

# SECURING ASSETS FOR EXECUTION: THE UTILITY OF THE MAREVA OPTION

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## 1.00 INTRODUCTION

1.01 In recent times, it has become increasingly difficult to enforce interim or final judgments of courts against the assets of judgment debtors either within or outside jurisdiction of the courts seised of the suit. The advent of several forms of technologies which enables persons vested with title or ownership of assets to dissipate them has worked to weaken the possibility of execution of court judgments against these assets. Some of these technologies are mobile, virtual and extra – territorial in their capabilities and delivery patterns. For example, in certain jurisdictions, title to properties can be changed on-line. Similarly, funds standing to the credit of customers of financial institutions can be transferred out of jurisdiction and to multiple levels of persons online within a few minutes. It is also pertinent to note that the capacity of would-be judgment debtors to move their assets outside jurisdiction or dissipate them has equally improved overtime due to other related but distinct factors.

1.02 As a result to these emerging developments, the judicial process has become helpless and; by implication, unable to meet the justice which it is structured to deliver and ensure. In our courts today, we find several judgment creditors with “empty judgments” which are clearly, albeit helplessly, incapable of meeting the aspirations of their beneficiaries. Thus, the velocity at which litigants, and men engaged in commercial activities, loose faith in the judicial process is increasing by the day. Chief Afe Babalola, SAN,<sup>1</sup> succinctly captured the mood of these men correctly when he wrote that:-

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<sup>1</sup> “Injunctions and Enforcement of Orders” Obafemi Awolowo University Press, Ile Ife (2000) P.120.

“As stated on, the essence of a judicial system as a veritable institution of securing justice can only be measured by the system’s responsiveness to meeting the ends of justice under every and any circumstance. One seriously wonders what consequence it has on the plaintiff other than that of conferring a pyrrhic victory, where a plaintiff secures a judgment but the defendant has cleverly removed all assets from within jurisdiction of the court or has even rendered them by careful machinations, untraceable in the event of an anticipated execution.”

1.03 The above observation by this learned author clearly typifies the problems which the introduction of the mareva injunction legal theory seeks to address.

1.04 In this paper, efforts shall be made to, *in extenso*, examine the substantive and procedural aspects of the mareva specie of injunctive remedies. An attempt shall also be made to examine the implications of the service of the enrolled order of mareva injunction on defendants and third parties. Similarly, the jurisdictional issues associated with the enforcement of mareva orders shall also be reviewed within the envelope of its utility in the legal regime intended to secure assets at all stages of litigation.

## 2.00 JURISPRUDENTIAL FOUNDATION

2.01 Although definitions are not usually necessary<sup>2</sup>, it is sufficient to define injunctions as orders or decrees by which a party to an action is required to

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<sup>2</sup> See the observations of Justice Oliver Wendel Holmes in *Toner vs. Eisner* 245 US (1918) 418 at 425.

do, or refrain from doing, a particular thing.<sup>3</sup> Injunction may be preventive or compulsive, depending on the text of the orders. Once injunction is granted, it is enforceable by committal proceedings. There are different species of injunctions. They generally include perpetual, interim, interlocutory, *quia timet*, *mareva* and *anton piller* injunctions.<sup>4</sup> *Mareva* injunction is, therefore, one of the species of injunction. The principles<sup>5</sup> that guide the courts in the grant of these types of injunctions are substantially similar save that, in the case of *mareva* injunction, the applicant is required to make full disclosure of all material facts relevant to the application like the full particulars of the assets within jurisdiction, that the debt is due and owing as well as imminent danger or risk of<sup>6</sup> evacuation of assets from jurisdiction to render judgment nugatory. The court must also be satisfied, from the averments in the dispositions in the affidavit in support of the application, that the applicant is likely to be successful at the end of the case.<sup>7</sup> *Mareva* Injunctions are usually granted *ex-parte* i.e. without notice to the other party.

2.02 Originally, a plaintiff could not obtain any interim injunctive remedy intended to prevent a defendant from dissipating his assets or taking his assets outside jurisdiction in the face of imminent lawsuit or judgment. Cotton L. J., made that point, very succinctly, in the case of *Lister & Co. vs. Stubbs*<sup>8</sup> as follows:

“But here, if money sought to be recovered is  
not money of the plaintiffs, we should simply

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<sup>3</sup> See Osborn’s Concise Law Dictionary (8<sup>th</sup> Edition) Sweet & Maxwell P.178.

