



Guide to
Asset Freezing Injunctions
in the Cayman Islands

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PREFACE

This Appleby Guide outlines the circumstances in which asset freezing injunctions (known as Mareva injunctions) are available in the Cayman Islands, the procedure by which they are obtained and their usual terms. It also summarises the principal considerations relevant to defendants and third parties affected by such orders.

This Guide is for informational purposes only. Readers who are considering applying for, or have been served with, a Mareva injunction are encouraged to consult Appleby without delay.

1. INTRODUCTION

A major risk facing anyone bringing a claim is that the defendant will use the period between becoming aware of the claim and trial to dispose of or hide his assets, so that they will not be available to satisfy a judgment. A Mareva injunction is a court order which mitigates this risk by prohibiting the defendant from dealing with or disposing of his assets. The order also usually requires the defendant to provide the plaintiff with information about his assets. This information is required for the purpose of enabling the plaintiff to police the injunction – i.e. to ensure that the defendant is not breaching it by disposing of or dealing with those assets.

2. WHEN IS A MAREVA INJUNCTION AVAILABLE?

In order to obtain a Mareva injunction, the plaintiff must show that he has a good arguable case, that the defendant has assets in the Cayman Islands, and that there is a real risk that, if the Mareva injunction is not granted, the defendant will remove those assets from the jurisdiction or otherwise dissipate them so that any judgment which the plaintiff obtains will remain unsatisfied.

a. Good arguable case

A good arguable case has been described as “a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success”.

The Court will only grant a Mareva injunction if the underlying case is one which is capable of being determined in the Cayman Islands. The Court has held that it may continue a Mareva injunction, or even grant a fresh Mareva injunction, in support of foreign proceedings following a stay of Cayman proceedings; however it has indicated that such an injunction will be granted only in an unusual case.

b. Assets

The plaintiff must show solid evidence of the existence of assets either within or outside the jurisdiction. These can include land, bank accounts and chattels such as motor vehicles, jewellery and artwork.

c. Real risk of removal/ dissipation

The plaintiff must show that there is a real risk that the defendant will remove assets from the Cayman Islands, dissipate them or hide them. The Court will take into account such factors as:

- the defendant’s previous conduct;
- if the defendant is already aware of the claim, how it has reacted to it;
- any indication the defendant has given in respect of its assets, or any information which the plaintiff has been able to obtain in relation to the defendant’s assets;
- in the case of a corporate defendant, the nature of the company. This will include its credit record, its connection with other companies, its place of incorporation and where it is registered, where its assets are held, and the length of time it has been in business;
- if the defendant is an individual, his credit record, where he is domiciled and resident and where his assets are held;
- if the defendant is a foreign company or individual, whether a Cayman judgment can be enforced in the defendant’s home jurisdiction.

d. Just and convenient

Even if the criteria outlined above are met, the Court may refuse to grant a Mareva injunction if it does not consider the grant of the injunction to be “just and convenient”. In considering this, the Court may take into account such factors as the effect of the injunction on third parties, or the fact that the effect of the injunction would essentially be to put the defendant out of business.

3. OTHER FACTORS FOR THE PLAINTIFF TO CONSIDER

a. Procedure

An application for a Mareva injunction may be made at any time before or after the trial of the proceedings. If the case is demonstrably urgent, the application may be made before proceedings are issued. In such cases, the Court will require the plaintiff to undertake to issue a writ and serve it on the defendant as soon as practicable after the order is made.

In most cases, the application will be made without giving notice to the defendant, as giving notice is likely to defeat the purpose of the order which is being sought.

If the application is made without notice, the Court will order that a further hearing take place at which the defendant will have the opportunity to be represented. This hearing is called the “Return Date”. The order made at the without notice hearing will have effect until the Return Date (when, if the plaintiff is successful, it will usually be continued until trial or further order).

