MAREVA INJUNCTIONS
The Do's and Dont's of Nuclear Relief

Introduction

The Mareva is a powerful form of injunctive relief described by Lord Denning as a legal nuclear weapon and one of the most significant judicial inventions. The utility of this legal device is evident in the numerous cases in which it has been properly granted and has prevented a dissipation or flight of assets from a jurisdiction which would frustrate enforcement of a judgment in favour of a plaintiff. The potency of this kind of relief however makes it as dangerous as it is useful and where it is imprudently granted it may be burdensome and harmful to a defendant who is likely to find himself financially crippled without an opportunity to give his side of the story. Because of these competing interests, the severity of the relief and the ex parte nature of the application for the relief, a body of case law and rules surrounding the grant and operation of the order has developed in order to balance the various interests at stake and to ensure some equilibrium of justice for not just the parties to the action, but also for third parties who are invariably affected by the grant of a Mareva injunction. This presentation then promises an exploration of the legal principles which seek to maintain and manage the balance of equity in the face of the need to preserve this piece of legal arsenal.

Nature of the Mareva

1. The Mareva is an interlocutory order which freezes the assets which are the subject of the order thereby preventing the respondent from dealing with those assets or removing them from the jurisdiction. It is usually granted before judgment but which may also be granted after final judgment in order to ensure that judgment can be executed and may

even be granted to a judgment creditor even where no application was made before trial for it: The Venus Destiny [1980] 1 WLR 460. It is usually granted until judgment or further order. It seems obvious that the applicant for a Mareva must have a cause of action against the respondent though some doubt was cast on this by virtue of the decision in Chief Constable of Kent v V [1983] 1 QB 34 where the court granted an order in favour of the Chief Constable to prevent the possibility of dissipation of the respondent's account in circumstances where the police believed that the monies in the account had been fraudulently obtained by the respondent. This seemingly was against the principle that the injunction should not be granted to protect a person who has no legal or equitable right that is in need of protection. The majority of the Court of Appeal however held that the Chief Constable had "sufficient interest" to give him locus standi in the application.

2. The application is usually ex parte but it can also be made inter partes. When made inter partes, the claimant is not burdened by the duty to disclose all the material facts relating to the defendant's case.

3. The order has an ambulatory effect so that assets which, subsequent to the order, fall within the subject of the Mareva will be caught by it.

Jurisdiction to grant Mareva orders

The jurisdiction to grant a Mareva appears to have arisen from the common law. However, Kerr JA in Bertram Watkis v Simmons et al (1988) 25 JLR 282 refers to

s.49(h) of our Judicature (Supreme Court) Act which he states is similar in terms to s.45 of the English Supreme Court (Consolidation) Act of 1925 which gave the English Court jurisdiction to grant such orders[1]. The terms of section 49(h) make no explicit reference to Mareva-type orders as does the English provision referred to by Kerr JA but states generally that the court may grant an injunction in all cases in which it appears to the court to be just and convenient to do so. It is this general provision that Kerr JA relies on to explain or justify the court's jurisdiction. Under Part 17.1(1)(f) of the Civil Procedure Rules 2002, the Supreme Court has explicit jurisdiction to grant a "freezing order" "(i) restraining a party from removing from the jurisdiction assets located there; and/or (ii) restraining a party from dealing with any assets whether located within the jurisdiction".

Circumstances in which the Mareva ought to be sought

The underlying purpose of the Mareva is to guard against a judgment being rendered or ineffective or nugatory because of the likelihood of the removal of the defendant's assets from the jurisdiction. This threat may arise particularly in circumstances in which the defendant is a foreigner or at least does not reside within the jurisdiction. In fact, in the course of the evolution of the Mareva in England, there was a time when it was thought that it was not available in regard to a defendant resident in the UK. This view probably emanated from the fact that in the earliest cases[2] in which this legal device was used the defendants resided outside the jurisdiction. For a short time this view received some

[1] See (1988) 25 JLR 282 at page 283D-G

[2] Mareva Compania Naviera SA v International Bulkcarrers SA [1975] 2 Lloyd's Rep 509; Nippon Yusen Kaisha v Karageorgis [1975] 1 WLR 1093

judicial endorsement[3] but doubt as to whether or not Mareva relief could be used against a defendant residing locally was finally put to rest in 1981 by statute[4] in England. In addition to this, Mareva relief may also be granted in respect of the defendant's assets anywhere in the world[5].

