USE OF MAREVA INJUNCTION FOR DEBT RECOVERY IN NIGERIA

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INRODUCTION

The feeling of control, sense of security and certainty is something that everyone covets and pursues when entering into commercial arrangements. This is also true when things go sour, where a person (standing usually in the position of a creditor) needs to test the efficacy of the remedial options available to him under the law arising from breach of the agreed commercial terms. In taking a decision to initiate a claim in court, an investor or creditor would be looking for counsel and representation from solicitors that can articulate, develop and implement effective debt recovery strategies using legal techniques and procedures developed to achieve asset preservation, retention and realization. Putting it simply, he would be looking for results. When this result is in the form of a favourable judgment, beyond that outcome, the risk of being unable to enforce same is an absolute nightmare for all plaintiffs/judgment creditors, for it is only a pyrrhic victory for a judgment creditor who has or no longer has access to assets which may be attached and realized.

The above reality is exacerbated by various gaps and frailties of the Nigerian system in terms of access to credit information about a borrower[2], weak collateral registry system[3], delays and compromises that may a times be witnessed in our judicial system even in the face of clearly enforceable claims and creditors rights, leading to loss or dispersion of assets over the period of the litigation.

A major response by the courts to the above risks/threats is the Mareva injunction[4] provided certain circumstances are met. This interlocutory judicial order -which has been described by many

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[2] Although post 2009 financial crisis, the Central Bank of Nigeria has revived use of its Credit Risk Management Systems Bureau, usually all that a plaintiff can do before instituting proceedings is to ascertain, informally and most times speculatively, whether his defendant is worth suing. This is not by any means guarantee that the defendant will remain judgment-worthy until the moment of execution arrives.

[3] This is virtually non-existent for goods and chattels and to a much lesser extent now for choses in action like shares. This makes it relatively very easy to surreptitiously dispose of such unregistered charged assets.

[4] Copper David, "*The Effect of Mareva Injunctions*" Civil Justice Quarterly 1998 35

commentators as a creditor's legal "nuclear weapon"[5]- has recently found a place of pride in the heart of Nigerian debt recovery outside its traditional sphere of maritime litigation where it was developed so much so that it is often used more in abuse than in protection of assets where there is real risk of dissipation. This article will briefly describe the nature of a Mareva injunction, its scope and limitations by reference the nature of defendants, third party rights and extent of seizure on assets. It will then consider the application of the doctrine in recent cases where the defendant is well situated within jurisdiction and there is no risk of loss or dispersion of assets outside the jurisdiction of the court and in the context of constitutional rights to property. Finally, we will attempt to make sense of the recent trend and make suggestions for protection of constitutional rights to property.

The Mareva Injunction: Definition and Origin

The Mareva injunction is an *ad personam*[6] order but it is also arguably an *in personam*[7] order. In its entirety it is a discretionary, interlocutory injunction awarded without the defendant being heard, either before or at the trial.[8]

It is further a preservatory specie of an injunctive order that is one that prevents the dissipating or dealing with the properties (pending the determination of a dispute) that could render the judgment of a court or the resolution of that dispute nugatory[9]. Further, unlike an interim order –also obtained *ex parte even without commencing a suit*- it operates until the substantive determination of the civil rights and obligations of the parties with regard to the subject properties. An interim order

[5] Fabano Carlos, "*Maximizing Plaintiff Protection in the World Of Asset Freezing and Bypassing the Due Process Requirement : The Mareva Injunction*" (2002) 9 ILSA J. Int'l & Comp. L. 131 at p.

[6] An '*ad personam order'* is an order to do or not to do something in another jurisdiction. *See also* Gemot Biehler, ''*Procedures in International Law'' (Springer Publishers 2008) p.98*

[7] An *in personam order* is made against and binds only a particular person whilst an order *in rem* binds the whole world. As we shall see, whilst it is made against a Defendant, the Mareva Order is generally meant to also be binding on third parties whose degree of liability is determined by reference to their degree of actual or inputed knowledge of the order of the court. As such it has been argued that it can be categorized as an *in rem* order.

[8] Catherine Colston, "*Principles of Intellectual Property Law* " (Cavendish Publishing Limited, 1999) p.422 see also *Sotiminu V. Ocean Steamship (Nig) Ltd* (1992) 5 NWLR (PT.239) 1 at 25

[9] *Akingbola V. Chairman, EFCC* [2012] 9 NWLR (Part 1306) 475 at 500 Paras E – G

seeking to preserve the status quo only operates until a named date or until further order of the court or until an application on notice can be heard[10].

