

FREEZING ORDERS – BY JAMES HAMILTON, PARTNER HOLDING REDLICH LAWYERS

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Introduction

Freezing orders, Mareva orders, or asset preservation orders have been described as an “*extraordinary interim remedy*”¹.

These orders seek to preserve the assets of the defendant pending a judgement or its execution. Their purpose is to preclude dealings in them, or their disposal, so as to defeat a judgment. This means the preservation should be limited to the probable judgement amount.

The remedy has been referred to by the High Court of Australia in the following terms:

- (a) Its aim is to “*prevent the abuse of the process of the court by the frustration of its remedies*”;
- (b) It is an exception to: “*the general rule that a plaintiff must obtain his judgement and then enforce it*”²;
- (c) “*He [plaintiff] cannot beforehand prevent the defendant from disposing of his assets merely because he fears that there will be nothing against which to enforce his judgement nor can he be given a secured position against other creditors. The remedy is not to be used to circumvent the insolvency laws*”³;
- (d) *It is to prevent a defendant from disposing of his actual assets (including claims and expectancies) so as to frustrate the process of the court by depriving the plaintiff of the fruits of any judgment obtained in the action...it should not purport to create security over them in favour of the plaintiff and it should make clear that it goes no further than to deprive the defendant of possession of them for the purpose of precluding his disposal of them so as to defeat judgment*”⁴;
- (e) The courts have been careful to ensure that the party at the receiving end of the order could carry on its ordinary course of business and have sufficient monies to fund its defence of any proceeding. The remedy does not create a charge or security over any of the assets⁵.

¹ Federal Court of Australia practice note CM9 paragraph 6: “because it can restrict the right to deal with assets even before judgement and is commonly granted without notice”

² Jackson v Sterling Industries Ltd per Wilson, Dawson JJ at 617.9, 618.1

³ Jackson v Sterling Industries Ltd per Wilson, Dawson JJ at 618.1

⁴ Jackson and Sterling Industries Ltd per Dean J at 626

⁵ Jackson v Sterling Industries Ltd per Gaudron J at 642.3

At the time of the United Kingdom “*Mareva*” case in 1975⁶, there was still some judicial debate as to the source of the court’s jurisdiction to enable such orders to be made. Initially such orders were made in the United Kingdom against foreign defendants to restrain them from removing assets from the jurisdiction⁷. The remedy was extended over time to prevent a party or third party holding those parties’ assets, from dealing with those assets, either within the jurisdiction or outside of the jurisdiction. The *Supreme Court Act 1981* (UK) finally confirmed this breadth of the remedy.

Court Rules / Practice

In Australia, harmonised practice notes have been issued by the Federal Court of Australia and the Supreme Court of NSW to provide a guide about the usual practice of the courts relating to freezing orders and to provide a form of the usual orders (**Practice Notes**). These Practice Notes recognise that there is still a judicial discretion for the courts to make such orders as “*are appropriate in the circumstances of the particular case*”⁸.

The Supreme and Federal Court both also have harmonised court rules dealing with freezing orders⁹. Ritchie’s Uniform Civil Procedure NSW, LexisNexis, provides a comprehensive commentary on the relevant UCPR.

The Practice Notes and court rules are essential reading for any lawyer wishing to approach either court to seek a freezing order. Earlier case law in this area should be used cautiously as it may conflict with the harmonised court the rules and the Practice Notes.

District Court

The District Court of NSW has power to make a Mareva Order¹⁰. In *Pelchowski v Registrar, Court of Appeal (NSW)*¹¹ the High Court examined the extent of the District Court’s jurisdiction to grant such an order.

In this case, the plaintiff filed a notice of motion seeking to restrain the defendants from dealing with a portion of the proceeds of the sale of land pending final determination of the proceedings. It obtained a verdict against the defendants (excluding costs) before the motion was heard. After the verdict, the District Court judge ordered that the defendants be restrained from selling or otherwise disposing or encumbering their interest in the land, until further order, or payment of the verdict. Only one of the defendants (who was self represented) was aware that the order had been made. The plaintiff did not promptly issue a bankruptcy notice, or a writ of execution against the land. One of the defendants applied for a loan, eleven days later, securing the loan via a registered mortgage over the same land. Four months later, the solicitor for the plaintiff learned of the mortgage and loan. The plaintiff filed a notice of motion seeking a referral to the Supreme Court, alleging that the defendants