However, the principles guiding the grant of a Mareva where the substantive claim has been brought or has arisen in another jurisdiction do not appear to be settled. This is evident from the decisions in S & T Bautrading v Nordling [1997] 3 All E R 718 and Credit Suisse Fides Trust SA v Cuoghi [1997] NLD 11 June 1997. In S & T Bautrading the English Court of Appeal stated that a worldwide Mareva should only be granted in very exceptional circumstances. This restrictive approach appears to emanate from considerations regarding potential conflicts between such an order and court orders in other jurisdictions as well as the possibility of perceptions of interference and issues of reciprocity. In Credit Suisse, the C.A. took a more liberal approach. In granting a worldwide Mareva in respect of a substantive suit arising in Switzerland, the court said that its jurisdiction to grant such an order was not dependent on exceptional circumstances but on whether it was expedient for the court to grant the order having regard to the fact that it had no jurisdiction over the substantive proceedings. The question of course arises as to whether a court should grant such an order if it is

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[3] See for example Van Weelde v Homeric Marine Services [1979] 2 Lloyd's Rep 117 in which Lloyd J accepted as sound counsel's argument that there was settled practice which indicated that a Mareva could not be granted against a defendant resident within the jurisdiction.

[4] The Supreme Court Act

[5] Rule 17.1(f)(ii) of the Civil Procedure Rules 2002 gives the Supreme Court of Jamaica the authority to grant a freezing order in connection with assets outside the jurisdiction. One of the most well-known cases involving worldwide assets is Republic of Haiti v Duvalier [1990] 1 QB 202 in which the English Court of Appeal approved a situation where proceedings brought in a court in France were supported by a Mareva

impossible to get similar relief in the jurisdiction in which the substantive suit has been brought.

Having regard to the purpose of the Mareva, it is clear that it will only be available in circumstances where the claimant's action can result in enforcement against the defendant's assets. It is therefore not available where the claimant merely seeks a declaratory judgment. In The Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd [1986] 2 Lloyd's Rep 439, a Mareva injunction was refused because at the time, the applicants were at best only entitled to a declaration that the respondent shipowners would be liable to them **if** certain events occurred. But there is no bar on the type of case for which Mareva relief may be granted if the claimant is seeking damages or some other type of monetary compensation.

The scope and nature of the Mareva injunction have generated certain rules designed to ensure that the relief is not abused or taken lightly by the applicant. The claimant/applicant must show that he has **a good arguable case**. What does this mean? This was discussed by Mustill J in The Niedersachsen [1983] 2 Lloyd's Rep 600 who applied principles in Vitkovice Hornia Hutri Tegirstvo v Korner [1951] A C 869 regarding guidelines for the court in relation to allowing extra-jurisdictional service. These are as follows:[6]

1. The plaintiff must do more than make a bare assertion of facts.

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order granted in England in respect of assets of the defendants wherever they were located. The court stated however that cases in which such an order would be made would be very rare.

[6] [1983] 2Lloyd's Rep 600 at 604

2. The question whether the plaintiff has shown a prima facie case is not an appropriate test, at least where the respondent has adduced evidence in opposition.
3. The Court cannot, and should not, attempt to, try the issues at the interlocutory stage.
4. The Court should not apply the same standard of proof as will be appropriate at trial i.e. the applicant need not establish his case on a balance of probability.
5. The plaintiff needs to do more than show that his case is merely arguable but he need not go so far as to persuade the Judge that he is likely to win.

Mustill J précised the meaning of a good arguable case in this way: "a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success".

While the merits of the claimant's case must be considered, a court should not attempt, on the hearing of an application for Mareva relief, to decide legal issues which arise on the affidavit or to settle evidential questions. In Derby & Co Ltd v Weldon [1990] Ch 48, an application for Mareva relief occupied the court for more than five weeks. The Court of Appeal stated that it was wrong to "attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a Mareva is sought or relating to the elements of the Mareva jurisdiction such as that of dissipation" or to allow "detailed argument on difficult points of law on which the claim of either party may ultimately depend" and that if such attempts are made they should be discouraged by an appropriate order as to costs.