<sup>4</sup> For a fuller discussion on the various types of injunctions, see Gupta, G.S, Law of Injunctions. (7<sup>th</sup> Edition) (2008) Orient Publishing Company Chapter 1. See *Pats – Acholonu, J.C.A (As he then was) in the case of G.M.C (UK) Ltd & Ors vs. Medicaire W/A Ltd & Anor* (1998) NWLR (Pt.536) P.86 at 91 – 92.

<sup>5</sup> For the principles that govern the grant of injunctions. See the case of *N.A. Kotoye vs. Central Bank of Nigeria & Ors.* (1989) 1 NWLR (Pt.98) P.419.

<sup>6</sup> See the decision of the Supreme Court in *Sotiminu vs. Ocean Steamship Nigeria Ltd.* (1992) 5 NWLR (Pt.239) P.1 at P.25. See also *Dr. Tunji Braithwaite vs. China Civil Engineering Construction Corporation* (2001) FWLR (Pt.71) P.1882 at 1887, 1890 – 1891.

<sup>7</sup> See Justice Clara Ogunbiyi, JCA, in *Extraction System & Commodity Services Ltd. Vs. Nigbel Merchant Bank Ltd* (2005) All FWLR (Pt.269) P.1805 at 1837.

<sup>8</sup> (1980) 45 Ch.D 1 at P.14.

ordering the defendant to pay into Court a sum of money in his possession because there is a prima facie case against him that at the hearing it will be established that he owes money to the plaintiffs. In my opinion, that would be wrong in principle..... If we were to order the defendant to give security asked for, it would be introducing an entirely new and wrong principle - which we ought not to do, even though we might think that, having regard to the circumstances of the case, it would be highly just to make the order”.

2.03 This rigid position of the law, clearly worked hardship upon plaintiffs; and, in turn, assisted the recalcitrant defendant to evade possible or anticipated execution of judgment against his assets. Lord Lawton, admirably described the scenario and dangers associated with this position in the case of *Third Chandris Shipping Corporation vs. Unimarine SA*<sup>9</sup> thus:

“Once a writ is issued, a debtor who intends to default will do what he can to avoid having to meet his obligations. .... A telephone call or text message could within seconds of service of a writ, or knowledge that the writ had been issued, put all liquid assets out of the reach of the creditor.....”

2.04 That was the position of the law until in 1975 when the Court of Appeal decided the cases of *Nippon Yusen Kaisha vs. Karangeorgis*<sup>10</sup> and *Mareva*

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<sup>9</sup> (1979) Q. B. 645 at 671.

<sup>10</sup> (1975) 1 W. L. R 1093

Compania Naviera SA vs. International Bulkcarries SA<sup>11</sup>. In both cases, the Court of Appeal granted injunctive orders restraining foreign defendants from dissipating funds held by them in British bank accounts within jurisdiction. In Nipon, ship owners from Japan entered into charter parties with two men by which three ships were hired to them on time and voyage charters. The hire was payable by the Charterers. The Charterers failed to pay the Charter party hire. Attempts to locate the two men were unsuccessful but the plaintiff was able to locate their bank account in a London Bank. Subsequently, the plaintiff filed an action and brought an application for interim injunction restraining them from disposing or removing their assets, which are monies in those banks, out of the jurisdiction. The trial judge, Donaldson, J., refused the application. On appeal to the Court of Appeal, Lord Denning, M.R., held that where there is a strong prima facie case that a plaintiff is entitled to money from a defendant who has assets within the jurisdiction, a court of law, acting in its capacity as a court of equity, is usually clothed with the jurisdictional power to grant an ex-parte injunction restraining the defendant from disposing of his assets. The same conclusion was reached by the same Court in Mareva's case.