⁶ *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.* [1975] 2 Lloyd’s Rep.509

⁷ See the discussion in *Jackson v Sterling Industries Ltd* [1987] 162 C.L.R 612

⁸ Practice Note CM9 – Federal Court of Australia dated 1/8/2011; Practice Note No. SC Gen 14, dated 16/6/2010

⁹ UCPR 25.10-25.17 / FCR Division 7.4

¹⁰ S46(1) of the District Court Act

¹¹ [99] HCA 19 unreported

had been guilty of contempt of court. This led to an appeal to the Court of Appeal and thereafter an appeal to the High Court. The defendant who had been aware of the order was sentenced to a fixed imprisonment of 6 months for contempt by the Court of Appeal. In the High Court however, that defendant was successful in overturning the contempt, on the basis that 3 of the justices (2 dissenting) found that the District Court had no authority to grant an injunction after the provision of a verdict. Section 46 of the *District Court Act* limited the rights of the court to make an injunction order “*in any action*”. The majority would not allow a post verdict order securing the payment of the judgement debt. Further the court noted that:

- (a) There had been no undertaking by the plaintiff that it would expeditiously pursue its remedies of enforcement; and
- (b) The order of the District Court continued until further order, or payment of the verdict.

The District Court’s jurisdiction seems somewhat more limited therefore, although UCPR regulation 25.1 provides that the harmonised rules apply to proceedings in the District Court as well as the Supreme Court.

Practice Notes

The Practice Notes can be paraphrased as follows:

Ex Parte / Timing

- Most usually, the freezing order will be an ex parte application given the urgency of the application and the need to obtain an order from the court before the asset is dissipated.
- The ex parte freezing order should only seek a limited period initially for which it should operate. Therefore an early return date is required – suggested as usually no more than a day or two after the order is made, to allow the respondent an opportunity to be heard.
- The applicant will bear the onus or burden of satisfying the court the order should be continued at the second occasion.
- A freezing order should reserve liberty for the respondent to apply at short notice. The court may make a freezing order before a cause of action has accrued.

Party

- The respondent to an application for the remedy can either be a person liable on the substantive cause of action, or a third party who has possession, custody or control of assets which might ultimately be required to satisfy the judgement against the ultimate respondent.

- The third party need not necessarily be a party to the main proceeding, but should be a respondent to the application for the freezing order or other orders.

Assets Affected

- The value of assets sought to be frozen must be limited to the amount which is the expected likely maximum of the applicants claim, including interest and costs. If the amount is not known (the practice note gives the example of fraud by an employee) then it may need to be broader at first instance, given that difficulty.
- The Mareva order should usually allow the respondent to deal with its assets for legitimate purposes. The usual order reflects this principle. This will mean that not all of their assets will be able to be frozen. The practice note lists examples of these legitimate purposes as follows:
 - (c) Ordinary living expenses;
 - (d) Reasonable legal expenses;
 - (e) Dealings and dispositions in the ordinary and proper course of the respondents business;
 - (f) Dealings and dispositions to discharge obligations bona fide and properly incurred under a contract entered into before the order was made.
- The court is not limited by the Practice Notes and its usual form of orders.

Foreign Proceedings / Parties

- The court may make a freezing order to aid foreign proceedings in certain circumstances.
- Where there are assets in Australia, service outside of Australia is permitted under a “*long arm*” service rule.

Undertaking as to damages

- It is most typical that an undertaking called the “*usual undertaking as to damages*” is given by the applicant to the court. This is dealt with in more detail below.
- The respondent may challenge the undertaking as to damages, by seeking security.

Disclosure

- When seeking the ex parte freezing order, the court requires the applicant to make a full and frank disclosure of all material facts. That disclosure must be of all possible defences known to the applicant, information which may cast doubt on its ability to meet the usual undertaking for damages from assets in Australia. This is dealt with further below

- The court is not limited by the Practice Notes and its usual form of orders.

Affidavit in Support

Affidavits in support of a freezing order should if possible address details of the judgement, or if there is no judgment, information about the cause of action, including the basis of the claim for relief, the amount of the claim and, the applicant's knowledge of any possible defence.

The nature and value of the respondent's assets, as known, within and outside of Australia will need to be set out.

The affidavit will also crucially need to deal with the matters required to be proved in UCPR Rule 25.14; being:

"if the court is satisfied having regard to all circumstances that there is a danger that a judgment or prospective judgement will be wholly or partly unsatisfied because any of the following might occur.

