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MAREVA INJUNCTION APPLICATIONS AND OTHER PRE-JUDGMENT REMEDIES:

TACTICAL AND ETHICAL CONSIDERATIONS

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"With great power comes great responsibility."

- *Amazing Fantasy #15*, a.k.a. *The First Spider-Man Story* (August 1962); *Oeuvres de Voltaire*, Volume 48 (1829)

Introduction

As citizens and residents of a democratic nation, we feel secure that our property rights will remain unimpeded until a court of competent jurisdiction, exercising due process, determines otherwise. It is the civil law equivalent of "innocent until proven guilty".

In this paper, I will explore tactical advantages which may be available by tying up property before judgment, with a focus on *Mareva* injunctions.

By their very nature, interim steps to tie up assets are frequently taken *ex parte*. In this author's experience, counsel's most dangerous missteps occur when diving headlong to implementation without a full and proper analysis of the facts and of corresponding ethical considerations.

The fact that these extraordinary remedies are used sparingly, and the important practical and ethical considerations involved, do not minimize their potential value in cases where they are appropriate. In this author's view, in as much as we must exercise caution in using extraordinary prejudgment remedies, their potential benefits can be massive which ought not to be underestimated by plaintiff's counsel.

Similar considerations applicable to *Mareva* orders also apply to the use of other prejudgment remedies such as *Anton Piller* orders, preservation orders and the use of Certificates of Pending Litigation ("CPLs").

In this paper, I will explore the potential benefits to be gained; the ethical duties involved; and the devastating consequences which may result if the powers are misused. I will also explore other related steps which may be taken by plaintiffs and defendants at an early stage and which may significantly alter the course of the future proceedings.

Initial strategic considerations

Creative counsel will always look for potential ways to move beyond the standard pleadings-discovery-trial formulation to consider alternative opportunities to improve prospects of a good result. If we move away from standard approaches to our cases we can achieve exemplary results as much through strategy as through skill and hard work.

One of the most effective strategies can be to tie up opponents' assets well before trial, if and when permissible. Whether in commercial or estate litigation, and often in family cases, the target assets

most often involve interests in real property. There are many reasons for this. By their nature, real estate usually involves significant equity, whereas it is unusual for defendants in such cases to maintain large balances in the bank or investment accounts. Real estate is also harder and more costly to get rid of quickly. As well, the cases themselves often involve *in rem* claims which lend themselves more readily to prejudgment remedies. Finally, defendants often use their real estate as leverage for other investments; tying it up can wreak havoc with defendants' other business plans.

Efforts to tie up assets pre-judgment are so effective that it is not uncommon for clients to demand it of their lawyers. This can put tremendous pressure on counsel wishing both to please their clients and to comply with their ethical obligations.

The temptation to act quickly

Due both to the apparent advantages of tying up assets early, and to client pressures, and given the need to make fast decisions in fear of dissipating assets, lawyers are often tempted to jump to register a CPL or applying for a *Mareva* injunction without properly considering the substantive merits of these steps or the implications of taking such steps in improper circumstances.

A recent case in which the author was defense counsel is illustrative of the potential adverse consequences of acting in undue haste. In *Shen v Lou*, 2023 BCSC 414, the plaintiff seeking to enforce a $29,280,000 Chinese judgment had, in July 2022, obtained a *Mareva* injunction and related orders freezing substantially all of the defendant's worldwide assets. The Order was granted *ex parte* upon the commencement of proceedings and specifically prevented any dealings with a property in West Vancouver which had been recently listed for sale for $14,000,000; and it provided that the Order be registered on title to that property.

The *Mareva* Order also provided that the:

> "Defendant must, within 7 [seven] days of service of this Order, provide the Plaintiffs solicitor with a list (the "Defendant's Asset List"), verified by her affidavit setting out all of the Defendant's assets as of the date of this Order whether in or outside British Columbia and whether in her own name or not and whether solely or jointly owned, and details of all such assets…"

In accordance with the model order, the *Mareva* Order in *Shen* carved out an exception allowing the Defendant to spend:

> … "reasonable amounts on ordinary living expenses, ordinary and proper business expenses and legal advice and representation. Before spending any money on living, business or legal expenses, the Defendant must advise the Plaintiffs' solicitors in writing of the intended source of the funds".

