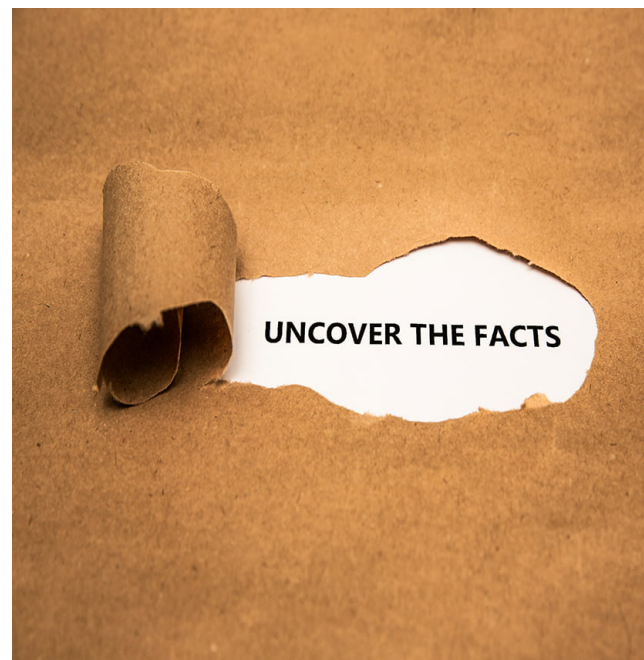


The *Mareva* Injunction: A “vital arrow” for fraud victims, according to Ontario’s Divisional Court

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By Kayla Theeuwen



In a recent decision, Ontario’s Divisional Court reviewed the requirements for succeeding in obtaining a *Mareva* injunction, and, more importantly, reaffirmed the importance of such an injunction in fraud cases.

In [2092280 Ontario Inc v. Voralto Group Inc, 2018 ONSC 2305](#), the Appellants sought leave to appeal a decision of a motion judge, who refused to grant an *ex parte*(without notice) *Mareva* injunction as against the Respondents, to restrain them from disposing of or dissipating their assets. The Appellants were a landlord and contractor who had allegedly been defrauded by the Respondents in a scam involving the illegal dumping of waste.

The Decision Below

In support of their *ex parte* motion for a *Mareva* injunction, the Appellants adduced evidence of allegedly fraudulent activity carried out by the Respondents, including that (i) one Respondent had previously been convicted for illegal dumping and other fraudulent or illegal activity, (ii) another Respondent was the subject of a criminal investigation, and (iii) the Respondents illegally dumped 1,500 truckloads of industrial waste on property owned by one of the Appellants.

The motion judge declined to grant the relief *ex parte*, citing delay by the Appellants in advancing their claim for injunctive relief, and a lack of direct evidence that the Respondents were actually dissipating assets. Having not been persuaded that relief without notice to the Respondents was warranted, the motion judge ordered that the motion for a *Mareva* injunction be brought on notice.

Without giving notice to the Respondents, the Appellants sought leave to appeal the decision of the motion judge.

The Divisional Court’s Review of Principles Regarding *Mareva* Injunctions

The Court summarized the well-known requirements for succeeding on a motion for a *Mareva* injunction:

- (1) The plaintiff must make full and frank disclosure of all material matters within his or her knowledge.

- (2) The plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim thereof, and the points that could fairly be made against it by the defendant.
- (3) The plaintiff must give grounds for believing that the defendant has assets in the jurisdiction.
- (4) The plaintiff must give grounds for believing that there is real risk of the assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff would be unable to satisfy a judgment awarded to him or her.
- (5) The plaintiff must give an undertaking as to damages.

In response to the apparent delay by the Appellants in advancing their claim for injunctive relief as cited by the motion judge, the Court also confirmed that “timeliness” is not one of the five requirements for a *Mareva* injunction. Though delay might be a relevant factor in certain cases, especially when urgency is advanced as a reason for moving without notice, it is not relevant when the basis for moving without notice is the risk that assets will be dissipated.

***Mareva* Injunctions in Fraud Cases**

The Court noted that where the five requirements above have been met, notice to the parties affected by the *Mareva* injunction is not initially required. This is particularly true in cases where a plaintiff is attempting to recover losses due to fraud by obtaining injunctive relief to restrain the dissipation of assets by the perpetrator of fraud. If a plaintiff is required to give notice of an impending motion for a *Mareva* injunction, the remedy sought could, in the Court’s view, be significantly “watered-down”.

In identifying the importance of protecting victims of fraud, the Court explained that:

[28] ... where evidence discloses a strong *prima facie* case that [d]efendants perpetrated a premeditated, substantial fraudulent scheme against innocent victims, the law’s reluctance to allow prejudgment execution must yield to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct.

The Court also addressed a plaintiff’s evidentiary burden with respect to the dissipation of assets (the fourth requirement). The Court confirmed that the requirement that there be a “real risk” of the removal or dissipation of assets can be established by inference, rather than direct evidence.

The Divisional Court’s Decision

In this case, the Divisional Court found that the Appellant met all five requirements for a *Mareva* injunction. As to the risk of dissipation requirement, the Court held that the circumstances of the alleged fraud suggested that the Respondents were very likely to dissipate assets.

Based on the foregoing, the Divisional Court concluded that there was good reason to doubt the correctness of the motion judge’s decision. In the result, the Court granted leave to appeal, set aside the decision of the motion judge, and issued an *ex parte Mareva* injunction against the Respondents.

Take-Away Points

The Voralto Group decision is a nod by the Divisional Court to the importance of providing adequate remedies to “unwitting victims”

of fraud. The Court (i) confirmed the lower evidentiary burden on a plaintiff seeking a *Mareva* injunction in fraud cases as it relates to the risk of dissipation of assets, (ii) concluded that notice of a motion for a *Mareva* injunction may not be required in fraud cases, and (iii) granted leave to appeal, notwithstanding that the Respondents had not been given notice of the Appellants' motion for leave to appeal.

The decision also provides helpful guidelines to parties seeking *Mareva* injunctions, particularly on an *ex parte* basis. Though the Court identified the extraordinary burden on a plaintiff to make full and frank disclosure when moving for a *Mareva* injunction without notice, it did not discuss the Appellants' disclosure in this case. It will be interesting to see how the Appellants' disclosure is dealt with by the Respondents (and the Court) on any eventual appeal or motion to set aside.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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