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Rare Court Orders Can Help Companies Take Legal Action - Part 3

by John Polyzogopoulos
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John Polyzogopoulos provides counsel in a variety of matters including shareholder disputes, breach of contract, tort claims, product liability, professional negligence, debt and security enforcement claims, insolvency and family law, particularly where the division of assets and valuation of businesses is involved. John is a member of The Advocates' Society, the Ontario Bar Association and the Toronto Lawyers' Association. He is a current board member and past president of the Hellenic Canadian Lawyers' Association.

John may be reached directly at 416.593.2953 or jpolyzogopoulos@blaney.com

This is the third of three articles on unusually forceful, difficult-to-obtain court orders that can enable companies that fear they are the victims of such illegal activities as fraud, intellectual-property theft, and trade secret theft to (a) capture evidence before it might be destroyed or (b) freeze assets that could be used to pay claims they might win.

The first article in this series, published in the January, 2008 issue of *Commercial Litigation Update* , focused on Norwich orders, which allow a person to obtain information from a third party, in particular a proposed defendant's bank, before moving forward with the claim against the defendant himself.

The second article, published in the June, 2008 issue of *Commercial Litigation Update* focused on Anton Piller orders, which allow a plaintiff to seize documents and other evidence from defendants when there is a risk that the defendant will destroy the evidence if given prior notice of a claim.

This article focuses on Mareva injunctions, in which the court freezes a defendant's assets at the outset of an action to assure that there will be money to pay any claim that it might grant.

One of the most important practical considerations that must be taken into account before commencing a law suit is whether the defendant will have sufficient assets at the end of a trial to pay any judgment that may be obtained. The last thing a litigant wants to do is spend tens of thousands of dollars only to receive a paper judgment that cannot be paid.

Normally, the most the plaintiff can do is conduct investigations into the creditworthiness of the defendant and decide whether to proceed based upon an educated guess as to whether the defendant will have assets at the end of the day. A plaintiff is not normally entitled to secure assets in advance to ensure that they will be available to satisfy a judgment that may not come for years. A defendant is normally entitled to carry on its ordinary course of business, and if business takes a turn for the worse and there is no money left by the time a judgment is granted, that is too bad for the plaintiff.

However, in situations where the defendant has acted fraudulently in the past or may act fraudulently in the future, a plaintiff may be able to apply to the court for what is called a *Mareva* injunction (named after the famous English decision in which one of the first such orders was made). A *Mareva* injunction freezes the defendant's assets pending trial. Because they run contrary to the general rule against execution before judgment, *Mareva* injunctions are very hard to obtain. If available, however, a successful application for a *Mareva* injunction can end the litigation at the very outset or, at the very

least, guarantee payment following a trial. Accordingly, it is a very powerful tool for litigants and their counsel at the outset in appropriate cases.

Because Mareva injunctions are hard to obtain, litigants and their counsel need to proceed cautiously with their application to the court. Knowledgeable counsel should be retained, as this will minimize the possibility of running into the many pitfalls that can arise.

In order to obtain a *Mareva* injunction, the plaintiff must establish that:

1. The plaintiff's case for damages against the defendant is strong;

2. There is evidence that the defendant is removing, or there is a real risk that the defendant is about to remove, his or her assets from the jurisdiction to avoid the possibility of a judgment; OR

3. The defendant is otherwise dissipating or disposing of his or her assets in a manner clearly distinct from his or her usual or ordinary course of business or living so as to render the possibility of future tracing of the assets remote, if not impossible; AND

4. The plaintiff is prepared to pay the defendant damages in the event that the court later determines that the *Mareva* injunction should never have been issued and the defendant suffers damage as a result of the injunction.

The first branch of the test is the most straightforward. It is usually fairly clear to counsel and the court whether the plaintiff's claim is strong. The most common types of "strong" claims are contractual claims (such as loan agreements or promissory notes), where it is often fairly clear that there has been a breach (non-payment of a loan, for example) and money is due and owing.

The more difficult cases to fit within this branch of the test are tort or equitable claims (e.g. claims in defamation, negligence, breach of fiduciary duty), where there is no contract to support the claim. In such cases, often neither the defendant's liability nor the amount of damages is clear. Where a case is 50-50, the court may not be persuaded that it is strong enough for a *Mareva* injunction to be granted. An added difficulty in proving a strong case for a *Mareva* injunction is that, by their nature, these applications to the court are brought at the very outset of the litigation, at the time the plaintiff's statement of claim is issued, well before the plaintiff has had an opportunity to build their case through the documentary and oral discovery of the defendant.

The second and third branches of the test, which are essentially alternatives to each other, are usually the most difficult hurdle to overcome in *Mareva* injunction cases. There is often no clear or irrefutable evidence that a defendant is, or is likely to be, dissipating or removing assets from the jurisdiction. Often, the best that a plaintiff can do is point to previous fraudulent or other bad conduct which would lead a reasonable person to conclude by inference that there is a real risk that the defendant will dissipate or remove assets. There is therefore often a leap of faith that must be made by the judge hearing the application. Predicting whether a judge will make that leap of faith is very difficult.

The evidence to support the inference that the defendant is, or will dissipate or dispose of assets, must be carefully gathered by counsel and his or her client, often with the help of private investigators and other experts. In addition to coordinating the fact-gathering exercise, counsel must ensure that the information included in the affidavits sworn in support of the application to the court constitute full and frank disclosure of all relevant and material facts, even those that might tend to help the defendant and diminish the plaintiff's case. This is because *Mareva* injunctions are brought without notice to the defendant (to give prior notice would risk the assets being dissipated or removed before the court can hear the matter), and therefore the court makes an initial order having only heard only one side of the story. To a great extent, therefore, the court is relying on the candour and integrity of

the plaintiff and his or her counsel and must assume, when granting such orders, that it has not been misled. If the court later determines that an important fact was not brought to its attention, it can set aside the *Mareva* injunction and order the plaintiff to pay damages and costs.

Finally, as with any other injunction application, the plaintiff must be prepared to give an undertaking in damages, which is an undertaking to the court that if it is later determined that the *Mareva* injunction should not have been granted and the defendant suffers damages as a result of the freezing of his or her assets, the plaintiff will pay the defendant the damages. The requirement to given an undertaking in damages causes the plaintiff to carefully consider the relative strength and importance of his or her case. It helps to weed out speculative or tactical applications and provides the court with added assurance that the plaintiff is serious and confident in the justness of his or her cause.

After the initial granting of the *Mareva* injunction, the plaintiff's counsel serves the order on the defendant and any third parties, such as banks, which may be holding the plaintiff's assets. These third parties are bound to comply with the order and not release the assets to the defendant pending further court order. The defendant then has the opportunity to retain counsel and go back to court to challenge the validity of the order. Often times, rogue defendants either settle quickly or simply vanish or do not contest the matter and the plaintiff is able to fairly quickly obtain default judgment and thereby access the seized assets on a timely basis.

As summarized in this three-part series of articles, clients should be aware that there are a number of powerful pre-trial remedies available to litigants at the outset of a case that can greatly help ensure a successful outcome. *Norwich* orders allow a plaintiff who suspects he or she has been defrauded to obtain information about a defendant from third parties, usually banks, without the defendant's knowledge. Such information can often be the whereabouts of the plaintiff's assets, which can then be used in support of an application for a *Mareva* injunction to freeze those assets pending trial. *Anton Piller* orders can be obtained to seize documents and other evidence from defendants when there is a risk that the defendant will destroy the evidence if given prior notice of a claim. ■