

update

25 May 2007

Friday Facts: When preserving the status quo is not enough

In our 9 February 2007 edition of Friday Facts, we discussed the circumstances in which a Court will grant a Mareva injunction to preserve a position and prevent the dissipation of assets.

However, sometimes an urgent situation will need more than just preservation of the status quo. It will need a Court order in which a premises or thing can be searched, inspected, detained, put into custody or preserved.

Traditionally known as an Anton Piller order, the Court can make such an order without notice to the defendant. However, there needs to be a very serious risk that once the defendant has notice of the application, the property or documents sought are likely to be destroyed.

The Court may make such an order if the Court is satisfied that there is a strong prima facie case on an accrued cause of action and that the potential or actual loss or damage to the applicant will be serious if the search order is not made. The plaintiff also needs to establish that there is sufficient evidence that the defendant possesses important evidentiary material and there is a real possibility that the defendant might destroy such material or cause it to become unavailable for use in evidence in a proceeding, or an anticipated proceeding.

To convince the Court that an order should be made the application needs to be supported by affidavit material which provides:

- a description of the things for which the order is sought
- the address or location of the premises or things in which the order is sought
- why the order is sought, including whether there is a real risk that the things to be searched will become unavailable for use in evidence
- the prejudice, loss or damage likely to be suffered if the order is not made
- the name of an independent solicitor who consents to being appointed to serve the order and supervise its execution
- whether it is likely that the premises to be search will only be occupied by a female or a child under the age of 18 years or a person vulnerable, based on age, mental capacity, infirmity or English language ability

It is important to note that, like the requirements for a Mareva injunction, the plaintiff must give an "undertaking as to damages" to the Court. That is, if it is found that the plaintiff did not have a cause of action against the defendant and the defendant suffered loss and damage as a result of the orders that had been made, the plaintiff will compensate the defendant.

Once the order is made, a breach of the order is contempt of Court which is punishable by imprisonment.

For more information

For more information, please contact:

- Mary Nemeth, Partner on
03 9321 7810 or 0400 627 048
mnemeth@rigbycooke.com.au

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