



FREEZING ORDERS MAREVA ORDERS ASSET PRESERVATION ORDERS

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"I have an unlimited power to grant an injunction in any case where it would be just or right to do so"

Jessel MR: *Beddow v Beddow* (1878) 9 CH D 89 at 93

What are Mareva Orders?

- Orders usually
 - ex parte,
 - pre judgment or
 - post judgment,
 - to preserve some or all of the defendant's assets pending a judgment or its execution
- Asset can be with third party

What are Mareva Orders?

- To prevent frustration of the processes of the court
- Contempt of court is the stick to enforce
- Not security interest or charge
- Not affect secured party's rights

Mareva Case

UK Court of Appeal 1975

Lord Denning, Roskill LJ, Ormrod LJ

- Up to that time Mareva orders had been applied for but consistently refused: Roskill LJ
- Qualifies Beddow - person must have legal or equitable right.

Mareva Case

- *Debt is due and owing (even if the right has not been established)*
- *There is a danger the debtor may dispose of his assets so to defeat it before judgement,*
- *court has jurisdiction in a proper case ... to prevent him disposing of those assets: Lord Denning MR*

Harmonised Court Process

Federal and Supreme Courts

- Harmonised rules and practice notes
- Harmonised usual draft orders
- VIP starting point
- District Court – power - follow above
- Judicial discretion retained

Procedure

- Discretionary remedy –move quickly and explain any delay
- Originating process and motion in division in which claims to be brought
- Motion if in existing claim

Claim ?

- What is the actual cause of action or prospective cause of action?
- What is the estimate of the maximum amount of the claim including interest and costs?
- If accrued or prospective action in other court - must be sufficient prospect that a judgement will be obtained and will be registered or enforced in this court.

Judgment ?



- Obtain evidence of judgement and of costs relating to it.
- If a judgement in another court – must be sufficient prospect will be registered or enforced by this court

Danger of asset loss

- Proof of danger that a judgment or prospective judgment will be wholly or partially unsatisfied because:
 - The defendant or someone else may abscond;
 - The assets the defendant or someone else may be removed from Australia or from a place inside or outside Australia, or disposed of dealt with, or diminished in value?
 - UCPR 25.14 (4)

Procedure

- Affidavit must prove *“good arguable case”*.
- *“..more than barely capable of serious argument... Not necessarily better than 50% chance of success”*
- Mere assertion not enough, court may infer risk.
- More serious the cause of action ie fraud, greater ability to infer risk

Affidavit disclosures

- If ex parte - must disclose:
 - All material facts to the court
 - All possible defences to the claim
- Lack of candor could lead to discharge of the order on first return date
- Submissions also disclose

Form of order ?

- What is the nature of and estimated value of the respondents assets?
- Where are they situated?
- Who may be affected by the order? – defendant and third parties?

Third parties ?

- Satisfy courts of danger of judgement or prospective judgement being unsatisfied because
 - Third party holds, is using, or power of disposition over assets of the defendant or possible defendant;
 - Third party in position of control or influence concerning those assets; or

Third parties ?

- Process may be available to the plaintiff following a judgement or prospective judgement under which the third party may be obliged to disgorge the assets or contribute towards the judgment.
- Applicant must pay all reasonable costs and expenses of the third party in observing the terms of the order: UCPR 25.17
- Third party should be made a respondent.

Long Arm Reach



- Application for freezing or ancillary order can be served on person outside Australia if any assets within the jurisdiction of the court

Undertaking as to damages

- Duty to proffer to court:
 - *"undertaking to submit to such order...the court may consider to be just for the payment of compensation...to any person (whether or not a party) affected by the operation of the order..."* UCPR 25.8

Undertaking as to damages

- Affidavit must disclose whether doubt of ability to meet this undertaking
- Court may require security for undertaking
- Be ready to proffer it if doubt exists
- Evans case
 - Breadth of compensation order
 - Warn clients

Ancillary Orders

- Seek before Mareva application or as part of it.
- Purpose must be to:
 - Illicit information relating to assets relevant to freezing order or prospective freezing order; or
 - Determine whether order should be made:
UCPR 25.12

Ancillary Orders

- Most common is affidavit to disclose assets;
Kodak v Cochran
- leaving jurisdiction
- Restrain transfer of assets out of jurisdiction
- Appoint receiver
- Banks to disclose information

Privilege against self incrimination

- Mareva order situation may be linked to serious unlawful conduct
- Self incrimination – Evidence Act 1995 s.128A
- object on grounds that information to be disclosed may tend to prove that the person:
 - *"has committed an offence against or arising under an Australian law or a law of a foreign country or*
 - *Is liable to a civil penalty"*

Privilege against self incrimination

- Mandatory process
 - Disclose all information to which no privilege exists
 - Prepare separate affidavit of information to which objection is to be made
 - Deliver that affidavit to court in sealed envelope
 - File and serve separate affidavit on each party setting out basis of objection

Privilege against self incrimination

- Court will only open envelope
- Court then determines if reasonable grounds for objection
- If court files reasonable grounds will return to person
- If court requires information disclosed can give certificate for limited immunity

Post order tasks

- Return date will be in one or two days – prepare immediately
- Progress cause of action quickly or execution of judgement
- Must serve copies of
 - Order / application for order
 - Affidavits

Post order tasks



Serve:

- Exhibits
- Any written submissions
- Any document provided to the court
- Transcript or if none a note of oral allegations of fact made or oral submission put to the court
- Originating process or if none filed draft originating process – notify order to people affected

Court appointed receiver

- *“In any in which it appears to the court to be just or convenient to do so”*: section 7 FCA Act; 67 Supreme Court Act
- Perhaps even more dramatic than a Mareva order
- Most often aid in equitable execution of judgment debt where risk of fund being dissipated

Court appointed receiver

- Separately can be to secure property the subject of an equitable charge or charge in existence but not yet enforceable. Appointee limited to powers ordered by court
- Appointee is an officer of the court
- Appointee interference is contempt of court.



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