2.05 It does also, from case law, appears that the order of mareva injunction would lie so as to provide a form of security for plaintiff in the event that judgment is given in his favour<sup>12</sup>. Thus, Mareva injunction is designed to prevent the judgment from being a mere *brutum fulmen*<sup>13</sup>. It is, however, not intended to interfere with the ordinary business transactions of the defendant with third parties.<sup>14</sup> In this connection, a mareva order can be used to attach assets of the defendant notwithstanding that it is not subject

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<sup>11</sup> (1980) 1 All ER 213

<sup>12</sup> See Felexstowe Dock & Railway Co. vs. United States Lines Inc. (1988) 2 All E R 77. See also Flightline Ltd vs. Edwards (2003) 1 W.L.R. 1200 at 1212.

<sup>13</sup> Per Lord Diplock in Siskina (Cargo Owners) vs. Distos Cornpania Naviera SA (1979) AC 210 at 253.

<sup>14</sup> See Normid Housing Association Ltd vs. Ralph and Mansell (No.2) (1989) 1 Lloyd's Rep. 274.

matter in the litigation.<sup>15</sup> Lord Donaldson of Lynton M.R. explained how the mareva order operates in *Derby & Co. Ltd vs. Weldon* (No.3 and No.4)<sup>16</sup> as follows:

“The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way, or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is it its purpose to place the plaintiff in the position of a secured creditor. In other words, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment, it may not be possible for him to obtain satisfaction of that judgment fully or at all, the court should not permit the defendant artificially to create such a situation.”

### 3.00 JURISDICTION OF NIGERIAN COURTS TO GRANT MAREVA INJUNCTION

3.01 All the superior courts of record in Nigeria, created by the Constitution<sup>17</sup>, have powers to grant injunctions. Most of the enabling statutes also grant

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<sup>15</sup> *Efe Finance Holdings Ltd vs. Osagie, Okeke, Otegbola & Co. & 3 ors* (2000) 5 NWLR (Pt.658) P.536 at 545.

<sup>16</sup> (1990) Ch. 65, at 76.

<sup>17</sup> 1999 (As Altered)

these courts the power to grant injunctions.<sup>18</sup> Apart from these laws, the various rules of practice and procedure applicable to those courts<sup>19</sup> have invested them with the power to grant injunctions in appropriate cases. Section 18 of the High Court Law<sup>20</sup> provides as follows:

“18.

- (1) The High Court may grant a mandamus (as defined in subsection (5) or an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do”.

Section 13 of the Federal High Court Act<sup>21</sup> similarly provides as follows:

“13

- (1) The Court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient so to do”.

Section 15 of the Court of Appeal Act<sup>22</sup> provides that:-

“The Court of Appeal may, from time to time..... make an interim order or grant

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<sup>18</sup> See for instance the Section 15 of the High Court Law of Lagos State, 2004; Section 13 of the Federal High Court Act, Cap F12, LFN, 2004; Section 19 of the National Industrial Court Act, No.1, 2006; etc.

<sup>19</sup> See for instance, Order 38 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009.

<sup>20</sup> Cap H3, Laws of Lagos State, 2004.

<sup>21</sup> Cap F12, Laws of the Federation of Nigeria, 2004.

<sup>22</sup> Cap C36, LFN, 2004.

any injunction which the court below is authorized to make or grant.....”.

Section 19 of the National Industrial Court Act<sup>23</sup> provides as follows:

“19, The Court may in all other cases and where necessary make appropriate order, including-  
(a) the grant of interim reliefs.”

Section 22 of the Supreme Court Act<sup>24</sup> also contains similar provisions.

3.02 As I have earlier stated, the rules of practice and procedure of the various courts in Nigeria also grants these courts the procedural competence to grant mareva orders of injunction in a wide range of causes.

3.03 It remains to be stated that, since these provisions do not confer jurisdictions on these courts, the power granted to these courts under these provisions can only be exercised within the context of the subject - matter and substantive jurisdiction of the respective courts. The law is settled that a court of law will not have the jurisdiction to make an interlocutory order in an action in which it has no jurisdiction<sup>25</sup>. Thus, where a court, without jurisdiction, makes an order of mareva injunction, the order can be successfully challenged and discharged on that basis; since jurisdiction is the bedrock of any litigation process.<sup>26</sup>

3.04 In view of the foregoing, it is hereby, for instance, contended that the mareva order which the Federal High Court can validly grant must be

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<sup>23</sup> Act No.1, 2006

<sup>24</sup> Cap S15, LFN, 2004

<sup>25</sup> Soludo vs. Osigbo (2009) 18 NWLR (Pt.1173) P.290 at P.295 – 296.

