

update

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Friday Facts: Preserving the status quo

*Often factual circumstances give rise to a need to apply to the Court for urgent orders to prevent the dissipation of assets. The **Mareva** injunction has been developed to deal with such cases. The question that clients often ask is in what circumstances will a Court allow such orders to be made?*

In the ordinary course of litigation a plaintiff must firstly obtain a judgment before having the right to enforce that judgment against the assets of the defendant. However, the **Mareva** injunction provides a plaintiff the opportunity to attend Court urgently to obtain an order directing that the assets of the defendant be frozen pending the issuing of proceedings against the defendant.

The application can be and is quite often made *ex parte*, that is, without notice to the prospective defendant. The reason for the *ex parte* application is usually because the plaintiff does not wish to give the defendant a window of opportunity to dissipate or dispose of their assets.

It is preferable for the application to be made with supporting affidavit material. However, sometimes the urgency of the matter results in the application being made orally and evidence being adduced through a witness in open Court.

So what needs to be demonstrated to the Court to persuade it that an order of such an urgent and restrictive nature should be made? The elements are clearly established.

Firstly, the plaintiff must prove to the Court that on the balance of probabilities it has a cause of action against the defendant.

Secondly, the plaintiff must establish that there is a sufficiently strong case against the defendant to justify the granting of an interim order to freeze assets prior to the issuing of proceedings.

Thirdly, the plaintiff must demonstrate that there is a "real risk" or danger of the defendant's assets being dissipated or put beyond the reach of the Court if the injunction is not granted.

Finally, it must be established that the balance of convenience lies with the plaintiff. That is, if the order is not made, the plaintiff will suffer prejudice which cannot be cured by the payment of damages by the defendant.

A plaintiff must also provide an "undertaking as to damages" to that Court. That being, the plaintiff must undertake that should it be found that the plaintiff did not have a cause of action against the defendant, and the defendant suffered loss or damage as a result of its inability to deal with its own assets, the plaintiff will compensate the defendant.

Once an order is made, if a defendant deals or attempts to deal with the assets in question they will be in contempt of Court which is punishable by imprisonment.

For more information

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