The foundations of the Mareva Injunction can be traced back to the English Courts in 1975 where in two landmark maritime cases, to wit *Nippon Yusen Kaisha v. Karageorgis*[11] and *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A*[12], the English courts departed from its self inflicted rule of practice pre - 1975[13] not to seize assets of a defendant in advance of judgment.

Initially the English courts took the view that there was no reason to grant interlocutory preservative orders in the nature of a Mareva against a British defaulter who would attempt to dissipate his assets as he would face retribution in the form of bankruptcy or winding up procedure. But not only was that approach arguably economically unsound[14] but it was oblivious of the immunity of a foreign defendant, the subject of another Sovereign, from local jurisdiction of an English court once his funds or assets are removed outside the local jurisdiction, which issue was particularly prevalent then in maritime commercial disputes.

Accordingly, by 1975, the English courts took the view that it was in the interest of justice to issue preservatory orders that would prevent **foreign** defendants from removing assets outside the reach of the English courts thereby thwarting the benefit of the judgment obtained against such defendants[15].

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[10] *Bank Boston N.A. U.S.A. v. Adegoroye* [2000] 2 NWLR (pt.644) 215 C.A; *Saraki v Kotoye* (1992) 9 NWLR (Pt. 264) 156

[11] [1975] 2 Lloyds Rep. 187

[12] [1975] 2 Lloyds Rep. 509

[13] Prior to 1975, section 45 of the UK Supreme Court of Judicature (Consolidation) Act 1925 *in pari materia* with Section 37(1) of the UK Supreme Court Act 1981 vested in the High Court the power to grant injunction or mandamus in all deserving cases

[14] What would be the sense of bankruptcy or liquidation proceedings or such other collective proceedings for the Plaintiff when the assets have been disposed off within and without jurisdiction? Without prejudice to the avoidance powers of a liquidator for the benefit of all creditors whose claims are proved, the plaintiff together with a legion of other aggrieved creditors would be left with an empty shell and an empty judgment.

[15] See Goff J. in the *Angel Bell* [1980] 1 Lloyds Rep. 632 at 635; *Third Chandris Shipping Corp.* v. *Unimarine SA* [1979] Q.B. 645 at pp. 668-669; Gee, *supra*, n. 10; Powles, "Mareva Round-Up" [1982] J.B.L. 383 at p. 489; I. S. Goldrein and K. H. P. Wilkinson, *Commercial Litigation: Pre-Emptive Remedies* (2nd ed., 1991), p. 129; S. W. Hoyle; *The Mareva Injunction and Related Orders* (2nd ed., 1989); D. M. McAllister, Mareva Injunctions (2nd ed., 1987)

Thus in the first English Court of Appeal case of *Nippon Yusen Kaisha v. Karageorgis*, where the ship owners had brought a claim before the English High Court for charter hire against two non-resident charterers, established that the same charterers had funds placed with banks in London, but could not locate the whereabouts of the charterers, Lord Denning M.R. of blessed memory stated that the practice of English courts not to seize assets of a defendant in advance had to be revised. He thereafter cited the power of the High Court to grant an interlocutory injunction in Section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 as the statutory basis for the court to grant the necessary order to freeze access to and disposal of the assets located within the English jurisdiction. The Court of Appeal immediately in the same year confirmed this new procedure and practice that had been conceived and again granted an *ex parte* interlocutory injunction in the case of *Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A.* This is the case after which the injunction became named. Nowadays, this injunction is referred to as a freezing order in the UK and not a Mareva injunction as part of the justice reform agenda to simplify courts processes and jargons.

The Mareva Injunction in Nigeria

A large number of Commonwealth countries (Including Nigeria) have recognised the Mareva injunction in their jurisdictions through relevant case law, initially placing reliance on adjectival laws endowing courts with jurisdiction to grant interim orders to preserve properties, and subsequently giving more legislative attention to this power of the courts. The legislative effort was partly a response to the realization of the threat posed within each country by, the increasingly high reluctance to disclose assets and the relative increase in cross border mobility of assets. As Mclean rightly puts it "*EVERY legal system would accept as axiomatic that an offender should not enjoy the profits of his criminal activities and a debtor should rightly pay the fruits which is owed".*[16] The proceeds of crime or debt owed in the past were perhaps once typically pieces of personal property, for example stolen chattels, which could be seized or restored to their owner.

[16] Hatchard John, Combating Transnational Crime in Africa: Problems and perspective (2006) Journal of African Law p. 15

Today they are more commonly represented by cash or securities, and subjected to sophisticated cross border "money-laundering" techniques.

