

ATO RECEIVABLES POLICY

PART B The Collection of Taxation Debts

Chapter 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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Key legislation: N/A (Common Law-Civil Procedure)

PURPOSE

1. This chapter should be read in conjunction with Chapter 3 'Risk management'. It outlines the circumstances and risk factors which will determine when the Commissioner will utilise the Mareva injunction process.

INTRODUCTION

2. The Commissioner will generally utilise the Mareva injunction process where it is concluded that action of certain debtors to dispose of or deal with assets, present an unacceptable level of risk to payment or the enforcement of a judgment he may subsequently obtain should legal action become necessary to recover the debt.
3. A Mareva injunction is essentially a form of injunction that is used to restrain a defendant or his/her agents from removing assets from the jurisdiction, or otherwise disposing of or dealing with those assets pending further orders by the court (usually until judgment is obtained against the defendant).
4. The law which governs the granting of Mareva injunctions is well-settled and the Courts have been prepared to adapt Mareva injunctions to a range of situations where the Commissioner has sought to preserve assets at risk of being dissipated.
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'.

POLICY

6. The Commissioner has a duty to protect the revenue. This duty requires him to ensure that debtors do not evade their liability by dealing with their assets in such a way so as to frustrate the execution of judgment.
7. 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 Chapter 3 'Risk management'.

8. Where the risk assessment process establishes an unacceptable level of risk to the revenue, the Commissioner will make a 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.

Requisite elements for a Mareva injunction

9. The risk assessment process requires due regard to the requisite elements for a Mareva injunction as settled by the Court.
10. 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:

Prima-facie cause of action

- (i) 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.
- (ii) 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 (that is, payable at a future date).
- (iii) 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 the *Income Tax Assessment Act 1936*, is 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.

Disclosure to the Court

- (i) 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.
- (ii) Hearsay evidence is admissible as long as the source of information is explicitly stated.

Assets within the jurisdiction

- (i) 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.

- (ii) 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.
- (iii) 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.
- (iv) 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.
- (v) 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). 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.

Grounds for believing that there is a real risk of dissipation

- (i) The Commissioner must provide some grounds for believing that there is a risk of the assets being moved from the jurisdiction or otherwise dealt 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.
- (ii) 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.
- (iii) 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.
- (iv) 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.

- (v) 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.
- (vi) 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.
- (vii) The 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.
- (viii) 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 inquiries. 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.
- (ix) 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.

Undertaking as to damages

- (i) 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.
- (ii) 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.

Third parties

11. During investigations of the defendants' affairs, including their compliance history, it may become apparent that the defendant has deliberately structured his/her financial affairs in a manner so as to defeat any judgments made against him/her. For example, the defendant's matrimonial home may have been transferred to a related third party being the spouse, a family company or trust.

12. Accordingly, where such third party assets appears to be at risk of dissipation by the defendant, the Commissioner would often seek to include such assets within the scope of a Mareva injunction.
13. The decision of the High Court in *Cardile and Others v. LED Builders Pty Ltd* [1999] 198 CLR 380, assessed the basis of a Mareva order with particular focus on its application against third parties who are non-parties to the main proceedings. By majority judgment, the High Court found that a Mareva order may be granted against non-parties, where it is necessary to prevent the dissipation of assets so as to protect the administration of justice. The High Court said that such an order against a third party may be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which:
 - (i) the third party is in possession or means of control of assets of the judgment debtor or potential judgment debtor, or
 - (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.
14. From a taxation perspective, a Mareva injunction will be used to restrain the disposal or removal of assets held by third parties where it can be demonstrated to the court that the judgment debtor has control over property held by a third party and that execution of the judgment would be successfully levied against such property.
15. 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 assets beneficially or equitably held on behalf of the defendant against which a judgment creditor should be able to levy execution.
16. The evidentiary onus lies on the Plaintiff to convince the court that assets of a third party are, in reality, available to the defendant to meet his obligations.
17. A Mareva injunction cannot be used to affect the legitimate 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.

Breaches

18. A Mareva injunction is a court order. Consequently, wilful breaches are punishable as a contempt of Court with appropriate penalties.
19. As a model litigant, the Commissioner has a duty to bring such contempt to the attention of the Court.
20. 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.

21. 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.

Roles of the Tax Office technical areas

22. 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.
23. 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.
24. Once a decision has been reached to proceed with the application, the manager of the Legal Services Branch will decide whether a solicitor within the Legal Services Branch will have conduct of the matter or alternatively whether the services of an external legal provider will be required.

TERMS USED

Mareva injunction – 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.

Injunction – 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).

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.

Ex parte – 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.

Chapter 36 - Archived version

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