MAREVA INJUNCTIONS AND ATTACHMENT ORDERS: HOW WE HAVE REAPED WHAT THE SHADY MARINERS HAVE SOWED

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1. INTRODUCTION

In this paper I shall explore the history, evolution and principles of two pre-trial remedies which were designed to address the same problem: both are designed to help the plaintiff or claimant who faces the prospect of getting a meaningless judgment (one on which he or she cannot collect) because the defendant has taken steps before or during the litigation to either improperly dispose of his or her assets or otherwise improperly put them out of the reach of the plaintiff or claimant. The first, the Mareva injunction, is a judicial creation, largely the work of Lord Denning. The second, the attachment order (or at least the Alberta version) is a creature of statute finding its genesis in the ***Civil Enforcement Act*** R.S.A. 2000 c. c-15. The Mareva injunction predates the attachment order and we will start with an account of the former's history.

2. MAREVA INJUNCTION

A HISTORY

Prior to 1975 it was trite law in the English common law world that a debtor or defendant could not be restrained from dealing with his property in favour of a plaintiff or claimant in the absence of the latter having a judgment against the former. The leading case was the English case ***Lister & Co. v. Stubbs*** *(1890), 45 Ch.D. 1 (C.A.).* In that case the plaintiff was a manufacturing company which was the defendant's employer. The defendant was a foreman who purchased materials on behalf of the plaintiff and it was alleged that he was getting kick backs and bribes from at least one of the suppliers he purchased from. The defendant invested his ill gotten gains in land and securities and when the plaintiff found out about what the defendant was doing it brought an action against him and in the course of that brought an application for an interlocutory injunction seeking to restrain the defendant from dealing with the real estate in which his ill gotten gains had been invested and directing that the balance of the ill gotten gains and any proceeds of such be paid into court. The application was dismissed both initially and on appeal with Cotton L.J. saying the following at the Court of Appeal level:

> I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree. [at p.13]

It was against the backdrop of this centuries old position that Lord Denning stepped in to create a new remedy in a series of cases which Estey, J. in ***Aetna Financial Services Ltd. v. Feigelman*** *[1985] 1SCR 2* aptly described as involving "…the depradations of shady mariners operating out of far away havens, usually on the fringe of legally organized commerce." (at p.35).

The first shady mariners case was ***Nippon Yusen Kaisha v. Karageorgis*** *[1975] 3 All E.R. 282 (C.A.).* In this case the plaintiffs were a firm of Japanese shipowners who had leased ships to the defendant. The defendant did not pay and could not be located. The plaintiff found out that the defendant had money in a London bank and brought an application for an injunction restraining the defendant from dealing with or disposing of the funds in the London bank account.

Given the centuries old line of authorities represented by ***Lister*** it was probably not surprising at the time that the application was initially dismissed. The Plaintiffs then appealed and were perhaps fortunate to have this case heard in the Court of Appeal by Lord Denning. The centuries old ***Lister*** position was set aside in a judgment of less than a page with Lord Denning saying as follows:

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them….
>
> It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s. 45 of the ***Supreme Court of Judicature (Consolidation) Act 1925*** which says the High Court may grant a mandamus or injunction or appoint receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems that this is just such a case. There is a strong ***prima facie*** case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction ***ex parte*** and we should continue it. (at p.283)

The second shady mariners case is the one from which the injunction takes its name, ***Mareva Comapania Naviera S.A. v. International Bulkcarriers Ltd.*** *[1980] 1 All ER*

213 (C.A.). The plaintiff in this case was a shipowner and the defendant a charterer of the ship which did not pay what it was required to pay to the plaintiff. The defendant had subchartered the ship to the President of India and while the President of India was paying the defendant into a London bank account the defendant was not making its payments to the plaintiff. The plaintiff brought an application ***ex parte*** for an injunction restraining the defendant from removing or disposing of money in the London bank account and the injunction was granted at first instance but only for a specified time until the case could be heard by the Court of Appeal. In the Court of Appeal the case was heard again by Lord Denning and he concluded that:

> If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exercise of this jurisdiction. (at p.215)

Karageorgis and ***Mareva*** indicated that the injunction was available and in subsequent cases Lord Denning began to spell out the principles which would apply to this new injunction. In ***Rasu Maritima S.A. v***. ***Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*** *[1977] 3 All E.R. 324 (C.A.)* (another shady mariners case) Lord Denning addressed the issues of the test that the applicant had to meet in terms of the strength of the case and what assets the injunction could be issued against. With respect to the strength of the case that the applicant had to advance Lord Denning indicated that the case did not have to be so strong as to justify the court in issuing summary judgment. Rather, it was sufficient that the applicant be able to demonstrate that he had a good arguable case. In terms of the assets that the injunction could apply to Lord Denning held that the injunction could apply to goods of the defendant other than just money. The combination of these two holdings – that the applicant only had to demonstrate a good arguable case and that the injunction could apply to essentially any assets of the defendant – made the *Mareva* injunction a more feasible option for claimants and the number of applications for this pre trial remedy increased significantly after the ***Rasu Maritima*** case was decided.

Most of the applications for *Mareva* injunctions were made ***ex parte.*** There were two reasons for this. The first was a practical reason and that was that in most cases the