- (g) *The judgement debtor, prospective judgement debtor or other person absconds;*
- (h) *The assets of the judgement debtor, prospective judgment debtor or another person are:*
 - (i) *Removed from Australia, or from a place inside or outside Australia, or*
 - (ii) *Disposed of dealt with or diminished in value".*

Third Party Orders

UCPR 25.14(5) sets out the minimum requirements as to when a court may make a Mareva order or ancillary order against a third party. It requires that a court be satisfied having regard to all the circumstances, that:

- (a) *There is a danger that a judgment or prospective judgment will be wholly or partially unsatisfied because:*
 - (i) *the third party holds or is using, or has exercised or is exercising, a power of disposition over assets (including claims and expectancies) of the judgement debtor or prospective judgment debtor, or*
 - (ii) *the third party is in possession of, or in a position of control or influence concerning, assets (including claims and expectancies) of the judgment debtor or prospective judgment debtor or,*

(b) A process in the court is or may ultimately be available to the applicant as a result of a judgment or prospective judgment, under which process the third party will be obliged to disgorge assets, contribute towards satisfying the judgment or prospective judgment

In order to be affected by the orders, the third party will at least need notice of the orders, or a direct order to be made against it.

This could mean for example that a third party is given notice of an order affecting the assets of a person (ie a bank) even though the plaintiff is not sure whether the bank in fact holds money in an account creating a debt from the bank to the person affected by the Mareva order.

If the third party does not have a precise order made against it, but is given notice of a Mareva order affecting assets it holds, then it could be guilty of contempt of court and potentially penalised.

The sample freezing order attached to the Practice Notes permits a set off by a bank in respect of a facility which it had given prior to the notification of the order. It also provides that a bank need not enquire as to the application of money withdrawn from it, if the withdraw appears to have been permitted by the order.

A third party will be entitled to recover costs and expenses incurred in complying with an order against it¹². It is likely that the reasonable costs of the third party and its expenses would include solicitor and own client basis costs¹³

Undertaking as to damages

The expression “*usual undertaking as to damages*” is defined in UCPR 25.8 which states:

“The “usual undertaking as to damages”, if given to the court in connection with any interlocutory order or undertaking, is an undertaking to the court to submit to such order (if any) as the court may consider to be just for the payment of compensation (to be assessed by the court or as it may direct) to any person (whether or not a party) affected by the operation of the interlocutory order or undertaking or of any interlocutory continuation (with or without variation) of the interlocutory order or undertaking.”

As mentioned above, an applicant for a Mareva order must proffer an undertaking as to damages to the court. To comply with the Practice Notes, the applicant must also disclose

¹² UCPR 25.17

¹³ See Ritchie's Uniform Civil Procedure NSW at [25.17.5] LexisNexis

any inability, or doubts about their ability to meet the usual undertaking as to damages, from assets within Australia¹⁴.

Frigo v Culhaci¹⁵

This case is a useful example of a successful appeal against a Mareva order made in the NSW District Court. No undertaking was proffered by the plaintiff at any stage of the District Court proceedings and the plaintiff attempted to proffer it before the Court of Appeal “*nunc pro tunc*”.

The Court of Appeal noted, in a joint judgment:

- (a) “*Proof of the defendant’s insolvency is not itself sufficient... there must be evidence of at least a more than usual danger of assets being removed...*”¹⁶
- (b) “*... a court exercising equitable jurisdiction generally will only grant to a plaintiff by interlocutory relief the minimum relief necessary to do justice between the parties...*”¹⁷
- (c) “*we cannot conceive the circumstances where an ex parte Mareva injunction should be granted otherwise than subject to an undertaking as to damages*”¹⁸

The Court of Appeal was very critical of the fact that counsel had not reminded the judge of the need for the undertaking. The court felt that the onus was on the plaintiff (via counsel) to ensure the undertaking was offered and that the judge should be reminded of this need. The court referred to this failure by counsel as a “*serious breach of counsel’s obligations to the court*”¹⁹. The court also noted that a mere assertion that the defendant was likely to put assets beyond the plaintiff’s reach is not enough. There had to be established by evidence (and not assertion) the fact that there was a real danger of the defendant absconding or removing assets out of the jurisdiction or disposing of them within the jurisdiction²⁰.

