

Part B The Collection of Taxation Debts**36 MAREVA INJUNCTIONS**

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

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36.1 PURPOSE

36.1.1 The purpose of this chapter is to provide a general understanding of Mareva injunctions and when these should be used.

36.2 INTRODUCTION

36.2.1 The Mareva injunction is a legal procedure initially devised by the English courts. It gained its name from one of the initial cases in which such an injunction was granted by Lord Denning in 1975; *Mareva Campania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509.

36.2.2 In the early stages of its development, a Mareva injunction was used to restrain foreign defendants in actions for recovery of debts from removing assets from the jurisdiction of the Court. Nowadays, the defendant need not be foreign or foreign-based. The mode of dealing with assets is not limited to removing them from the jurisdiction. For example, there may be a fear that money in a bank account will be withdrawn and dissipated, or that expensive cars have been purchased as assets easily concealed and disposed of for cash or that a company with nominal paid up capital is likely to distribute its assets to the beneficiaries of the trust of which it is the trustee.

36.2.3 Mareva injunctions are available in all Australian Courts. In *Jackson v Sterling industries Ltd.* (1987) 162 CLR 612;71 ALR 457, the High Court expressly recognised it and held that, as a general proposition, it should now be accepted in Australia that a Mareva injunction can be granted if the circumstances are such that there is danger of the defendant absconding, or a danger of his or her assets being removed from the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a real danger that a successful plaintiff will not be able to have his or her judgment satisfied. The High Court further expressed the view that the Mareva jurisdiction is based on the court's power to prevent an abuse of its process. Any attempt by a defendant to frustrate the enforcement of judgment, for example by moving or concealing assets, is an abuse of its process.

36.2.4 A Mareva injunction may be granted either before or after judgment has been obtained, and even in support of a costs order prior to taxation of costs. To this end, it represents a limited exception to the general rule that a plaintiff must obtain his judgment and then enforce it.

36.2.5 To justify a Mareva injunction, there must be in the view of the court a real and not merely fanciful risk 'that in the absence of an injunction any

assets wherever located which the defendant may have will be dissipated or dealt with in some fashion such that the plaintiff will not be able to have the judgment satisfied'. In this context, the court is unlikely to restrain a defendant from embarking on a course of conduct, which forms part of his normal course of business. For example, the court is unlikely to restrain a real estate developer from dealing with his/her real property, which constitutes his stock on hand and forms an integral part of his business.

- 36.2.6 The type of assets that are commonly made the subject of a Mareva injunction includes land, cash, the contents of bank accounts and shares.

Third parties

- 36.2.7 During investigations of the defendants' affairs, including their compliance history, it may become apparent that their affairs have been deliberately organised in this manner in order to frustrate any judgments made against them.
- 36.2.8 A Mareva injunction can be used to restrain the disposal or removal of assets held by third parties where it can be demonstrated to the Court that the debtor against whom judgment may be obtained has some control over property held by a third party. *DFC of T v Ousley & Ors* 92 ATC 4168.
- 36.2.9 Alternatively, a Mareva injunction may be granted against third parties where they have obtained the assets of the defendant by means of sham transactions or fraudulent conveyances. The court has taken the view on a number of occasions that assets, even though in the name of the defendant's spouse, were in reality family assets.
- 36.2.10 The evidentiary onus lies on the Plaintiff to convince the court that the assets of the third party are, in reality available to the defendant to meet his obligations.

Breaches

- 36.2.11 A Mareva injunction is a court order. Consequently, wilful breaches are punishable as a contempt of Court with appropriate penalties.
- 36.2.12 As a model litigant, the Commissioner has a duty to bring such contempt to the attention of the Court.
- 36.2.13 In an unreported Tax Office matter, a defendant who purported to assign his half share of his matrimonial home to his estranged spouse under a Family Law settlement while a Mareva injunction was in force, was sentenced to two months imprisonment.
- 36.2.14 On the other hand, because the Mareva injunction is an equitable remedy, the Court will not tolerate any abuse of the procedure. Accordingly, improper conduct by the plaintiff, such as not commencing recovery proceedings until well after the due date of an assessment or putting unfair pressure on the defendant may lead the Court to refuse to grant or continue the injunction.

