

Legal update

Proving risk of asset dissipation: the limits of the fraud inference in *Mareva* injunctions

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Fraud and asset recovery
White-collar crime

The Ontario Superior Court of Justice decision in *HZC Capital Inc. v Lee* reinforces the burden on the plaintiff in obtaining a *Mareva* injunction to provide strong evidence that the defendant has or is likely to dissipate assets.

The plaintiffs in *HZC Capital* brought a multi-party suit alleging a complex commercial fraud involving several real estate development projects. Claiming that the defendants fraudulently inflated purchase prices, imposed additional fees and received kickbacks, the plaintiffs sought a *Mareva* injunction to freeze the assets of some of the defendants. The court dismissed the motion.

Real risk of dissipating assets

The court reviewed the established test for granting a *Mareva* injunction, reiterating the need for a strong *prima facie* case of fraud, assets of the defendants in the jurisdiction, a real risk of dissipation of such assets, irreparable harm to the plaintiffs, and the balance of convenience between the parties. Dismissing the motion against one of the three defendants, the court found the plaintiffs had failed to establish a strong *prima facie* case against them. The court's decision on the remaining two defendants focused on the issue of the "real risk of the defendants dissipating assets."

In considering whether a real risk of dissipation of assets was established, the court began by affirming the precedent in *Sibley & Associates LP v Ross* that dissipation can be inferred where all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the plaintiff's reach. This inference of dissipation where a *prima facie* case of fraud is established is often relied upon in cases such as this.

However, the court made clear that the entire circumstances must be considered, and these circumstances may displace the inference. In particular, the court noted:

- Both defendants had "strong roots in the jurisdiction" as they were both well established in the Ontario real estate business before their dealings with the plaintiffs.
- Both defendants had commenced their own actions against the plaintiff Lalu Canada Inc. for monies allegedly owing to them.

- Lalu did not take any steps to commence an action against the defendants for nearly a year after it had become aware of the fraud.
- The claim amounts in the actions commenced by both defendants exceed the amounts alleged to have been improperly taken from Lalu.
- There is no evidence the defendants have any offshore assets or businesses or they may move their assets off shore to avoid judgement.

Take-away

Mareva injunctions are extraordinary and intrusive remedies that require the moving parties to supply ample evidence to meet a strict and high threshold test. Applicants must demonstrate the strength of the case at hand and substantiate a claim that defendants might dissipate assets with strong supporting evidence. It is not sufficient to simply rely on the inference arising from proof of a *prima facie* case of fraud. More is required. An applicant needs to carefully consider all the evidence relevant to dissipation of assets before bringing a motion for a *Mareva* injunction.

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