The freezing order also contained no maximum sum limitation over the assets. The court was also concerned that even a usual order about disposing of assets, expressed to be except so far as the unencumbered value exceeded a certain sum, leads to a difficulty. If the assets are not cash, they would have to be valued for the defendant to know whether they are breaching the court order. Further if a third party was involved, they would not know the value of the assets without a valuation. The court felt that at least the injunction must set out the maximum sum which it is thought the plaintiff is likely to recover. In this case the order did not have a maximum sum limitation.

¹⁴ Practice note SC Gen 14.19

¹⁵ (NSW) CA unreported [1998] NSW SC 393

¹⁶ The court at page 9.8

¹⁷ Page 9.9

¹⁸ Page 10.2

¹⁹ Page 10.5

²⁰ Page 11.5

National Australia Bank Ltd v Bond Brewing Holdings Ltd²¹

This case involved an application for special leave to appeal a decision, with respect to the court appointing a receiver to Bond Brewing Holdings Limited by National Australia Bank when it uses an unsecured creditor. The High Court was critical of the fact that no undertaking as to damages was proffered or required, meaning that an order should not have been made to appoint a receiver.

European Bank Limited v Evans²²

This case examined the extent of the damages which can be claimed against a party who provided an undertaking as to damages, if the undertaking has to be called upon by the respondent.

The respondent in the High Court appeal had given an undertaking as to damages to the Court of Appeal in respect of money paid into Court pending an appeal outcome in the substantive proceedings. The appellant bank now sought compensation pursuant to this undertaking as to damages. The Equity Division Judge ordered an assessment for the amount of compensation in the sum of USD\$800,000 being in effect increases in the value of the Euro against the US dollar. The primary judge had found that at the time of the undertaking, the party providing it knew that the respondent earned income from dealing in foreign currencies and that but for the order requiring a payment into court, it would have converted the judgment sum from US dollars into Euro's. The primary judge applied the criteria for assessing remoteness in cases of breaches of contract and looked at the rule in *Hadley v Baxendale*. As that court noted, that rule marks out the limits for which a plaintiff is normally entitled to be compensated. The rule entitles the plaintiff to recover in contract damages:

“as arise naturally that is according to the usual course of things, from the breach of contract or such damages as may reasonably be supposed to have been in the contemplation of both parties concerned at the time they made the contract as a probably result of the breach”²³.

The High Court however said that reliance upon this rule, should only be by way of analogy and that:

“... the undertaking as to damages is given to the court for enforcement by the court; it is not a contract between parties or some other cause of action upon which one party can sue the other. It is worth repeating the obvious proposition that such an undertaking is not lightly to be given”²⁴.

The High Court agreed with an earlier decision to the effect that it should not deal with causation of damages by examining the contract and tort scenario. The court felt it was

²¹ (1990) 169 C.L.R 271

²² 240 CLR 432

²³ Page 438.13 Judgement of the court

²⁴ Pages 438-439.14

really an instance of a party seeking an equitable remedy having to do equity and therefore the assessment of the compensation for an undertaking as to damages should not be:

“constrained by a rigid formulation”²⁵.

Their Honour’s accepted a formulation of Aickin J in *Air Express*²⁶ in which he had said:

“in a proceeding of an equitable nature it is generally proper to adopt a view which is just an equitable, or fair and reasonable, in all the circumstances rather than to apply a rigid rule. However the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted is one which will be just and equitable in the circumstances of most cases and certainly in the present case”²⁷.

The High Court supported the findings of the primary Judge in this case to the effect that the person giving the undertaking knew that when giving the undertaking the other party would be denying the bank the opportunity to convert the funds from US dollars into Euro’s and that this was its business. The Court of Appeal had found that the movement of the exchange rate was too remote. The High Court preferred the approach of the primary Judge, by which the following questions were asked:

- What is the loss that is now alleged?
- Did that loss flow directly from the order?
- Could the loss sustained have been foreseen at the time of the order?

The enquiry is whether a loss of the kind is one which *could have been* foreseen. It is not a question of whether the actual loss was foreseen at the time of the undertaking.

Given the potential breadth of a compensation order which may be made if the undertaking is called upon, legal practitioners should expressly warn their clients in writing about both the need for the undertaking in any contemplated Mareva application and its possible monetary effect if it is ever called upon.

