Blaney McMurtry LLP

PUBLICATION

The Full Court Press - Stopping Fraudsters Dead in their Tracks

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The most common civil court remedy to combat fraudsters is the *Mareva* injunction. This is a court ordered freeze of a defendant's assets including bank accounts, real property, etc., no matter where those assets are located. However, recent decisions from the Ontario Superior Court of Justice (and in particular, the Commercial List court of Toronto), demonstrate a willingness to grant significant "suites of relief" in certain circumstances, beyond only a *Mareva* injunction. The other relief can include *Anton Piller* orders (the "civil search warrant"), *Norwich* orders (pre-lawsuit disclosure from third parties, most often financial institutions), certificates of pending litigation to encumber real property, and sealing orders (to maintain the element of surprise in executing these orders). This "suite of relief" requires careful preparation, planning, and compelling evidence to obtain.

Blaney McMurtry LLP was recently successful in obtaining a combined *Anton Piller* order, *Mareva* injunction, *Norwich* order, and sealing order without notice to the defendants, on behalf of its client whose funds were misappropriated. Since there was serious concern about the manipulation of electronic data and records, the Court agreed to grant the *Anton Piller* order to search for and preserve relevant evidence at the defendants' premises. This involved the copying of numerous smartphones and computers, and the seizing and removal of additional computers and servers that could not all be mirrored on site in one day.

The *Anton Piller* order is something of a rare remedy, used either in cases where data and record manipulation or deletion is likely, or where actual evidence of wrongdoing and damages can be collected. This sometimes arises in cases of intellectual property infringement and counterfeit goods -- i.e. a warehouse full of counterfeit goods can be searched and the offending inventory seized as evidence.

Legal Requirements

Although disparate relief, the *Mareva* injunction, the *Anton Piller* order, and the *Norwich* order each compliment one another in combatting fraudsters and in allowing the aggrieved party to gather the necessary evidence to prove their case before it is too late and the evidence is gone forever. Although complimentary, each form of relief comes with its own legal test that a plaintiff must meet.

For a *Mareva* injunction, which freezes a defendant's assets pending trial, the claimant must establish: (1) a strong *prima facie* case (strong case on its face) and particulars of the claim against the defendants setting out the grounds of the claim and the amount, and fairly stating the points that could be made against it by the defendants; (2) some grounds for believing that the defendants have assets in Ontario";[1] (3) some grounds that there is a serious risk of the defendants' assets being removed from the jurisdiction, dissipated or disposed of before the judgment or award is satisfied; (4) proof of irreparable harm to the moving party; (5) that the "balance of convenience" favours the granting of the *Mareva* injunction; and (6) an undertaking as to damages.

The legal test for an *Anton Piller* order, which is an order allowing a claimant to enter a defendant's premises and to seize relevant documents (including electronic data), is as follows: (1) there must be an <u>*extremely*</u> strong *prima facie* case; (2) the damage, potential or actual, must be very serious for the plaintiff; (3) there must be convincing evidence that the defendant has in their possession incriminating documents or objects; and (4) there is a real possibility that the material may be destroyed or secreted before the parties can put their rights before the court.[2]

An *Anton Piller* order is a highly intrusive remedy that is considered exceptional by the courts. As a result, the requirements for obtaining an *Anton Piller* order are more onerous than for a *Mareva* injunction, and the high bar of a "*extremely* strong *prima facie* case" must be met before such an order will be granted.

An *Anton Piller* order permits the plaintiff to enter the premises of the defendant and seize evidentiary materials. A defendant who fails to comply may be held in contempt of court. In light of the order's characterization as "exceptional", such an order will only be granted where "there is no alternative way to ensure that justice may be done".[3]

The legal test to obtain a *Norwich* order is the least onerous. *Norwich* orders are requests for documents from third parties who deal with the defendant. Such third parties are typically banks, who have records of financial transactions. On a motion for a Norwich order the court considers: (1) whether the moving party has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim; (2) whether the moving party has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of; (3) whether the moving party has established that the third party from whom the information is sought is the only practicable source of the information; (4) whether the third party can be indemnified for costs it may incur because of the required disclosure; and (5) whether the interests of justice favour the obtaining of the disclosure sought.[4]

