Disarming litigation terrorists

John Fordham explains how devastating freezing injunctions can be

The world of litigation was, for a short period, in grave danger. Its most powerful weapon, the worldwide freezing (Mareva) injunction, had fallen into the wrong hands.

To English litigation lawyers, a worldwide freezing injunction is known as the nuclear weapon in the litigation armoury. Only English and a few like-minded courts have the jurisdiction to grant these very powerful orders. Courts on the continent of Europe do not, neither do courts in the US.

A DENNING CREATION

The weapon was first fashioned by one of the greatest English judges of the second half of the last century, Lord Denning. One of his relevant decisions concerned a ship called the Mareva which gave its name to Lord Denning’s piece of litigation hardware. Commonwealth countries and others followed suit. Subsequently, it was given a statutory basis. Most recently, and regrettably, there has been an attempt to abolish the Mareva name in favour of the allegedly more plain English “freezing injunction”. But, Mareva has stuck (see The Mareva [1980] 1 All ER 213).

EFFECT OF MAREVA ORDER

Classically, the English court orders a defendant not to remove from England and Wales any of its assets which are here, up to a certain value, nor in any way to dispose of, deal with or diminish the value of those assets, whether they are in or outside England and Wales, up to the same amount.

An upper limit is placed on the value of the frozen assets. Exemptions are usually made for transactions in the ordinary course of business (for companies and others carrying on business) and living expenses (for individuals in their private capacity) and for legal expenses. Apart from that, no disposals or other dealings with assets are permitted. Usually, the defendant is also subjected to the additional burden of having to disclose on oath to the claimant the nature and whereabouts of its assets and having to do so within a short period (usually no longer than a couple of days).

Failure to comply, either with the injunction or the disclosure, places the defendant at risk of being held to be in contempt of court and of being punished by the usual criminal sanctions (including, for an individual, imprisonment) and of being disadvantaged in the litigation itself.

THE COURT’S JURISDICTION

The English courts have gone as far as any in extending this jurisdiction. Initially, there had to be a substantive cause of action justiciable in England (see The Siskina [1979] AC 210, [1977] 3 All ER 803). Then, along came s 25 of the Civil Jurisdiction and Judgments Act 1982, which gave the English court the power to order a Mareva off the back of foreign proceedings, first those in Europe and then in the rest of the world. This was followed by s 44 of the Arbitration Act 1996, by virtue of which a Mareva could be granted off the back of arbitration proceedings, including those taking place abroad.

IN BRIEF

- The Mareva (freezing) injunction remains a very powerful weapon in the right hands.
- For the English court to grant a Mareva there still needs to be a real connection with England.
- A real risk of dissipation is also a necessary requisite.

CONNECTION WITH ENGLAND

However, if you are going to rely on s 25 or s 44, you need to have some connection with England. Usually, the defendant needs to be here or to have assets here. The jurisdiction was extended nearly to breaking point in the Republic of Haiti v Duvalier [1990] 1 QB 202, [1989] 1 All ER 456.

The former president of Haiti and members of his family were resident in France. The Republic of Haiti started proceedings in France to recover US$120m alleged to be the republic’s money embezzled from it by the Duvalier.
family. It then issued English proceedings against the Duvaliers on the basis of s 25.

The English court granted orders restraining the Duvaliers from disposing of assets wherever situated and requiring them to disclose information relating to assets. Their appeal was dismissed by the Court of Appeal. The Duvaliers were not in England and there was no evidence that they had assets here. However, they had used English solicitors in connection with dealings with the assets and all of the documentary evidence in relation to such dealings was therefore located in England which was adjudged a sufficient connection with England.

**COVER STORY**

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**RISK OF DISSIPATION**

Another requirement for a *Mareva* is, to use the phrase most commonly applied—risk of dissipation. Most *Mareva* by far are granted against fraudsters. Risk of dissipation is easy to establish in such cases: if there is a prima facie case of fraud, eg misappropriation of the claimant’s money, then the court will readily accept that the defendant is also likely to try to take steps to move his assets out of the reach of the claimant before the latter can obtain and enforce a judgment.

**MOBIL CASE**

Against that background, Mobil Cerro Negro Limited (a subsidiary of ExxonMobil) (Mobil) dropped its *Mareva* bomb on Petroleos de Venezuela SA (PDVSA) and its assets (see Mobil Cerro Negro Ltd v Petroleos de Venezuela SA [2008] EWHC 352 (Comm), [2008] All ER (D) 310 (Mar)). Mobil needs no introduction. PDVSA is the national oil company of Venezuela and wholly owned by the Bolivarian Republic of Venezuela. The amount of the freeze was in the not insig-

by President Chavez’s government in Venezuela. That allegedly triggered an obligation to negotiate which Mobil argued amounted to a claim for compensation under a contract between Mobil and a subsidiary of PDVSA, whose obligations PDVSA had guaranteed the subsidiary’s obligations. Mobil had started an arbitration under the Rules of the International Chamber of Commerce in New York pursuant to the contract and the guarantee, and that gave Mobil the opening to seek an English *Mareva* under s 44.

**THIRD PARTIES**

The *Mareva* bomb may not injure third parties but it certainly frightens them. The court order was not only sent to PDVSA but to a large number of its banks. While PDVSA’s assets are worth much more than US$12 billion, that did not stop the banks being nervous about carrying out transactions involving PDVSA. PDVSA applied to the court for a discharge of the *Mareva* against it.

**MAREVA REQUIREMENTS**

In support of the “connection” requirement, Mobil had referred to a number of English companies, some of which were in the process of being dissolved and all of which were at best indirect subsidiaries of PDVSA, and also to an agreement between Ken Livingston’s Greater London Authority/Transport for London and another indirectly held PDVSA subsidiary. In response, PDVSA stated that there is in reality absolutely no connection of any sort between it and the English jurisdiction. PDVSA is a foreign incorporated body which has no assets within the jurisdiction, which does not carry on business in the jurisdiction and which has no presence within the jurisdiction. The contract out of which the dispute arises has nothing to do with England, and nothing has to be done in England by PDVSA which has any connection with, or effect on, either the contract or the dispute which has arisen under it. The court accepted PDVSA’s position and rejected Mobil’s “connection” argument.

As to the “risk of dissipation” requirement, Mobil’s arguments were equally strained. They included PDVSA’s declared policy of transferring some assets pre-

**THE SECOND BLAST**

The disclosure part of the court order (the second blast of the bomb), somewhat surprisingly, required PDVSA, a company worth many billions of dollars, to disclose each asset worth more than the relatively miniscule sum of US$5,000.

However, the duty of disclosure was only triggered by formal service of the court order on PDVSA. As PDVSA had no presence in England, it had to be served under the Hague Convention, ie through diplomatic and court channels between the two countries, and that had not happened by the time the *Mareva* was discharged by the court.

**DISCHARGE OF MAREVA**

When the court was able to hear PDVSA’s arguments as well as those of Mobil on “connection” and “risk of dissipation”, the *Mareva* injunction was discharged. During the course of the hearing counsel for PDVSA had characterised Mobil as “the Al Qaeda of the oil world” engaged in a form of “legal terrorism” and had argued that this was not a case in which the English court should adopt the role of international policeman. PDVSA’s arguments prevailed, the *Mareva* was discharged, and order has been restored to the litigation battlefield.

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