The affidavit in support of the application should set out the facts relating to the claim and because the application is typically ex parte, the claimant/applicant should also indicate the defences raised by the defendant against the claim, even if he thereafter comments on the strength of the defences. In fact, the claimant/applicant is obliged to make full disclosure of all relevant matters which may include information on the impact of the order on third parties as well as on the solvency of the applicant if this is in question[7]. The claimant's duty extends to facts which would have come to his knowledge if he had made proper inquiries. Whether inquiries have been proper will depend on the nature of the applicant's case at the hearing and the nature and likely effect of the order on the defendant. Breach of this duty to disclose is likely to be a ground for variation or revocation of the order granting relief. Dicta in Behbehani v Salem (1989) 1 WLR 723 by Woolf LJ citing Gibson LJ in Brink's Mat Ltd v Elcombe[8] indicate the judicial policy behind non-disclosure:

> "If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure….is deprived of any advantage he have derived from that breach of duty".[9]

Similarly, in Siporex Trade v Comdel [1986] 2 Lloyd's Rep 428, Bingham J stated:

> "If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full

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[7] This will assist the court in assessing the applicant's ability to give an undertaking for damages which is usually required on the grant of a Mareva.
[8] [1988] 1 WLR 1350
[9] At page 726 -727 of the report.

disclosure".[10]

Additionally, this rule indicates to applicants that the duty to disclose and make proper inquiries should not be taken lightly. The court however will not allow this rule to thwart the course of justice so that the "court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms....if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed"[11].

Despite this window, the strict nature of the duty on the claimant/applicant to disclose cannot be overstated. Non-disclosure is not cured by general statements in a supporting affidavit to which are exhibited several documents which elucidates the applicant's position. In Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428, the applicant had made reference in its affidavit to arbitration proceedings it had commenced against the respondent and attached certain documents as exhibits which gave a different view of the strength of the applicant's claim. The court discharged the Mareva order on the ground that the applicant did not make frank and clear disclosure about the precarious nature of its position in the arbitration proceedings by reason of which the judge at the hearing of the application "must have received an altogether too rosy view of Comdel's [the applicant's] litigious position".[12]

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[10] At p. 437
[11] [1989] 1 WLR 723 at 727

What this means is that we, as lawyers, have to take particular care when crafting an affidavit supporting the application. Full disclosure could result in material adverse to the claimant's case being put squarely before the court but the draconian nature of Mareva relief and the fact that it is usually granted ex parte demand of the Applicant to make the application in the duty of utmost good faith.

The applicant is also required to prove that there is a risk of the defendant removing assets from the jurisdiction or that he is likely to dispose of assets. The Niedersachsen [1983] 1WLR 1412 (at 1422) and Third Chandris [1979] QB 645 indicate that the test to be applied here is whether the judgment is likely to go unsatisfied if the Mareva were refused. Relevant factors must be shown to indicate this risk as the court will not be moved by mere assertions. A list of non-exhaustive relevant factors are outlined in Steven Gee's[13] work which include[14]:

1. The type of assets – whether they may be easily removed or spirited away.
2. The financial standing of the defendant's business. In Siporex Trade v Comdel, Bingham J stated that since it was shown that Siporex was "a Panamanian company with no place of business in the United Kingdom, no identified assets elsewhere and no published accounts[, it was open to a court to conclude] that there [was] a real risk that Siporex would, if free to do so, transfer the proceeds of performance bonds, once paid out of the jurisdiction with the result that Condel might be unable to enforce any award in their favour

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[12] [1986] 2 Lloyd's Rep 428 at 438 per Bingham J
[13] Gee, Steven, (1995) Mareva Injunctions and Anton Piller Relief, 3rd edition
[14] At p. 439

3. Where the defendant is a foreigner or foreign company, the country of residence or registration **and** the ease of reciprocal enforcement. Lord Lawton in Third Chandris states that the mere fact that the defendant is a foreigner or a foreign corporation does not by itself justify the grant of a Mareva but adds that there must be facts from which the court "can properly infer a danger of default if assets are removed from the jurisdiction".[15] This approach was applied in the Jamaican case of Wheelabrator Air Pollution Control v F C Reynolds[16] in which the appellant/defendant challenged the grant of the injunction on the basis that there was no evidence of the risk of dissipation or removal of assets. Carey JA dismissed the appeal noting that the appellant was a foreign company registered in a country with which no reciprocal arrangements existed for registering foreign judgments and that the only asset in Jamaica were payments due under a contract with Jamalco. He stated that "the inference is inescapable that having been paid, [the defendant] will collect its assets and withdraw itself from the jurisdiction [and] would hardly have any reason for remaining. It follows that there is or must be good grounds for believing that there is a real risk of a judgment in the respondent's favour remaining unsatisfied".