The moving party on a *Norwich* order must establish that the discovery sought is needed for a "legitimate objective". This may include identifying wrongdoers, evaluating whether a claim exists, identifying and tracing funds, or preserving evidence or property.[5] To meet the threshold of a valid, *bona fide* or reasonable claim, the plaintiff must only show that its claim is not frivolous or vexatious. The threshold of a "*bona fide* or reasonable claim" is lower than the threshold for a "strong *prima facie* case."[6] The requirement that a person be the "only practicable source of information" has been taken to mean that the person must be the only source from whom the information can be efficiently obtained.[7]

Courts will allow for *Norwich* relief in fraud cases because, when the plaintiff believes it is the victim of fraud, it is unreasonable to require it to approach the alleged wrongdoer for the information. It is often the case that financial institutions become the only practical source of the information.[8]

Finally, a temporary sealing order is appropriate and is usual relief to be granted along with a *Norwich* order. Orders would be ineffective at protecting the claimant's rights if the alleged wrongdoer was aware of the order and its consequences, as that party would then be able to dissipate assets, destroy documents, or take other steps to frustrate the claimant's rights.[9]

The element of surprise for an *Anton Piller* order is also very important, and therefore also supports that a sealing order ought to be granted. If the defendant knows about the *Anton Piller* order before steps are taken to actually execute it, the likelihood that any useful evidence will be recovered quickly diminishes.

Sealing orders make the court file confidential and are not granted lightly, since they are contrary to the "open courts" principle that provides legal proceedings should be accessible to the public. Accordingly, they are usually granted on a temporary basis until the need for confidentiality is at an end.

Planning and Execution

The logistics for successfully executing on "suite of relief" orders requires meticulous and careful planning on the part of the claimant. For instance, when executing a *Mareva* injunction and an *Anton Piller* order at the same time, it is critical that the defendants not be tipped off in advance, leading them to either move assets, delete incriminating evidence, or hide their computers or servers. Therefore, these orders must be executed at the exact same time. This involves having agents standing by to serve banks with *Mareva* orders to freeze accounts at 9:00 a.m. sharp when they open, while at the same time, legal counsel execute the *Anton Piller* order at the premises to be searched. Legal counsel are normally accompanied by a mandatory, court-appointed independent supervising lawyer and a digital forensics service provider to copy electronic data. It is also prudent to have police officers present to assist in keeping the peace, as tensions can understandably run high during an entry and search. Private investigators are also used to gather intelligence and monitor the premises to ensure that the key individuals do not leave, or that critical evidence is not removed, in the hours just before the search is executed.

Blaneys is experienced in the obtaining and execution of these orders to have them carried out seamlessly. If your organization has been defrauded by a bad actor and wishes to obtain relief from the court, please contact us for assistance.

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[1] *Original Traders Energy Ltd.* (Re), 2023 ONSC 1887, at paras 22 and 39.

[2] *1805753 Ontario Inc. v. Feldman*, 2020 ONSC 5601 at para 14.

[3] *2298679 Ontario Inc. et al. v. Northern Homecare Solutions Inc. et al.*, 2019 ONSC 3055, at para 35.

[4] *Isofoton S.A. v. Toronto Dominion Bank* (2007), 85 O.R. (3d) 780 (Sup. Ct.) at para 40 [*Isofoton*].

[5] *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at paras 75-76, 91.

[6] *Isofoton, supra* note 58 at paras 46-47.

[7] *Alberta (Treasury Branches) v. Leahy*, 2000 ABQB 575 at para. 157, aff'd, 2002 ABCA 101 [*Leahy*].

[8] *Enbridge Gas Distribution Inc. v. Toronto Dominion Bank* (2008), 201 A.C.W.S. (3d) 121 (Sup. Ct.) at para 7.

[9] *Isofoton, supra* note 58 at para 63.