

# Frozen but Available: The Limits of a Mareva Injunction

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By

In the recent decision *Trade Capital Finance Corp. v Cook*, the Ontario Court of Appeal considered a claim of a non-party creditor over the defendant's funds that were subject to a *Mareva* injunction.<sup>1</sup> While the decision focuses on a specific aspect of a *Mareva* injunction, as discussed further below, it serves as a reminder of how this equitable remedy can be obtained and used in commercial litigation, and of the limits of this remedy.

A *Mareva* injunction, which is often referred to as a "freezing order", is an extraordinary, equitable remedy intended to prevent a genuine risk that a defendant would dissipate assets prior to the conclusion of a trial or action. The jurisdiction to grant a *Mareva* injunction derives from a superior court's inherent jurisdiction to grant an injunction when it appears to be just or convenient to do so. While *Mareva* injunctions are typically granted on a motion brought by a plaintiff, their primary function is to maintain the integrity of the court process by preventing the defendant from dissipating assets and becoming judgment-proof.

In order to establish that granting a *Mareva* injunction would be just or convenient, the plaintiff must show the following to the court:

1. a strong *prima facie* case on the merits;
2. a real risk that the defendant will remove or dissipate assets before the judgment; and
3. the balance of convenience favours the plaintiff.

A *Mareva* injunction is, therefore, a discretionary remedy which entitles the court to balance the parties' respective interests.

In *Trade Capital Finance Corp. v Cook*, the plaintiff, Trade Capital Finance Corp., brought an action against various defendants to recover funds it claimed to have paid as a victim of fraud. Among other things, Trade Capital sought a declaration that the defendants received funds belonging to Trade Capital and tracing orders with respect to those funds. Trade Capital obtained a *Mareva* injunction on an *ex parte* basis which applied to all assets of the defendants, including the defendant The Cash House Inc. ("TCHI").

In a separate and unrelated action, TCHI made a claim against Maple Trust and others, which claim was dismissed against Maple Trust. Maple Trust was awarded costs, and filed Writs of Seizure and Sale with respect to those costs awards which it intended to enforce against a particular account of TCHI (referred to as the 701 account in the decision). It brought a motion to vary the *Mareva* injunction to allow it to seize the funds from the 701 account, taking the position that a *Mareva* injunction does not extinguish the rights of *bona fide* creditors enforcing legal process to collect under judgement.

Trade Capital argued that the *Mareva* injunction was an order designed to preserve assets for execution and to enable Trade Capital to recover the money stolen from it.

Relying on prior jurisprudence, the motion judge, Emery J., found that while a *Mareva* injunction is an extraordinary remedy, “it does not have an extraordinary effect on the rights of other *bona fide* creditors of the defendant as a debtor”.<sup>2</sup> Its purpose is to restrain the defendant from taking unusual steps to put its assets beyond the reach of the plaintiff in order to thwart the judgment that the plaintiff might eventually obtain. It is not intended to give the plaintiff priority over other creditors of the defendant who are entitled to be paid. Giving a *Mareva* injunction such effect would be to “rewrite the ... law of insolvency.”<sup>3</sup>

Emery J. identified a number of factors that need to be considered in evaluating a claim of a creditor seeking to enforce a judgment against assets that are otherwise subject to a *Mareva* order, including that the *Mareva* order must not contain any terms that gives it a proprietary character. In this case, Emery J. found that “the language of the order clearly shows that the remedy granted is to prohibit the removal or transfer of money or assets by any *Mareva* defendant, not the recognition of a proprietary interest or a legal claim to a particular account, or to a specific fund.” Further, Emery J. noted that Trade Capital could have moved to obtain a proprietary injunction, or to make a claim to a legal interest in specific funds held in the 701 account. In any event, there was no evidence before Emery J. linking the funds in the 701 account to the fraud committed against Trade Capital.

On appeal, Trade Capital asserted that a temporary stay (presumably, of the motion judge’s decision) should have been granted to allow Trade Capital to continue to try to trace its stolen funds onto the 701 account. It also argued that the real issue on the motion and the appeal was whether Maple Trust should be entitled to execute against funds that may be shown at some point to be funds stolen from Trade Capital which therefore never belonged to TCHI. The Court of Appeal did not accept this submission and found that Maple Trust obtained its judgment in good faith and was pursuing execution. Therefore, even if Trade Capital could demonstrate that there was a serious issue to be tried in respect of the tracing claim, the balance of convenience favoured Maple Trust.

The Court of Appeal also upheld the motion judge’s finding that Trade Capital’s *Mareva* injunction gave it no proprietary interest in the 701 account, and that Trade Capital was unable to date to establish a claim in respect of that account. Therefore, there was no basis for Maple Trust to suffer prejudice as result.

The brief reasons of the Court of Appeal confirm that the overall purpose of a *Mareva* injunction is to prevent the defendant from dissipating its assets and avoiding compliance with a judgement of the court, rather than preserving the specific entitlement of the plaintiff asserted in the action.

Further, balancing the interest of the affected parties, including non-parties to the action in this case, is a crucial consideration for the court when deciding whether equitable and discretionary remedies like the *Mareva* injunction should be granted.

[1] *Trade Capital Finance Corp. v Cook*, 2018 ONCA 27.

[2] 2017 ONSC 1857 at para. 40.

[3] *Ibid.* at para. 39, quoting from *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2.

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