4. Consistent failure on the defendant's part to honour debts (although if this is merely due to the defendant's insolvency it will not be a consideration in the court's determination of whether it is likely that the claimant's judgment will go unsatisfied).

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[15] [1979] 2 All E R 972 at 987
[16] SCCA No 91/94

Types of Assets which may be the subject of a Mareva

Typically, bank accounts are the subject of a Mareva but the order can be given in respect of any type of asset eg. judgment debts owed to the defendant; land (but the order does not make the applicant a chargee), proceeds from the sale of land, chattels. Whatever the asset, the defendant must be the legal or beneficial owner. (With regard to legal ownership, the defendant's ownership of the asset must be in the same capacity in which he is defendant.)

Form of the Application/Order

The Civil Procedure Rules 2002 prescribe the form of an application for interim relief of which the Mareva (freezing order) is one form. An important factor is that, unless the court otherwise directs, the applicant must give an undertaking to the court in damages which will come into play if the defendant suffers loss as a result of the imposition of the Mareva[17]. The idea is that the claimant should bear the loss if the injunction ought not to have been obtained. The undertaking in damages is typically, but not necessarily,[18] a condition of an interim order. The impecuniosity of an applicant will therefore clearly affect a court's discretion against granting the ex parte order but this can be mitigated by the weight of the merits of the applicant's case. Alternatively, it is open to the court to require a kind of guarantee undertaking from another person. This approach supported

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[17] See Rule 17.4(2)

[18] See F Hoffman-La Roche v Secretary of State [1974] 2 All E R 1128 in which the HL held that in circumstances in which the Crown sought an injunction to prevent the defendant from acting in violation of an order issued by an authority under statute and the defendants were contending that the order was ultra vires, the Crown was entitled to an injunction without giving an undertaking in damages unless the defendants could show a strong prima facie case that the order was ultra vires.

by the dicta of Hirst J in Commodity Ocean Transport v Basford Unicorn [1987] 2 Lloyd's Rep 197 where he stated that "if the Court considers that the [plaintiff] might not be worth powder and shot if it he held that he is obliged to fulfil his cross-undertaking, the Court can strengthen the undertaking by requiring some sort of security"[19]

If we look at the form that a Mareva order should take as prescribed in a Practice Direction issued by the English court at [1994] 4 All E R 52, we note that the applicant's undertakings should include one to compensate third parties who might also suffer loss as a result of the order[20]. Such an undertaking in damages regarding third parties may be properly required for example in regard to subsidiary companies in circumstances where a Mareva order has been made against the parent company. If in fact the undertaking does not cover third party subsidiaries who may suffer loss resulting form the order against the parent, it is open to those subsidiaries to apply to the court to be included in the scope of the applicant's undertakings. Failure by the applicant to provide the undertakings required by the court is a ground for discharge. Although it is not uncommon in an order to see that the applicant has given "the usual undertakings" which implicitly would include the undertaking in damages, I would suggest that any undertaking given by the applicant be explicitly and accurately stated in the order.

Suggested Form of Undertaking To Court Where Ex-Parte Applicatio Made

Since the undertaking is given to the court, the procedure for enforcement would be by way an application to the court for the court to assess and award damages. Typically, the

[19] At page 198 of the report.
[20] See for example, Annex 2, Schedule 1 at paragraph 6 (page 61 of the report)

court will direct that damages be paid in accordance with the determination of an inquiry as to the damages. Discharge of the Mareva **prior to trial** certainly raises the issue of whether the undertaking may be enforced immediately upon discharge. This will depend on the circumstances. Where for example, the Mareva was entirely inappropriate or wrongly applied for (as for example where there is non-disclosure of material information which would have affected the grant of the Mareva), then a court is likely to enforce the undertaking in damages since the outcome of the substantive claim would be irrelevant to such an exercise of its discretion to enforce it. In contrast to this, the court may await the outcome of trial before conducting an inquiry as to damages. So in Cheltenham & Gloucester Building Society v Ricketts [1993] 1 WLR 1545 the English Court of Appeal were of the view that, despite the proper discharge of a Mareva when it had been shown that the basis of the allegations of fraud by the building society had been unfounded, it was more prudent to await the outcome of the trial before proceeding to an inquiry into damages because the trial judge would be in a superior position to assess whether the building society had been at risk at the time the order had been made.