Taxation context

- 36.2.15 In the taxation context, a debtor might decide to deny the Commissioner access to his or her assets by disposing of them, or moving them to places where the Commissioner could not levy execution on them. To

avoid this, the Commissioner can apply to the Court for a Mareva injunction, which would prohibit the debtor from dealing with his or her assets pending further orders from the Court.

- 36.2.16 The Courts have been prepared to adapt Mareva injunctions to a range of situations, eg to combat a comprehensive 'web or scheme' designed to disguise a taxpayer's ownership of assets and thus assist the taxpayer evading tax: *DFC of T v Winter* ATC 4144.
- 36.2.17 In other unreported cases, the court has been receptive to the Commissioner's application for Mareva injunctions particularly in cases where the liability arises out of an audit of undisclosed income or where the debt has arisen as a result of a fraud on the Commonwealth.
- 36.2.18 The Courts have also recognised that an income tax liability becomes due (although not payable until a future date) upon service of the notice of assessment. To this end, the court have been prepared to grant Mareva injunctions notwithstanding that the due date for payment of the assessment has not yet expired: *DFC of T v Sharp & Anor; Ex parte DFC of T* 88 ATC 4572.
- 36.2.19 The existence of a Mareva injunction does not prevent parties other than the defendant from dealing with the defendant's assets. Accordingly, the existence of a Mareva injunction would not preclude the Commissioner from utilising his garnishee powers pursuant to section 260-5 of the TAA 1953 (*DFC of T v Zumtar & Ors (92)* ATC 4351).

Limitations on the effectiveness of Mareva injunctions

- 36.2.20 The remedy operates against the individual concerned and not against the actual property. Accordingly it does not create additional rights nor transfer property rights to the plaintiff.
- 36.2.21 The injunction is not intended to give the plaintiff security in advance of judgment but merely to prevent the defendant from defeating the plaintiff's chances of recovery by dissipating or secreting away assets. Accordingly, it does not elevate the plaintiff to the status of a secured creditor.
- 36.2.22 A Mareva injunction does not apply indefinitely, but can apply both prior to and after the entry of judgment in the primary cause of action and can continue in force until judgment is executed.
- 36.2.23 Generally, the Courts would not place a total freeze on all of the defendant's assets and will normally permit the defendant to use a specified amount for reasonable living/business expenses and other proper purposes: *Commissioner of State Revenue (WA) v Mechold Pty. Ltd. & Anor* 95 ATC 4053.
- 36.2.24 A Mareva injunction cannot be used to affect the rights which a third party may have acquired over the defendant. For example, a defendant cannot be prevented from paying his legitimate debts, or disposing of his assets in the normal course of business *A.J.Bekhor & Company v. Bilton* [1981] 2 ALL ER 565.
- 36.2.25 A Mareva injunction will not apply to shares or title deeds, which a financial institution is holding as securities nor to articles in a safe deposit in the name of the defendant. Similarly, a Mareva injunction may not apply to money standing to the credit of a joint account in the names of

the defendant and some other person or persons who is/are not a party in the proceedings.

Requisite elements for a Mareva injunction

36.2.26 In *Third Chandris Shipping Corp. v Unimarine S.A. (1979) Q.B. 645 at 668*, Lord Denning outlined the requisite elements that the plaintiff must address in an application for a Mareva injunction. In the case of the Commissioner as plaintiff, the following are considered relevant:

A Prima-facie cause of action

36.2.27 In the first instance, the Commissioner must establish a prima-facie cause of action against the defendant. A prima-facie case is one that has a serious possibility of ultimate success as opposed to a speculative case. Therefore the Commissioner must demonstrate a good arguable case against the defendant. The cause of action is the non-payment of the debt by the date that it was due to be paid.

36.2.28 Although it is an advantage to have commenced legal recovery proceedings before embarking on a Mareva injunction, it is not an essential prerequisite. It will not always be possible to commence legal action because the assessed amounts due to the Commissioner may not be payable at the point in time when action to obtain a Mareva injunction is commenced (ie payable at a future date).

36.2.29 If legal action has not commenced, the plaintiff must establish a claim against the defendant. The Courts would appear to be satisfied that the Commissioner has a sufficiently strong case where notices of assessment have issued. Production in Court of notices of assessment, by virtue of section 177(1) of *Income Tax Assessment Act 1936* are deemed to be conclusive evidence of the making of the assessments. (*Commissioner of Taxation v. Rosenthal* [1984] 16 ATR 159) and (*DFC of T v Sharp & Anor, Ex parte DFC of T* 88 ATC 4572). Where legal action has not commenced, it is to be expected that the court will require an undertaking that proceedings for recovery be commenced within a fixed time.