Because the Order was registered against the West Vancouver property and specifically prevented dealings with it, the Defendant (a single mother) was unable to access the equity to pay for her living expenses or those of her children, nor for her legal expenses in defending the proceedings which proved intense and costly; nor was she able to service the mortgage or pay property taxes on the West Vancouver property.

In November 2022, the Defendant brought an application to vary the *Mareva* Order so that the property might be sold and the net proceeds placed in trust with her [then] counsel "only permitting withdrawals for reasonable amounts for ordinary living expenses, and legal fees, pending further agreement of counsel or further order of the Court. The Applicant shall account to the Plaintiff for any such expenditures."

The Plaintiff strongly resisted the variation application arguing that the Defendant had "not been honest in the disclosure of her assets, in violation of the *Mareva* Order and has a demonstrated history of not complying with court orders and failing to disclose assets in the Chinese court proceedings that form the basis for this action". He applied to cross-examine the Defendant on her affidavit and demanded elaborate production of nearly all her financial information from 2013 to 2022, far beyond the scope of the pleadings, as it arose from her application to vary.

In March 2023 and with the variation motion still pending, the Court ordered that the *Mareva* Order should be discharged based on the Plaintiff's material non-disclosure at the time he applied for it, i.e. upon commencement of the proceedings. The court noted that because *Mareva* injunctions are invariably sought on *ex parte* applications, they are subject to the general rules applicable to such applications as summarized in *Pierce v. Jivraj*, 2013 BCSC 1850, including the duty to make full and frank disclosure of all material facts, including not only known facts but also those facts that ought to have been known had proper inquiries been made.

In this case, the *ex parte* application had been premised (at para. 48) on the Plaintiff's evidence that the Defendant had "flagrantly breached" certain court orders in China and that she had "attempted to create an impression that she has no assets to satisfy the Chinese Judgment, evaded detention in China, and withheld information from him and the Chinese Court about her assets". The Court noted that "[e]ach of these statements implicitly asserts that [the Defendant] was aware that she was a named party under the Chinese judgment and aware of the Enforcement Orders against her".

Prior to the hearing, the Defendant had the opportunity to examine the Plaintiff for discovery over two days, and to adduce her own affidavit evidence, based on which the court held the evidentiary basis for the Plaintiff's initial statements to be lacking:

> [61] Mr. Shen's argument for the *Mareva* Order was centred on his evidence that Ms. Lou had disregarded, disobeyed and actively evaded the Chinese Judgment and Enforcement Orders. McDonald J. expressly referred to conduct having been taken to evade payment in granting the application. Had she been aware there was no evidentiary basis for asserting that Ms. Lou knew of the orders against her, the outcome clearly might have different.

In addition to setting aside the initial *Mareva* Order, the court held that on the facts, the application must also fail on a *de novo* consideration. Tucker J. further ordered special costs of the discharge application due to reprehensible conduct, and as well, she ordered that the Defendant is at liberty to apply to the Court for an inquiry to assess damages under the Plaintiff's undertaking. The Defendant's position is, *inter alia,* that due to a decline in the West Vancouver housing market

during which she had to remove the property from the market, her damages are in the millions of dollars.

Tucker J.'s discharge Order was also referred to and relied upon by the Court in granting an application to dismiss portions of the claim outright.

Sober second thought

It is essential, before embarking on an application for extraordinary relief such as a *Mareva* order, that counsel confer closely with their client to consider not only the potential benefits to be gained, but also the potential drawbacks. This comment is *not* intended to second-guess what occurred at the time the *Shen* case was initiated; rather, the case is helpful in demonstrating the pitfalls which can sometimes be overlooked in the excitement of the moment.