If the claimant intends to oppose the enforcement of the undertaking, he should bring this to the attention of the court ordering the inquiry to avoid costs and also because the court making the inquiry as to damages should only be concerned with issues relating to assessment.

Factors which are relevant to the court's exercise of its discretion to enforce the undertaking in damages post-trial are:

1. whether the claimant has received judgment in his favour at trial; and
2. whether there was a real risk of dissipation or removal of assets; or
3. whether the assets which were the subject of the Mareva far exceeded the judgment debt. A device that can mitigate this possibility is a maximum sum order which restricts the order to a certain value which is likely to satisfy the judgment in favour of the claimant. Even where the applicant does not request a maximum sum order, a court should be mindful to limit the order in appropriate cases. Effectively such an order allows the defendant to deal with his assets which are in excess of the maximum sum. However, a maximum sum order, if excessive, will still constitute a basis for the enforcement of the applicant's/claimant's undertaking in damages.

(1) This is clearly evident in the case of

In Dalton Yap v Union Bank of Jamaica Ltd SCCA No. 58/98 in which the Court of Appeal, in considering whether the Inquiring judge in the court below was correct in not ordering an inquiry as to damages, noted that "in every case the extent to which it is sought to restrain a defendant in the use of his assets should bear a reasonable relation to the claim in respect of which a Mareva injunction is sought".[21] Further in this case, claims of deceit and fraud largely grounded the injunctive order in respect of a sum of US$400,000. Since these claims of fraud and deceit were withdrawn or rejected at first instance, the injunction in respect of this amount had being improperly sought and obtained in the first place. This factor, coupled

with the defendant's allegations of loss suffered in account of the order certainly constituted, in the Court of Appeal's opinion, a basis upon which the judge ought to have exercised his discretion in favour of ordering an inquiry as to damages. This outcome accords with the decision in Financiera Avenida SA v Shiblaq (in The Times Law Reports, January 14, 1991) which was extensively referred to in Yap and which gives support to the principle that where an injunction is mounted on grounds which fail or are subsequently abandoned by the claimant, a prima facie case is made that the claimant ought to bear the defendant's loss caused by the injunction via the enforcement of the undertaking.

Factors affecting the court's discretion against enforcing the undertaking include:

1. the defendant's conduct in relation to the obtaining or continuation of the injunction or the enforcement of the undertaking which may make it inequitable to enforce it. (See dicta of Lord Diplock in F Hoffmann-La Roche & Co v Secretary of State [1974] 2 All E R 1128 at 1150g.)
2. Delay in applying for enforcement. To avoid non-enforcement on account of delay, the application should be made as soon as the order has been discharged.

Damages on an inquiry are to be assessed on the same basis as damages for breach of contract. This means the defendant must show that he would not have suffered loss if the

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[21] per Walker, JA

Mareva had not been imposed but the defendant, in addition, must prove that the loss was something that should reasonably have been within the contemplation of the parties. This principle is exemplified in Tharros Shipping Co Ltd v Bias Shipping [1994] 1 Lloyd's Rep 577. Here, a third party sought to enforce the claimant's undertaking in damages on the ground that it suffered exchange rate losses when their bank, having been notified of the Mareva against related companies and exercised their right of set-off which forced the third party to convert large sums in their US$ account into sterling in order to reduce or liquidate their overdraft on their sterling account with the bank. The conversion occurred at a time when the value of the pound had fallen sharply against the dollar with the result that the forced conversion cost the third party nearly £200,000 in exchange rate losses. Having regard to the circumstances in which the bank had previously exercised its right of set-off and required conversion from the party's dollar account to its sterling account, the court doubted whether in fact the conversion had been caused by the fact that the Mareva had come to the notice of the bank. The court however went further to hold that in any event one could not expect that the claimant could have reasonably contemplated that the defendant was operating the dollar and sterling account as a means of currency speculation and secondly that the claimant could not have reasonably contemplated when it applied for the injunction, that there would be a dramatic fall in the value of sterling as against the dollar. On these bases, it was impossible for the third party to succeed in enforcing the undertaking since the causative link had not been adequately established.

Recoverable losses may include post-discharges losses so long as it can be proved that such losses were a result of the order (and not for example, as a result of the litigation).