B Disclosure to the Court

36.2.30 In an ex-parte application, it is important for the applicant to adequately bring to the court's attention all material matters, to avoid injustice to the defendant. Such matters should include any assumption made in the absence of sufficient evidence or suspicion of a particular course of conduct by the defendant, which may not be fully substantiated.

36.2.31 Hearsay evidence is admissible as long as the source of information is explicitly stated.

C Assets within the jurisdiction

36.2.32 The Commissioner must provide evidence of the existence of assets owned by the defendant within the jurisdiction. The nature of the assets, their location and their approximate value should be identified with as much detail as possible.

36.2.33 It is however not a fatal obstacle that the applicant for a Mareva injunction has little or no knowledge of the financial circumstances of the party against whom the injunction is sought, nor that with more diligence

something more might have been discovered: Commercial reality often requires an application for this relief to be brought quickly and without notice before detailed enquiries can be made, otherwise its very purpose could be frustrated.

- 36.2.34 The case of *Riley McKay Pty. Ltd. v McKay* [1982] 1 NSW LR 264 established the principle that a defendant is required to make an affidavit of discovery of assets in aid of a Mareva Injunction.
- 36.2.35 In the event, however, that the plaintiff can identify the defendant's assets with sufficient particularity to enable the court to make an effective order, no discovery will be required. However discovery should be sought where the precise form and whereabouts of a defendant's assets are in doubt; or where distribution of assets among a number of defendants is unclear. Without the aid of discovery, it may be impossible to enforce the order or to oblige third parties to comply with it. A defendant is obliged to disclose all assets including those in which he has only a contingent interest, when making his affidavit of discovery.
- 36.2.36 Some Australian decisions indicate that a Mareva injunction may be granted to restrain a person from dealing with assets wherever they are located, and regardless of whether they have ever been within the jurisdiction. In *DFC of T v Hickey & Anor* 96 ATC 4892, the Supreme Court of WA ruled that a Mareva injunction can apply to assets outside the territorial jurisdiction of the court (in this case New Zealand).
- 36.2.37 However, this is not settled law and there appears to be some judicial conflict on the question of jurisdiction (*FC of T v. Karageorge & Ors* (96) ATC 5114), (*National Australia Bank Ltd v. Dessau & Ors* (1988) VR 521) and (*Brereton & Ors v. Milstein & Ors* (1988) VR 508). Generally, the Commissioner will apply for an injunction covering assets in Australia and overseas.

D Grounds for believing that there is a real risk of dissipation

- 36.2.38 The Commissioner must provide some grounds for believing that there is a risk of the assets being moved from the jurisdiction or otherwise deal with so that there is a danger that the Plaintiff if he recovers judgment, will not be able to satisfy it. A fear held by the Commissioner that the assets are likely to be improperly dealt with is not sufficient to seek a Mareva injunction.
- 36.2.39 Evidence must be provided that the risk has materialised or will probably do so. It must be shown that the defendant may be organising his/her affairs and assets so that any judgment obtained will be frustrated.
- 36.2.40 It may be difficult to establish a clear case of real risk, but evidence as to the previous conduct of the defendant may hold significant weight in such matters. Situations may arise where evidence relevant to the cause of action itself is also relevant to the question of risk of dissipation of assets.
- 36.2.41 The same factors that go toward establishing a prima-facie cause of action may in certain cases be used to establish the question of risk of dissipation. This is particularly so in cases in which the prima-facie cause of action against the defendant involved evidence of gross dishonesty.
- 36.2.42 The case of *Patterson v. BRT Engineering (Aust) Ltd* (1989) 18 NSWLR 319 involved a claim by the plaintiff that the defendant had fraudulently misappropriated a large sum of money from a company in his control. It

was held by the court that the nature of the scheme in which the defendant appeared to have engaged was such that it was 'reasonable to infer' that he was not the sort of person who would, unless restrained, preserve his assets intact so that they might be available to his judgment creditor. The evidence used to bring on the action was also held to be relevant in establishing the question of the risk of asset dissipation.