Generally in Nigeria, the root of the court's statutory, equitable and inherent jurisdiction would be traced back to the Constitution[17]. The court's power to grant mandamus, injunction or appoint a receiver is usually donated by statute establishing the relevant court pursuant to the 1999 Constitution as amended[18] and amplified by the relevant court rules[19]. However, in terms of case law in Nigeria, recognition of Mareva injunction may be first traced to the Supreme Court case of *Sotiminu v. Ocean Steamship (Nig) Ltd* in 1992[20] where the Supreme Court acknowledged as a preventive measure the power of the court to grant anticipatory and preservative *ex parte* injunction to a Plaintiff with a good prima facie case against a "mischievous" Defendant planning to remove assets outside the jurisdiction of the court before judgment.

Mareva injunction has not only gained a pride of place in commercial dispute in Nigeria but also enjoys statutory patronage in the country's fight against corruption, terrorism and money laundering in addition to special case management rules developed by the courts to fast track prosecution of these cases[21]. Accordingly, sections 26, 28 and 34 of the Economic and Financial Crimes Commission (EFCC) Act, 2004, Sections 12 and 16 of the Terrorism (Prevention) Act, 2011 inter alia make provision for law enforcement and investigative agencies to administratively but temporarily freeze the accounts of a person suspected of having committed economic and financial crimes, attach funds and properties allegedly associated with proceeds of crime alleged to have been committed by such persons by a freezing (Mareva) injunction issued by the Court pending determination of the criminal charge[22].

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[17] Section 6(6) 1999 Constitution of the Federal republic of Nigeria as amended

[18] Please Section 18 of the High Court of Lagos Law, Cap. H3, Laws of Lagos State, 2003; Section 13 of the Federal High Court Act, Cap. F.12, LFN 2004; Section 19 of the National Industrial Court Act, Act No. 1, 2006; Section 15 of the Court of Appeal Act, Cap. C.36 LFN 2004; Section 22 of the Supreme Court Act, Cap. S.15 LFN, 2004;.

[19] Please see Order 28 Federal High Court (Civil Procedure) Rules 2009; Order 38 High Court of Lagos State (Civil Procedure) Rules 2012; Order 14 National Industrial Court Rules 2007, Order 4 Court of Appeal Rules, 2011; Order 8 Supreme Court Rules , 1985

[20] Supra, note 7; see also *7UP Bottling Co. v Abiola & Sons (Nig.) Ltd* (1995) 3 NWLR (Pt.383) 257

[21] See for instance, Federal High Court Practice Direction 2013 dated 30th April, 2013, Lagos State High Court Practice Direction 2013 dated 30th December, 2013, Court of Appeal (Criminal Appeals) Practice Direction, May 2013 and Supreme Court (Criminal Appeals) Practice Direction, July 2013

[22] Sections 49 and 50 of the Asset Management Corporation of Nigeria (AMCON) Act 2010 as amended also empower the Federal High Court to grant Mareva injunction to AMCON without the corporation having any need of filing any

The Court of Appeal in the quasi criminal appeal case of *Akingbola v Chairman, EFCC*[23] put it succinctly that "*the court has power to grant interlocutory injunction to the police for the preservation of the proceeds of crime in the public interest. It is the duty of the police to enforce the law of the land. It is its duty once it knows or has reason to believe that goods have been stolen or unlawfully obtained to do its best to discover and apprehend the thief and to recover the goods. Corresponding to that duty, it has a right or at any rate an interest on behalf of the public to seize those goods and detain them pending trial of the offender and to restore them in due course to the true owner. In pursuance of that duty and of that right and interest, it can apply to the magistrate for a search warrant and to a High Court for an injunction*[24] ".

Scope of Mareva injunction

It is pertinent to note that although it was originally and principally used as a means of preventing unscrupulous foreign defendants from placing, disposing or transferring their assets beyond the reach of a plaintiff and the court, the scope of grant of Mareva injunction has since been extended to make this procedure to become a formidable weapon to halt or paralyze activities of both locally or foreign based defendant company and any third party associated to the defendant company within and outside the jurisdiction of the court. This as will be shown is perhaps an unfortunate outcome if left unbridled as it would then drive the subject of such an order towards liquidation rather than recovery.

Firstly, the courts in England and in Nigeria have since moved from confining grant of Mareva injunction to resident or non-resident foreign based defendants to a defendant who claims to be or is in actual fact based within jurisdiction if the circumstances were such that the court is

originating processes immediately provided that after the grant of the Mareva injunction AMCON shall file a suit against the debtor within 14 days.