<sup>26</sup> Government of C.R.S. & Ors vs. Assam (2008) 5 NWLR (Pt.1081) P.658 at P.671, 672.

within the context of the jurisdiction conferred on it under Section 251 of the Constitution<sup>27</sup> and any other law made by the National Assembly. The same principle applies to all other courts including the state high courts. One problem which may arise in this instance is where the order of injunction is made to be enforced against an asset to which the court has no jurisdiction. For instance, can a State High Court, which has no admiralty jurisdiction, in an action in which it has jurisdiction, order the arrest of a vessel for the purpose of securing the possible execution of a judgment that it may enter against the owners of that vessel? This author believes strongly that the state high court will have the jurisdiction to make the order in so far as it has jurisdiction to enter judgment in respect of the main claim before it. It can be reasoned, in this connection, that the primary consideration in determining whether or not the state high court will have jurisdiction to make the order has nothing to do with the asset to be secured pending judgment, but the subject matter constituted in the statement of claim before the Court.<sup>28</sup> The validity of this contention can be found in the case of *Efe Finance Holdings Ltd vs. Osagie, Okeke, Otegbola & Co.*<sup>29</sup> where Justice Galadima held that the court is entitled to issue a *mareva* order against an asset that is not connected with the suit. It would also appear, from the body of decided authorities, that the purpose of a *mareva* order is to secure the defendant's assets for the purposes of execution of anticipated judgment. However, it does also appear that the asset must be within jurisdiction.<sup>30</sup> The conclusion that can be drawn from the foregoing, therefore, is that the Court cannot issue a *mareva* order against assets that are outside the court's jurisdiction notwithstanding that the defendant is within jurisdiction.<sup>31</sup>

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<sup>27</sup> 1999 Constitution (As Altered)

<sup>28</sup> *Channel Tunnel Group Ltd vs. Balfour Beatty Ltd.* (1993) A. C. P.334 at 366 – 368.

<sup>29</sup> (2000) 5 NWLR (Pt.658) P.536 at P.545

<sup>30</sup> *Z limited vs. A* (1982) 1 All ER 556.

<sup>31</sup> In England, following the provisions of Pt.25 r. 25(1) (f) of the Civil Procedure Rules, the High Court of England has a worldwide freezing order power to restrain defendants from dissipating assets outside the United Kingdom. See *Babanaft Int. Co., SA vs. Bassante* (1990) Ch.13. Similarly, it was held in *Derby vs. Weldon (No.6)*. (1990) 1. W.L.R.P 1139 that the High Court of England has the power to order a party to a proceedings to transfer assets from one foreign jurisdiction to another. It does not appear that the Nigerian Courts have such wide powers.

3.05 The practical problem that is escalated, in this regard, is with regard to funds held by banks which, although domiciled outside jurisdiction, but can be drawn within jurisdiction. I am not aware whether our courts have been confronted with this situation but it clearly seems to me that the court will, nevertheless, be in an excellent position to make the order since the order can be enforced within jurisdiction.

#### 4.00 THE NIGERIAN EXPERIENCE

4.01 Although there is no legislation in Nigeria like the Civil Procedure Rules applicable in the United Kingdom, our courts have happily received and applied the principles of Mareva injunction as conceived in the cases of *Nippon Tuse Kasia vs. Karageorgis* (supra) and *Mareva Companies Naviera SA vs. International Bulkearriers SA* (Supra). It appears that the first time the order for Mareva injunction was considered for possible application in Nigeria was in the case of *Olumuyiwa Sotiminu vs. Ocean Steamship (Nig), Limited & 7ors.*<sup>32</sup> In that case, the appellant filed an action against the respondents for, amongst others, 5% of the gross earning of the 1<sup>st</sup> respondent. The trial judge dismissed all the reliefs sought for by the appellant. The appellant appealed to the Court of Appeal. After filing the appeal, the appellant also filed a motion seeking, amongst other prayers, an order of injunction restraining the 6<sup>th</sup> and 7<sup>th</sup> respondents from releasing funds from the accounts of the 1<sup>st</sup> respondent. The application was, again, refused and dismissed by the learned trial judge. A further application filed at the Court of Appeal was equally dismissed. The appellant filed an interlocutory appeal at the Supreme Court, contending and relying on the Mareva Case, that since there is the likelihood that the 2<sup>nd</sup> respondent, a German national, will withdraw the monies of the 1<sup>st</sup> respondent in the 6<sup>th</sup> and 7<sup>th</sup> respondents, that it was an appropriate case for the court to grant the mareva injunction against the 6<sup>th</sup> and 7<sup>th</sup>