Principles relating to the defendant's duty to mitigate will also apply as well as principles concerning remoteness of damage. It does appear that the courts are inclined to the view that exemplary damages may be awarded upon an enforcement of an undertaking in damages.[22]

Variation of the Order

There are two main reasons for applications to vary Mareva orders: the first, to allow the defendant to have ordinary living expenses where this has not been already provided for in the order or where the amount specified in the order is not sufficient. Some idea as to the meaning of 'ordinary living expenses' was given TDK Tape Distributor (UK) Ltd v Videochoice Ltd and others[1985] 3 WLR 345 where Skinner J stated that they are 'ordinary recurrent expenses involved in maintaining the subject of the injunction in the style of life to which he is reasonably accustomed"[23]. It was held in TDK that ordinary living expenses did not include a bill to a lawyer for a defence against a serious criminal charge amounting to £10,000 so that the use of proceeds of an insurance policy in the name of one of the defendants to employ Queen's Counsel in his defence against criminal charges amounted to a dissipation of assets in breach of the Mareva.

In regard to a defendant corporation, an application for variation may be made to allow it to pay debts ordinarily incurred in operating the business such as salaries. The defendant seeking such a variation must show that the debts he is seeking to pay are bona fide and that they would not be in conflict with the principle and purpose of the Mareva.

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[22] See for example dicta by Downer JA and Smith JA(Ag) in Dalton Yap v Union Bank of Jamaica SCCA No 58/98.

However, it has been said that judges should bring "a very healthy skepticism"[24] when dealing with variations in favour of persons to whom a Mareva order applied. A factor which a court will take into account in exercising its discretion to vary an order in this regard is whether the amount of assets within the jurisdiction which are the subject of the Mareva are likely to be sufficient to satisfy a final judgment.

The second major reason for variation applications relates to situations in which third parties have been affected by the order who are under an independent duty not to act in such as way so as to breach the order. Third parties who may be affected a Mareva will include a variety of persons but we will consider the position of banks and judgment creditors.

Banks

Once a freezing order has been notified to the defendant's bank, the bank should cease to honour cheques against the defendant's account to the extent that so doing would be inconsistent with the terms of the order. A Mareva however will not generally prevent a bank from exercising its ordinary right of set-off in relation to its customers. So in Oceania Castelana Armadora SA v Mineralimportexport (Barclays Bank International Ltd intervening) [1983] 2 All E R 65, it was held that the bank was entitled to a variation of the Mareva in respect of the defendant's account which was subject to the order in order set-off against the account interest owing to it under a loan agreement with the defendant made prior to the grant of the Mareva. The court also confirmed that a bank was entitled to meet any obligations arising as a result of letters of credit opened on the

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[23] At page 349 of the report

[24] See Campbell Mussels et al v Thompson and OGT Group of Companies Ltd in (1985) 135 NLJ 1012

defendant's behalf prior to the order and thus debit the defendant's account accordingly. The court stated that since a defendant was entitled to vary an order to enable him to pay debts arising from ordinary living expenses, a bank should not be in a worse position than other creditors of the defendant merely because it was the one in custody of the funds.

The court in Oceania cautioned that even though a bank had the right in law to exercise its right of set-off in the face of a Mareva, the bank might not be in a position to do so without first obtaining an order for variation to allow payment. This will all depend on the formulation of the order. This case suggests a form of words[25] which might be included in a freezing order which would afford banks the opportunity to exercise the right of set-off without applying to court for a variation. It should be noted that the bank's entitlement to exercise its right of set-off is applicable only in relation to facilities extended by the bank prior to the date of the Mareva and it is unlikely that a court will vary an order in respect of facilities extended after the grant of the order. Additionally, the court made the point that a bank should not be required to disclose the state of the defendant's account as a condition to the grant of a variation in its favour as this would amount to an interference with the contractual arrangement between the defendant and the third party.[26]

Another issue that banks face in respect of Mareva orders relates to joint ownership of assets subject to the Mareva. Typically, a Mareva order will state that the defendant is

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[25] The suggested formulation approved by the Court reads: "Provided that nothing in this injunction shall prevent [the bank] from exercising any rights of set-off it may have in respect of facilities afforded by [the bank] to the defendants prior to the date of this injunction". (See p 71 of the report).

[26] See page 70 h-j of the report.

not entitled to remove or deal with or dispose of assets "whether in his own name or not and whether solely or jointly owned"[27] up to the maximum sum. This formulation would mean that a bank would not be entitled to pay a jointholder of an account which is the subject of the order. If part or all the beneficial interest in an account belongs to the person other than the defendant, then that person should be entitled to use or deal with the funds standing to the credit of the account which belongs to him. The jointholder would of course be able to apply to the court for a variation of the order that would allow him to deal with the account to the extent of his interest. If it can be shown that the defendant is the beneficial owner of all the sums in the joint account, then the account would be subject to the Mareva up to the amount of the maximum sum.