²⁵ Page 439.17

²⁶ (1981) 146 CLR 249 at 266-267

²⁷ Page 439.18

Burden of Proof

There are some differences between a Mareva order and an equitable injunction in the test applied by the court in considering whether an order should be made.

UCPR 25.14 sets out the prerequisites for a Mareva order. These are:

- (1) *This rule applies if:*
 - (a) *judgment has been given in favour of an [applicant](#) by:*
 - (i) *the court, or*
 - (ii) *in the case of a judgment to which subrule (2) applies- another court, or*
 - (b) *an [applicant](#) has a good arguable case on an accrued or prospective cause of action that is justiciable in:*
 - (i) *the court, or*
 - (ii) *in the case of a cause of action to which subrule (3) applies-another court.*
- (2) *This subrule applies to a judgment if there is a sufficient prospect that the judgment will be registered in or enforced by the court.*
- (3) *This subrule applies to a cause of action if:*
 - (a) *there is a sufficient prospect that the other court will give judgment in favour of the [applicant](#), and*
 - (b) *there is a sufficient prospect that the judgment will be registered in or enforced by the court.*

The matters mentioned on page 5 above, must then be satisfied in the affidavit in support.

In *Davis v Turning Properties Pty Ltd and an or*²⁸ Campbell J noted that it had been decided in *Cardie v LED Builders Pty Limited*²⁹ that a Mareva order is not a species of injunction. Mareva relief is a right in personam only³⁰. It is not creating a security, or right in ram, even if viewed practically, it may have that effect.

The remedy should be seen as:

²⁸ (2005) 222ALR 676

²⁹ (1999) 198 CLR 380

³⁰ See [28]

“A remedy to protect the integrity of the processes of the court and not as an injunction”

Campbell J. also cited with approval of the comments of Brennan J. in *Jackson v Sterling Industries Ltd*³¹:

“A judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case and, the schemes which a debtor may devise for divesting himself of assets being legion, novelty of form is no objection to the validity of such an order”

Campbell J. also noted the comments in *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia*³² per McHugh, Gummow, Kirby and Hayne JJ:

“If relief is available against non-parties the focus must be the administration of justice..... To avoid confusion as to its doctrinal basis it is preferable that references to “Mareva orders” be substituted for “injunctions”.

Campbell J. commented upon the elements of the burden of proof for Mareva orders. He said:

“The court does not operate in the conceptual frame appropriate to decisions about whether to grant an interlocutory injunction, of inquiring whether there is a serious question to be tried, and, if so, where the balance of convenience lies. Rather, the court adopts the conceptual frame used for other interlocutory decisions of enquiring whether there is prima facie evidence of those facts which are the basis for the grant of the particular interlocutory relief in question and a reasonably arguable basis for any question of law involved...”³³

Further useful statements about the practical matters to be dealt with in proving a good arguable case are found in *Patterson v BTR Engineering (Aust) Ltd and others*³⁴.

Meagher JA noted in that case, that in exceptional cases, one example being gross dishonesty, it may be possible to infer the existence of the risk of dispersal, partly or wholly from the proof of the very nature of that cause of action.

Rogers A-JA also stated that:

“...I can imagine situations where there may be overwhelming evidence that a person against whom a claim may be made is

³¹ (1987) 162 CLR 612 at 621

³² (1998) 195CLA1 at 332

³³ At [37]

³⁴ (1989) 18 NSW LR 319

about to leave the jurisdiction with all of his assets. At that time the claim against him may still be shadowy but the very circumstance of the proposed flight may lead to the strong inference that further investigation will reveal the basis for a claim.”

Therefore, although UCPR 25.14 sets out a codified standard of proof, as the comments above indicate, both the type of action and the degree of risk can operate to improve the prospects of obtaining a Mareva order.

A useful outline of evidentiary requirements (although in a UK decision) is also found in the *Ninenia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Niedersachsen*³⁵. Mustill J noted in that case the following points:

- An interlocutory injunction is a direct reflection of the underlying cause of action;
- A Mareva application however was not of the same character. It bears no relation to the relief sought in the trial. The plaintiff in a Mareva is not seeking to obtain a perpetual injunction in the form of the orders sought in the Mareva;
- A mere assertion of the facts is not sufficient;
- The test is whether there is: “**a good arguable case** in the sense of 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% chance of success” (emphasis added).

In weighing up the plaintiff’s evidence in a “*Mareva application*”, Young J has expressed the view³⁶:

“It is also clear that when one is looking at the evidence as to whether that test has been made out, one is looking through the eyes of a prudent sensible commercial man and asks whether he can properly infer a danger of default...”