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<sup>32</sup> (1992) NSCC (Pt.2) P.1

respondents. The Supreme Court, per Uwais, Kawu, Nnaemeka - Agu, Wali and Uche Omo, JJSC (as they then were), dismissed the appeal on the ground that there was no established imminent danger of very substantial damage and the existence of extreme probability of irreparable injury to the 1<sup>st</sup> respondent's funds in the hands of the 6<sup>th</sup> and 7<sup>th</sup> respondents.

4.02 Although the appeal was dismissed, the Court, however, agreed that the principles encapsulated in the cases of Mareva and Nippon are, indeed, applicable in Nigeria in appropriate cases. The judgment of Justice Nnaemeka - Agu, JSC (of blessed memory) contained at pages 13 - 17 of the Report was very illuminating and instructive. In it, the law lord set out the pre-conditions that must exist before the order for mareva injunction could be made by the court and that our courts do possess the jurisdictional competence to grant Mareva injunctions. He stated, at page 16, as follows:

“I am of the clear view that by the joint effect of sections 10, 13 and 18 of the High Court Law of Lagos State, that court has jurisdiction and power to entertain and, in appropriate cases, grant a Mareva Injunction as was developed by the High Court of Justice in England in 1975. By Section 16 of the Court of Appeal, 1976, that court could in an appeal pending before it exercise that power.”<sup>33</sup>

After this decision, our courts have, in a number of cases granted the orders of mareva injunction in appropriate and well deserving cases.<sup>34</sup>

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<sup>33</sup> See page 15 – 16 of the Report.

<sup>34</sup> See the case of Turbine Technology Services Corporation vs. AES Nigeria Barge Limited (2002) 3 FHCLR P.201 at P.212.

On the criteria for the grant of mareva injunctions, the authors of Halsbury's Laws of England<sup>35</sup> has this to say:-

“A Mareva injunction may be granted when (1) it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate item, and (2) there are also reasons to believe that the defendant has assets to meet the judgment in whole or in part but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him. It may also be granted where judgment has been given for the plaintiff and there are grounds for believing that the judgment debtor will dispose of assets to avoid execution”.

4.05 The said authors referred to a number of judicial authorities in support of these assertions.<sup>36</sup> It must however be understood that the purpose of the Mareva Injunction is not to punish or penalize the defendant but to do justice between the parties.<sup>37</sup>

4.06 On the conditions that must be satisfied before an order of mareva injunction is granted by any court, Justice Nnemeka-Agu, JSC, in the same case of *Sotiminu vs. Ocean steamship (supra)*, laid out the conditions an applicant must satisfy before the order is issued. The conditions as follows:

1. The existence of a strong case against the defendant.

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<sup>35</sup> (4<sup>th</sup> Edition Reissue) P.458 para – 868.

<sup>36</sup> *Z Limited vs. A – Z and AA – LL* (1982) QB 558 at 585; *Orwell Steel (Erection and Fabrication) Limited vs. Asphalt and Tarmac (UK) Ltd.* (1985) 3 All ER 747 at 749 – 750.

<sup>37</sup> See the comment of Lloyd, J., in *PCW (Underwriting Agencies Ltd v. Dixon)* (1983) 2 All ER 158 at 162.

2. That existence of justiciable cause of action against the defendant.
3. The existence of a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain against him.
4. Make a full disclosure of all material facts relevant to the application.
5. Give full particulars of the assets within the jurisdiction against which the order is sought.
6. The balance of convenience must be on the side of the applicant.
7. Prepared and able to give an undertaking as to damages in the event that the order ought not have been made in the first place.