In particular, in considering strategic options, counsel should attend to the following :

1. Counsel should perform a full and proper analysis of the grounds for applying for extraordinary prejudgment relief, particularly on an *ex parte* basis.

2. The analysis should involve a careful "cross-examination" by counsel of their own client and of other material witness, which much necessarily include:

    a. an examination of documents material to the application;

    b. an admonition to each witness that their evidence will have to stand up on cross-examination.

3. Counsel should exercise extreme caution in drafting pleadings and application materials in a manner to avoid any argument that the facts have been overstated.

4. The temptation to accede to the wishes and demands of sometimes overzealous clients should be fiercely resisted.

5. It is worthwhile to consider whether an application ought to be made *with* notice rather than *ex parte*. An application with notice does not carry with it the heavy burden of presenting material facts which are adverse or which could *potentially* be unfavourable. The consideration of whether to provide notice will require counsel and their clients to weigh the risks of dissipation (and whether there are other potential avenues to prevent dissipation such as the filing of a CPL) against the relatively heavier burden placed on *ex parte* applicants.

6. Counsel should explore with their client the potential for an Order of damages arising from the required undertaking, however rare it may be. The potential applicant should also explore other potential drawbacks for the litigation in the event things go "sideways".

When acting for defendants, the following additional considerations apply:

1. If feasible, try to take your time in bringing an application to discharge the *Mareva* order. While practicalities may create a rush situation, consider with your client the relative benefits of slowing the process down to get all "ducks in order". In *Shen*, this involved obtaining extensive documents from the underlying Chinese court, having them translated, and interviewing witnesses and obtaining affidavits from individuals in China and in Canada, whereas the initial *Mareva* application had been supported by a sole affidavit of the plaintiff.

2. Consider whether it is practical to engage in discovery of documents and examinations for discovery prior to bringing an application to set aside a *Mareva* order. The ability to pick and choose extracts from discovery transcripts allows the defendant to conduct a much more far-reaching and exploratory examination of the principal deponent(s), which may provide more fodder for the hearing when compared with a cross-examination on affidavit in which case the entire transcript will be before the court.

3. Consider what other leverage may be obtained either from a potential finding of material non-disclosure, in terms of costs, potential damages on the plaintiff's undertaking, or otherwise. Consider the opportunities to turn the tide of the case, bearing in mind the reality that many cases end up resolved, dismissed or discontinued after the initial flurry of applications. In many cases, rambunctious plaintiffs may become disillusioned if early stage manoeuvres do not turn out as they had planned.

Anton Piller applications: strategic and ethical considerations

Anton Piller orders are otherwise known as "civil search and seizure warrants". They are frequently used in trade secret and improper competition cases. Because such orders involve potential destruction of incriminating documents which may be easily undertaken, applications for *Anton Piller* orders are almost always conducted *ex parte,* wherein the same duty of full and frank disclosure arises as in *Mareva* applications, including the duty to bring up facts that might potentially be detrimental to one's case.

The Supreme Court of Canada set out the following four requirements in *Celanese Canada Inc.* v. *Murray Demolition Corp.*, [2006] 2 S.C.R. 189:

- the plaintiff must demonstrate a strong *prima facie* case;

- the damage to the plaintiff arising from the defendant's alleged misconduct, whether potential or actual, must be very serious;

- there must be convincing evidence that the defendant has in its possession incriminating documents or things; and

- there must be a real possibility that the defendant may destroy such material before the discovery process.

Although potentially powerful in nature, *Anton Piller* applications are almost invariably complex and costly. It will be a challenge to meet the four criteria at the outset of one's case, and the

production of the necessary materials will invariably be time-consuming and costly. In addition, the courts require *Anton Piller* applicants to engage an independent supervising solicitor to protect defendants against potential overreach given the intrusive intrinsic nature of the order and the potential to exploit access to documents which may not otherwise be available for due to irrelevancy, privilege or other reasons. Accordingly, the BC Model Order based on *Celanese* requires that elaborate protocols be established in advance and followed carefully, failing which the order may be discharged on that basis alone on the potential set-aside application that is always available in these cases.