This was said in looking at the likelihood of assets being organised so as to frustrate a judgement.

Foreign Cause of Action

As noted above, Mareva order can be made in respect of assets situated in this jurisdiction, even though the cause of action is justiciable in a foreign court.

The requirements of UCPR 25.14 are perhaps stricter than those set out in *Davis v Turning Properties*³⁷ in which Campbell J dealt with circumstances where there were proceedings in the Bahama’s in which a Mareva order had been made, but they did not yet have

³⁵ [1984] 1 All ER 398

³⁶ *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSW LR 545

³⁷ *Op cit*

substantive relief claimed. He was satisfied that “*from the intrinsic circumstances*” it was more likely than not proceedings would be begun by the plaintiff against the defendant seeking substantive relief to recover money which the plaintiff has lost. He stated that it did not matter that the precise causes of action could not be stated with any certainty at that time. His Honour however, was influenced by the fact that there was a “*powerful prima facie case that the plaintiff has been defrauded*” by the defendant.

Service out of Australia

UCPR rule 25.16 allows a freezing order or ancillary order to be served on a person:

“Who is outside Australia (whether or not the person is domiciled or resident in Australia) if any of the assets to which the order relates are within the jurisdiction of the court”.

This rule differs from the general rule as to when a court could authorise foreign service under the UCPR.

Defending a Mareva Order

Usually there will be liberty to apply reserved in the Mareva order. The Practice Notes emphasise that the duration of a freezing order should be as early as practicable, being usually no more than a day or two after the order is made. If the return date is too long, the defendant should seek to have the matter listed at the earliest possible time before a duty judge upon giving notice to the plaintiff. The usual practice is for the defendant to oppose the order before a judge, by seeking its discharge, rather than by appealing the judgement as an interlocutory order, via an application for leave to appeal to the Court of Appeal. This is a similar process to when an interlocutory injunction is ordered.

The Practice Notes also state the applicant will still bear the onus of satisfying the court that the order should be continued or renewed at the next return date. That may mean that the defendant need not put on evidence in response.

In the *Ninemia*, case³⁸, Mustill J described the weighing up of the evidence at the first return date in this manner:

“The evidence adduced for the defendant will normally be looked at for the purposes of deciding whether it is enough to displace any inference which might otherwise be drawn from the plaintiff’s evidence. I see no reason in principle why if the defendant’s evidence raises more questions than it answers, and does so in a manner which tends to enhance rather than allay any justifiable apprehension concerning dissipation of assets, the court should be advised to leave this out of account. On the other hand, the plaintiff has no right to criticise the defendant’s evidence, for omissions or obscurity... the less impressive his evidence the less

³⁸ Op cit

effective it will be to displace any adverse inferences. But there must be an inference to be displaced if the injunction is to stand and comment on the defendant's evidence must not be taken so far that the burden of proof is unconsciously reversed. "

As mentioned earlier in the paper, of course the defendant should consider the level of frankness or otherwise of the disclosures of the plaintiff, both as to the merits and detriments of the cause of action and as to any weaknesses of the undertaking as to damages. The defendant may choose to issue a notice to produce in respect of the assets of the plaintiff if there is a doubt as to its ability to meet an undertaking as to damages and it is substantial. Even if the Mareva order cannot be defended outright, the defendant should seek to ensure that the ambit of any Mareva order is limited, so as:

- to allow the defendant to deal with its assets beyond the estimated scope of the plaintiff's damages claim; and
- to allow it to fund its defence of the claim and carry out its ordinary business affairs.

The form of any order in these respects would need to be carefully scrutinized. The value of the frozen assets may be an issue of importance given the comments in *Frigo v Culhaci* mentioned above. The defendant may also have cross claims or set offs which ought be taken into account in setting the maximum amount of assets affected by any Mareva order.

Ancillary Orders

The court may make ancillary orders as it order as the court considers appropriate.³⁹ These ancillary orders include:

- An order requiring the listing of information relevant to assets relevant to the proposed orders may or actual order.⁴⁰
- An order that the respondent direct a the bank to disclose information to the applicant.⁴¹
- An order for the cross examination of the respondent about their asset disclosure affidavit (Kodak case).⁴²
- An order for delivery up of specific assets.
- An order restraining the respondent from leaving the jurisdiction.
- An order for the transfer of assets from one jurisdiction to another.
- An order appointing a receiver to the respondent assets.⁴³

³⁹ UCPR 25.12(1).