It is useful to mention the position of a chargee/mortgagee here since banks are typically in this position under debentures containing fixed or floating charges. The question here is the effect of a Mareva on the enforcement of a charge or mortgage where the assets which are the subject of the charge are also the assets which are the subject of the Mareva. A Mareva order cannot operate so as to obstruct the enforcement of a charge by way of receivership since charges, vesting as they do proprietary rights in the creditor, create rights in rem[28]. The Mareva, on the other hand, gives relief in personam so that creditors secured by way of a charge would be entitled to realise and take the proceeds upon disposal of the assets. It does seem clear however, that a defendant would be in

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[27] See Practice Direction [1994] 4 All E R 52 at 59(e)

[28] In Iraqi Ministry of Defence and Others v Arcepey Shipping Co S.A. (The Angel Bell) [1981] 1 QB 65 Goff J stated that if mortgage and assignment documents had been effectively executed between the defendant and its creditors, the third party interveners seeking variation of the Mareva order, then the third party would have been entitled **by virtue of such security** to receive payment under the security. (See p. 67 of the report.)

breach of a Mareva order if he, subsequent to the grant of the order, grants a charge over his assets.

Judgment Creditors

A creditor who has obtained judgment after a full trial of a matter involving a defendant whose assets are subject to a Mareva order, is likely to be allowed to enforce his judgment or to get a variation or the order to allow such enforcement. Difficulty however seems to arise in cases of default or consent judgments. Certainly, consent judgments are open to abuse by the defendant in that they may be used as a way of circumventing the purpose of a Mareva order. This factor would obviously be a consideration for the court in any application for variation by a judgment creditor to facilitate enforcement. In the case of default judgment creditors, the court may grant a variation to the injunction pending the outcome of a hearing to set aside the judgment if the person who is the object of the Mareva intends to apply to have it set aside.

The underlying principle informing variations is that the Mareva is not intended as a device by which the plaintiff, a mere potential creditor of the defendant, might establish himself as a secured creditor or improve his position in comparison to other persons who deal with the defendant in the ordinary course of business.

Conclusion

Although Mareva Injunctions are frequently granted today, it is clear that a prospective applicant ought to give serious consideration to using it. This is not only because of scope of its effect on a defendant, but also because it can backfire on a careless

application via the undertaking in damages, without which, it is likely that a court will refuse to grant the order. As advisers, we need to ensure that our clients (applicants) are aware of their possible and potential liability in damages under the undertaking not just to the defendant/respondent but also to third parties. We must also advise defendants against whom an order has been made as to what assets they may or may not deal[29]. As draftsmen of applications for Mareva orders, we need to be careful about the application and supporting documentation. We must ensure full disclosure and also ensure that the application is properly substantiated in order to avoid as far as possible discharge on the ground of non-disclosure or on the ground that the order was not properly sought in the first place. Such a discharge, as we have seen, is a good ground for an inquiry as to damages. We as Attorneys also need to be careful about the drafting of the order ensuring that we make allowance for reasonable living expenses for the defendant and the proper exercise of third party rights and ensuring as well that we to do a reasonable estimate of the potential award upon a successful outcome of the trial for the claimant/applicant. This will avoid or minimise damages for "over-marevaing" and costs involved in applications for variation. In house attorneys, particularly those in banks, need to be very aware of the effects of an order and the rules which govern the treatment of accounts subject to an order both in terms of how the order affects the operation of the account by the holders of the account and in term of any rights the bank itself may have in respect of the account. Despite the considerable body of law that has developed since the invention of the freezing order in the mid-seventies, there remain unsettled areas of

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[29] It is interesting to point out that in TDK Tape Distributor (UK) Ltd v Videochoice Ltd and others [1985] 3 All E R 345 at 350, the court noted the carelessness of solicitors in failing to advise their clients of the effect of the Mareva in respect to certain assets (life insurance policy) and noted that the real responsibility

principle. One such is the issue of whether exemplary damages may be awarded upon an enforcement of an undertaking. This issue, among others, awaits further judicial assessment and development.

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for the defendant's failure to disclose the asset and subsequently for paying over the proceeds of the policy to the solicitors for payment to counsel in his defence rested on the solicitors.