The plaintiff’s lawyer will draft the evidence in support of the application, which will have to establish that the relevant tests are met.

b. Duty of full and frank disclosure

If the application is being made without notice, the Court requires the plaintiff to proceed with the “highest good faith”. In particular, there is a duty on the plaintiff to make full and frank disclosure of any relevant matters within his knowledge. This includes drawing the Court’s attention to any relevant facts and legal principles, including those adverse to the plaintiff’s case. The plaintiff must also draw the Court’s attention to any potential defences which the defendant may seek to rely on. The plaintiff is expected to have made proper inquiries, and must disclose the source of any information relied on.

If the plaintiff does not comply with this duty, the injunction may be discharged, and the plaintiff may be ordered to pay the defendant’s costs.

c. Undertakings required of the plaintiff

The Court will usually require the plaintiff to undertake that, if the Court later finds that the injunction has caused loss to the defendant, and decides that the defendant should be compensated, the plaintiff will comply with any order made by the Court compensating the defendant. The purpose of this is to protect the defendant, in case the plaintiff fails in the claim and/ or it emerges that the Mareva injunction should not have been granted.

The plaintiff will also usually be required to undertake to meet the costs of any third parties incurred as a result of the injunction, and to comply with any order made by the Court compensating third parties for damage which they have suffered as a result of the injunction.

If the plaintiff is not able to show that it has sufficient assets within the jurisdiction to satisfy these undertakings, the Court may require the plaintiff to provide security (for example, in the form of a payment into court or a bank guarantee).

4. THE TERMS OF THE ORDER

The order will contain a provision prohibiting the defendant from disposing of, dealing with or diminishing his assets, up to a certain value (which will be the value of the plaintiff's claim, as stated on the writ, plus interest and costs).

This prohibition will usually only apply to assets within the Cayman Islands. However, in certain circumstances, it may be possible to obtain a worldwide Mareva injunction, which will prohibit the defendant from disposing of, dealing with or diminishing his assets worldwide. If a worldwide Mareva injunction is granted, the Court's permission will have to be sought to enforce it outside the Cayman Islands.

There will be exceptions to the prohibition, to allow the defendant to spend a reasonable sum on legal advice and representation and (in the case of an individual) on his ordinary living expenses or (if the defendant is a company) to dispose of or deal with its assets in the ordinary course of business.

The order will also require the defendant to inform the plaintiff in writing of all his assets in the Cayman Islands (or, in the case of a worldwide Mareva injunction, worldwide). This information will have to be confirmed on affidavit.

5. CONSIDERATIONS FOR DEFENDANTS

If a defendant fails to comply with the terms of a Mareva injunction, he may be found guilty of contempt of Court and is liable to be fined, have his assets seized or (if he is an individual) be sent to prison. It is therefore of the utmost importance that the defendant seeks legal advice immediately upon being served, to ensure that the order is complied with.

The defendant will wish to consider with his legal advisers whether it is possible to apply for the injunction to be discharged. It may be appropriate to make such an application on the basis that the plaintiff has not shown that the conditions for grant of an injunction, which are set out above, are met. It may also be possible to apply for the injunction to be discharged on the basis that the plaintiff did not comply with his obligation to make full and frank disclosure of all material (and usually adverse) facts.

Even if it is not possible to apply for the order to be discharged, the defendant may wish to apply for it to be varied, for example if the amounts which he is permitted to spend on legal advice and living expenses are insufficient or, in the case of a corporate defendant, if variation is necessary to enable it to carry on its business.

If the defendant has sufficient assets, he may wish to consider offering security in place of the injunction.

6. CONSIDERATIONS FOR THIRD PARTIES

Although the order is addressed to the defendant, it also binds third parties. Anyone who knows of the order and assists or permits the defendant to breach it will risk being held in contempt of Court. This includes banks.

The exception to this is third parties who are outside the Cayman Islands. A worldwide Mareva injunction will generally only affect third parties outside the Cayman Islands if it has been declared enforceable by their local court.

Due to the serious consequences of being found in contempt of Court, third parties who are aware of a Mareva injunction and are unsure whether they are affected by it are urged to seek legal advice without delay.

7. CONCLUSION

The Mareva injunction, used correctly, is an effective weapon in the litigator's armoury and in many cases, particularly those involving fraud, is the only way of ensuring that proceedings are effective.

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