⁴⁰ UCPR 25.12(2)(a)

⁴¹ See *Ritchies* at [25.12.5]

⁴² *Kodak (Australasia) Pty Ltd v Cochran* unreported judgment of Brownie J. 4 April 1996 BC9601226.

Kodak Case – Cross Examination

In the Kodak case, the defendant Mr Cochran and his accountant swore affidavits in purported compliance with an order to file an affidavit disclosing their assets. The plaintiff wished to cross-examine both deponents on their affidavits. Brownie J noted that it would be a very unusual case where the plaintiff could cross-examine the defendant or witness for the defendant upon their affidavit filed in that circumstance. Brownie J found however, on a prima facie level, that the affidavits provided left unanswered, or answered what may have turned out to be an unsatisfactory way, some of the questions. There was a significant risk that if judgment was obtained, the assets could be dissipated. His Honour therefore allowed cross examination on the disclosure affidavits, but limited the grounds of the cross-examination. He later found that in the cross-examination the defendant was “*evasive and unpersuasive*”. As a result, His Honour was asked by the plaintiff to restrain the defendant from leaving Australia. His Honour felt that the basis for ordering the defendant not to leave Australia, was his failure to disclose as he should have, all of his assets.

Privilege against self-incrimination

A defendant may wish to refuse to disclose any of his assets due to a fear they may be incriminating themselves. As its noted in the Practice Notes at point 14, in order to object to complying with a disclosure order on the grounds of self-incrimination, the party claiming the privilege must follow the procedure set out in section 128A of the *Evidence Act 1995* (Cth) (NSW). Draft order 9 of the Practice Note’s usual form of Mareva order, incorporates these requirements.

In order to claim the privilege, the following requirements must be satisfied:

- The information, or some of it, 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.

Providing those grounds exist, the person must:

- first disclose in the affidavit the information for which no privilege is claimed; and
- then swear a separate affidavit containing the information on which self-incrimination privilege is maintained
- deliver that separate affidavit to the court in a sealed envelope; and
- file and serve on each other party, a separate affidavit setting out the basis of the objection;

⁴³ See Ritchies generally for these examples and case references at [25.12.5]

- The sealed envelope containing the privilege affidavit cannot be opened, except if the court directs;
- The court then determines whether there are reasonable grounds for the objection. After the court has made that determination, if it does not require the information, the sealed envelope must be returned to the person who provided it.

There are provisions for the Court to supply a certificate, if in fact the court rules that there should be a disclosure, even though it may tend to incriminate in certain respects. The certificate can be used to preserve this privilege in later proceedings.

Court Appointed Receiver

Whilst a court appointed receiver is a remedy which could be ordered as an ancillary order as part of a freezing order, the UCPR and FCR both have separate rules dealing with the appointment of a court appointed receiver. The power of the court to appoint a receiver is quite broad, being:

“In any case in which it appears to the court to be just or convenient so to do”⁴⁴

This remedy can be even more drastic than a freezing order, to the extent that all of the assets might be affected by the order. Following the *Bond Brewing* case mentioned earlier, to appoint a receiver ex parte would be highly unusual, given the dramatic effect of such an order. Most usually a court appointed receiver would be appointed to aid in an equitable execution of a judgment debt, where there is a risk of the fund being dissipated. Court appointed receivers however can be appointed to secure property the subject of an equitable charge, or where there is a charge in existence but it is not yet enforceable. The court appointee will only be able to act within the powers ordered by the court at the time of their appointment or as amended on a later application. That receiver also derives their income under the terms of the order under which they are appointed. As a court officer, the court appointed receiver is supervised by the court and to interfere with their appointment would amount a contempt of court.

ASIC powers

It is worth noting that the Federal and Supreme Courts have a particular freezing order power under section 1323 of the Corporations Act. This power normally is used in relation to investigations being carried out by ASIC.

Conclusion

Thankfully, the process for obtaining Mareva orders has been streamlined by the harmonised Practice Notes and court rules. These guides are not set in stone however and can be moulded to the circumstances. The earlier case law still provides useful examples of the court’s discretion being exercised and the background to the harmonised position.

⁴⁴ Section 57 *Federal Court of Australia Act*; section 67 *Supreme Court Act*