judgment has been obtained successfully, the test for a Mareva in aid of execution is identical to that of a Mareva at an earlier stage. As a judgement creditor, a plaintiff will often have a range of enforcement options available to it. Therefore, it is incumbent on the plaintiff to persuade a court why such an order is necessary in the circumstances. The purpose of the Mareva in aid of execution serves the same purpose as a pre-judgment one – to preserve specific assets at risk of dissipation pending a certain event. Thus, even in this context, the Mareva in aid of execution is better viewed as a preservation tool, not an enforcement tool.