4.07 The court also stated that all these pre-conditions must co-exist before the order can be made.<sup>38</sup> These conditions were, in some recent cases, adopted and applied by our Nigerian Courts.<sup>39</sup>

#### 5.00 PROCEDURE FOR APPLICATION

5.01 Since the objective of the Mareva Injunction is to prevent the possible judgment debtor or judgment debtor from rendering the anticipated judgment or judgment of the Court worthless, the application for the order is usually made Ex-Parte.<sup>40</sup> However, the application must be supported by affidavit and relevant documentary evidence. Under the rules of court prevailing in most jurisdictions, the motion will have to be supported by a written address which would contain legal arguments drawing the attention of the court to the salient evidence and law which should persuade it to grant the prayers(s). The affidavit evidence must contain

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<sup>38</sup> See pages 16 – 17 of the Report.

<sup>39</sup> Efe Finance Holdings Ltd. Vs. Osagie, Okeke, Otegbola & Co. (2000) 5 NWLR (Pt.658) P.536 at 548. See also the Judgment of Aderemi, JCA (as he then was) in the case of Durojaiye vs. Continental Feeders (2001) 10 N.W.L.R (pt.722) P.657 at P.665. See para 869, pages 458 – 459, Halsbury Laws of England (4<sup>th</sup> Edition Reissue) Vol.24.

<sup>40</sup> For the meaning of and import of Ex-parte application for injunction, see the case of Kotoye vs. Central Bank of Nigeria (1989) 1 NWLR (Pt.98) P.419 at P.450, 465. See also, generally, The Law of Interim Injunction in Nigeria by Justice Niki Tobi (2006) St. Paul's Publishing House.

facts which clearly supports the conditions for the grant of the application. In other words, the affidavit evidence must, of great necessity, establish that the applicant has an arguable case and not merely a *prima facie* case against the defendant. Where the affidavit falls short in respect of any of those conditions, the court would not make the order sought. That was exactly what happened in the Sotiminu vs. Ocean Steamship case. In that case, the court found as fact that there was no affidavit evidence establishing that the 1<sup>st</sup> respondent's funds with the 5<sup>th</sup> and 6<sup>th</sup> respondents were in imminent danger.

5.02 From the foregoing, it seems that an action, by whatever means allowed by the specific rules of the court, must be filed before an application for Mareva injunction may be applied for. Except for very few instances, actions are not normally commenced by ex-parte applications. In any event, the Supreme Court has held in a number of cases that an interlocutory order must be rooted in the substantive claim.<sup>41</sup> It follows, therefore, that the application must be predicated on the existence of an action for which judgment is sought and anticipated against the defendant.

## 6.00 LEGAL EFFECT OF A MAREVA ORDER

6.01 A Mareva order takes effect as soon as it is made and served. It does not operate as an attachment to the asset. It merely restrains the owner of the asset from dealing with the assets in specified manner. It does not, therefore, have a "rem" effect on the asset. Buckley, L. J., in *Cretanor Maritime Co. Ltd. Vs. Irish Marine Management Ltd*,<sup>42</sup> made this point very clearly when he stated as follows:

“.....It is, I think, manifest that a Mareva injunction cannot operate as an attachment.

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<sup>41</sup> *Adenuga vs. Odumeru* (2001) 2 NWLR (pt.696) P.184 at 201 – 202. However, in England, there is no provision that the interim order must be ancillary to the substantive claim.

<sup>42</sup> (1978) W.L.R. 966 at 974. See also the case of *Bekhor & Co. Ltd vs. Bilton* (1981) 1 QB 923 at P.942.

“Attachment’ must, I apprehend, mean a seizure of assets under some writ or like command or order of a competent authority, normally with a view to their being realized to meet established claim or held as a pledge or security for the discharge of some claim either already established or yet to be established. An attachment must fasten on particular assets..... A Mareva injunction, however, even if it relates to a particular assets ..... is relief in personam..... All that the injunction achieves is in truth to prohibit the owner from doing certain things in relation to the asset.....”