- 36.2.43 The court was also prepared to find a real risk of dissipation of assets by the defendant based on evidence of earlier dishonest conduct in the unreported decision of *DFC of T v. Robertson* Supreme Court of Western Australia on 21 January 2000. The court granted an extension of a Mareva injunction despite the fact that there was no direct evidence of intention to avoid the debts or of any preparations to dissipate assets. The court was prepared to find a real risk of dissipation of assets by the defendant based on evidence of earlier dishonest conduct.
- 36.2.44 The ATO Compliance model clearly links compliant attitudes to the severity of collection strategies, therefore a decision to seek a Mareva injunction should be closely linked to the framework of the Compliance Model.
- 36.2.45 To enable the judge to evaluate an application, the Commissioner's affidavit should disclose the inquiries which have been made about the defendant and its business and the results of those enquiries. The affidavit should also include details of any statements or inferences from the defendant indicating an intention to move assets as well as any threats made by the defendant. Financial statements, such as balance sheets may also be used to support the application.
- 36.2.46 The strength of the evidence contained within the affidavit presented to the Court will be the deciding factor in whether the Mareva injunction is granted.

E Undertaking as to damages

- 36.2.47 A Mareva injunction may have serious consequences on a defendant's business, which may lead to substantial claims being made against the Commissioner in the event that it is found that the injunction was unjustified. The Commissioner would ordinarily be required to give an undertaking as to damages, which may be supported, by a bond or other security.
- 36.2.48 In this regard, the Commissioner must ensure that the injunction is not too wide; catching unnecessarily assets of which he was unaware, or extending to assets greater in value than are necessary to meet the claim.

36.3 POLICY

- 36.3.1 The intent of the Mareva injunction procedure is to preserve the assets of a defendant in legal proceedings where there is evidence of a real **risk** that such assets may be removed, dissipated and generally put beyond the reach of the plaintiff to frustrate action for execution when he/she eventually obtains judgment.
- 36.3.2 In the taxation context, the Commissioner has a duty to protect the revenue. This duty requires him to ensure that taxpayers do not evade their liability by dealing with their assets in such a way so as to frustrate the execution of judgment.

- 36.3.3 As the prerequisites of a Mareva injunction are essentially predicated on the level of risk attributable to any case, the Commissioner's decision to embark on this process will invariably necessitate consideration of the principles foreshadowed in the chapter entitled "Risk management".
- 36.3.4 Where the risk assessment process, which requires due regard to the elements set out above, establishes an unacceptable level of risk to the revenue, the Commissioner will make a risk decision to minimise that risk. That decision may involve the instigation of a number of processes including the application to the Court for a Mareva injunction to preserve assets.

Roles of the Tax Office technical areas

- 36.3.5 Given the complexity of the matters requiring address in a decision to proceed with a Mareva injunction, the relevant technical area in Operations **must** be consulted at the earliest opportunity to assess the available evidence on which the application will rely.
- 36.3.6 As a Mareva injunction may impose considerable constraints on a taxpayer's resources which could adversely impact on his/her business, extreme care needs to be exercised in reaching a decision to utilise this remedy. Accordingly, the authority to approve an application for a Mareva injunction will be limited to senior officers after consultation with the relevant technical area.
- 36.3.7 Once a decision has been reached to proceed with the application, the manager of the ATO Legal Practice will decide whether the ATO Legal Practice will have conduct of the matter or alternatively whether the services of the Australian Government Solicitor will be required.

36.4 TERMS USED

- 36.4.1 'Mareva injunction' is an interlocutory injunction which restrains a debtor or the debtor's agents, servants or otherwise from removing assets from the jurisdiction or disposing of or dealing with those assets so as to frustrate a creditor seeking to recover from the debtor.
- 36.4.2 'Injunction' is an order by which the court directs someone to refrain from acting in a particular way, or in some instances, to perform a particular act (known as a mandatory injunction).
- 36.4.3 'Interlocutory' proceedings or applications are those actions taken during the course of an action which are incidental to the principal object of the action. In the collection context, it may be a further application made after a writ or summons has been issued for the recovery of a debt. These proceedings can also be taken prior to legal action being initiated provided the Commissioner gives an undertaking he will issue the relevant process (for example, writ or summons) within a certain time.
- 36.4.4 'Ex parte' means a matter dealt with by a court with only the applicant present – the defendant is not usually present to put forward an argument to refute that of the applicant.