Strategic considerations may be comparable to those which apply to *Mareva* applications. In the writer's view, the primary considerations are the prospects of successfully obtaining an *Anton Piller* order; the costs involved *including those of a set-aside application*; and the anticipated value of the documents once recovered.

Usually it will be difficult for the plaintiff to speculate on what may or may not be found in the opponent's trove of documents. In one past case involving alleged theft of trade secrets, this author was able to locate an engineering drawing containing a bespoke nut which, we argued, could only have been incorporated into the new product if the design had been stolen from the past employer. That single nugget was sufficient to turn the tide of the case; without the *Anton Piller* order it may have been impossible to refute the defendant's assertion that his new product had been produced independently.

Counsel must be especially cognizant of ethical obligations which will be of particular concern to courts where the parties are industry competitors. An overzealous client may see an *Anton Piller* order as a means to access a competitor's confidential documents for any number of improper reasons. It is incumbent on counsel to assess the potential application with a critical eye, to guard against any later accusation that counsel have allowed themselves to be used as a pawn for improper purposes. This is an offshoot of one's oath not to promote suits under frivolous pretenses.

As with *Mareva* orders, counsel for zealous clients must bear in mind that if things go awry with this complex application, it may leave behind a skeleton which may impair clients' position in later steps in the litigation. That is, it should be considered whether the application may ultimate prove a very costly gift to the defendant. As with *Mareva* applications, the supporting evidence must therefore be carefully scrutinized, and tested by anticipated cross-examination, before it is relied upon.

Finally, as with *Mareva* orders, an undertaking in damages is required. Although recourse to such undertakings is extremely rare, when it does occur it can prove devastating, placing the plaintiff on the defensive even if the merits of the case may lie in their favour. Special costs are also available in cases of overreach.

Certificates of Pending Litigation

In my paper entitled *Use and Abuse of Certificates of Pending Litigation (2021 Update)* I reached the following conclusions after reviewing the updated case authorities:

1. Despite admonitions against courts jumping to conclusions at an interlocutory stage, judges and masters hearing applications to cancel CPLs may be heavily influenced by the perceived merits of a claim and by their perception of whether the CPL was filed to obtain a tactical advantage. This perception may influence decisions on all of the bases upon which a CPL may be cancelled.

2. It is critical for plaintiffs to avoid the appearance that the CPL is being filed for tactical purposes unrelated to the underlying legal grounds giving rise to the alleged entitlement.

3. This means that counsel should take great care before filing a CPL to work closely with the client to assess the merits of their claim both on liability (e.g. is there a good claim for an interest in land?) and on the availability of an in rem remedy (usually specific performance or a trust claim).

4. It is important not to underestimate the complexity of these elements which may, at first brush, seem straightforward. An imprecisely pleaded case may prove fatal to protecting the asset which can ultimately prove critical to achieving the result intended.

5. Counsel seeking to cancel a CPL should carefully consider the three potentially available bases for such an Order, and the implications of each option.

6. Document discovery and an early examination for discovery may assist in disproving the merits of the plaintiff's position at an early stage which may prove essential. By obtaining critical admissions, the defendant may increase the prospects of convincing the court to apply s. 215 of the Act or the tests under Rules 9-5 or 9-6; or of minimizing the conditions which may be attached by the court to a potential cancellation of the CPL.

7. Counsel should give serious consideration to combining an application to cancel a CPL with other steps such as a security for costs application, a counterclaim for abuse of process, or an application to compel the plaintiff to post security if it is to maintain the CPL.

8. For all the above reasons, it is very easy to underestimate the cost of interlocutory proceedings relating to CPLs. Counsel for both sides should anticipate the potential costs and advise clients from the outset of what they may be getting themselves into in asserting or opposing a CPL.