- 6.02 Thus, a Mareva order is different from an order directing a defendant to pay money into court or an order nisi in a garnishee proceedings.<sup>43</sup> However, English Case Law seems to suggest that where a Mareva injunction order is served on a bank, it may effectively operate in *rem*.<sup>44</sup>
- 6.03 Since the Mareva Order is merely a prohibitive order against actions of the defendant intended to either move the assets outside jurisdiction or dispose same, it does not operate to prevent the execution by a judgment creditor<sup>45</sup>. Thus, a bonafide third party purchaser for value or assignee or charge of the asset can secure a good title over the assets which were subject matter of a Mareva injunction.<sup>46</sup>

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<sup>43</sup> The distinction between a Mareva injunction and an order directing the payment of money into court was made by Jonathan Parker, L. J. in the case of *Flightline Ltd vs. Edwards* (2003) 1 W.L.R P.1200 at P1212.

<sup>44</sup> See the observation of Webster, J. in *SCF Finance Co. Ltd vs. Masri* (1985) 1 W.L.R. 876 at 884.

<sup>45</sup> *Iraqi Ministry of Defence vs. Arcepay Shipping Com SA* (1981) Q.B. 65.

<sup>46</sup> Thomson: Commercial Litigation: Pre – emptive Remedies (International Edition) (2005) Sweet & Maxwell – London, P.224 at para A2 – 026.

6.04 A Mareva injunction order will not affect the interest of a pre-existing creditor. The order will not block an unsecured creditor of a company or person since to allow for such payment would not amount to seeking to avoid the defendant's obligations to the plaintiff. Similarly, a Mareva order does not operate to freeze payment by a bank to third parties under irrevocable security documents.<sup>47</sup> It is also not intended to prevent the defendant from carrying on its ordinary course of business.

6.05 It is not open to a third party to, with notice of the pendency of the Mareva order, flout such orders. Where such is done, the 3<sup>rd</sup> party shall be liable in contempt. Thus, a third party who assists the defendant to disobey the order of court would be liable to a finding that he is liable in contempt.<sup>48</sup> The banks enjoy some special considerations in this regard. It does appear that where a bank honours a cheque drawn upon it with the support of a bankers card or draws a bank cheque, it would not be treated as contempt because before the order was made, the obligation to pay the value of the cheque or draft has fallen due. This was the point that was made in the case of Z Ltd vs. A - Z and AA LL (supra). However, a bank is bound to freeze its customer's account with it upon being notified of the Mareva Order. The contractual authority to honour the customer's instructions is revoked or suspended by an order of mareva injunction. The bank has no discretion to exercise in this regard.<sup>49</sup>

## 7.00 CONCLUSIONS

7.01 There seems to be inherent weakness in the Mareva injunction regime. The major weakness is the impossibility of using the procedure to create financial security for a successful applicant. For instance, where an order is served on a bank or third party holding on to the assets of the defendant,

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<sup>47</sup> See The Bhoja Traderr (1981) 2 Lloyd's Rep. 256 at 257.

<sup>48</sup> See generally the provisions of Order 2 Rule 16, Order 9 Rule 13 of the Judgment (Enforcement) Rules.

<sup>49</sup> Comm. Of Customs & Excise vs. Barclays Bank Plc (2005) 1 Lloyd's Rep. 165 at 172.

upon becoming aware of the existence of the order, the third party may either allow or assist the defendant to disobey the order. The only recognizable remedy in law in favour of the plaintiff is to commence a contempt proceeding against the third party. Thus, the procedure does not provide financial remedy since the success of a contempt proceeding has no financial benefit to confer on the plaintiff.

7.02 On the other hand, in garnishee proceedings, where the third party allows the defendant to utilize or dissipate the assets, the third party would be liable to the plaintiff to the extent of the value of the asset or judgment. To this extent, the Mareva injunction remedy does not fully secure the assets for the benefit of the plaintiff in the event of judgment. On the basis of the foregoing, this writer does not think that the objective of the Mareva injunction has any cognizable commercial benefit.

7.03 It has been recognized that both parties have the option of obviating the commercial consequences of the Mareva Order. One of such ways is to either pay the sum claimed into court or provide adequate and acceptable bond or guarantee assuring the payment of whatever sum that may be adjudged as payable by the defendant. This practice was approved in the case of Hitachi Ship Building & Engineering Co. Ltd. Vs. Viafel Compania Naviera SA.<sup>50</sup> It is, therefore, submitted that parties and counsel who exercise the option of securing a Mareva injunction order should carefully examine and evaluate the profitability of the order having regard to the peculiar circumstances of their case.

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<sup>50</sup> (1981) 2 Lloyd's Rep. 498 at 509.