[23] Note 8 supra at pp.503-504, paras. H-F

[24] This statement of the law by the Court of Appeal should not unwittingly be interpreted to mean that Mareva injunctions are only available to superior court of records and not to Magistrate Courts in a **civil** context; for both the enabling law of the Magistrate Court as well as the Magistrate Court Rules donate to the Magistrate Court power to grant interim and preservatory injunctions. Please see Sections 28 and 33 of the Magistrate Court Law of Lagos State xxx and Order 9 of the Magistrate Court (Civil Procedure) Rules

apprehensive that he would remove his assets from jurisdiction or there is a threat or danger of his **absconding**[25].

In the English case of *Barclay-Johnson v Yuill*[26] Sir Robert Megarry V-C explained that the *raison d'etre* of Mareva injunction is to prevent a removal of assets by the Defendant out of jurisdiction and as such though nationality and domicile were important factors, Mareva jurisdiction needed not be confined to same before it is invoked by a Plaintiff.

But in *Bahman (Prince Abdul) Bin Turki Al Sudairy v Abu Taha*[27] Lord Denning M.R. went even further after approving the decision in *Barclay-Johnson's* case and stated that "*A Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of jurisdiction or disposed within jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied*" thereby adding a third instance where Mareva could be invoked, to wit, if there was a danger that the assets will be disposed of within jurisdiction.

In *Trade Bank Plc v Barilux (Nig.) Ltd*[28] which involved a dispute between a Nigerian company (Barilux) at the Lagos State High Court and a Nigerian bank, the Court of Appeal citing the above *Abu Taha* English case confirmed that under Nigerian jurisprudence the use of Mareva injunction was not restricted to obtaining preservatory orders against foreign defendants whether or not based/domiciled within jurisdiction but also covered a defendant based within jurisdiction.

A second aspect of the above on scope of applicability of Mareva is the extension given by the above jurisprudence with respect to location where removal or disposal of assets may occur before judgment. The *Barclay-Johnson*[29] *and Abu Taha* English cases and the *Akingbola's* Nigerian

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[25] *Bahman (Prince Abdul) Bin Turki Al Surdairy v Abu Taha* (1980) 3 AER 409; *Trade Bank Plc. v. Barilux (Nig.) Ltd.* [2000] 13 NWLR (pt.685) 483 C.A.
[26] [1980] 3 AER 190 at page 194
[27] Note 24 supra at page 412
[28] Supra at page 492 paras G-H
[29] Supra at page 194; please see also Goff J in the *Angel Bell* case at page 636

case[30] explain that although principally meant to avert removal of assets outside jurisdiction, "*the point of Mareva injunction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve this result the injunction must be in a wide form because, for example a transfer by the defendant to a collaborator within the jurisdiction would lead to the transfer of the assets abroad by that collaborator* ". In other words, it is as important that the gist of the Mareva Order covers disposal of assets at the local level through any third party for same to be effective and avoiding any attempt by the defendant to become "judgment proof".

A third aspect of extension of scope of Mareva injunction relates to the nature of the Plaintiff applying for Mareva. Under Nigerian law, in addition to the general access to court available to every aggrieved person pursuant to Section 6(6) of the 1999 Constitution as amended, the Nigerian system has witnessed the creation through legislation of two categories of special plaintiffs entitled to seek Mareva injunction with some special additional features or benefits associated thereto.

As we have seen earlier, some special statutes offer express and special recognition in the interest of the general public to law enforcement agencies to use Mareva injunction and as one of the resources for fighting crimes. The courts have developed a liberal approach to exercise of this power. Accordingly, these law enforcement agencies like the Police or the Economic and Financial Crimes Commission (EFCC) are by law entitled upon suspicion of economic crimes to direct the freezing of accounts associated with persons they are investigating and or temporarily seize/attach their properties at the point of search or arrest. The law further provides them with opportunity of immediately applying for a Mareva Order by filing a quasi criminal case[31].

In *Akingbola's case,* the Court of Appeal was asked to decide whether the application for Mareva must be made in the criminal charge and citing the English case of *The Siskina*[32] held that in so far as the Federal High Court is imbued with jurisdiction to grant Mareva by virtue of Section 13(1) of its enabling Act, all that is required to enable it grant Mareva is the existence of an *actual or*

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[30] Supra at page 508 paras E-F; see also *I.F.C v DSNL Offshore Ltd* (2008) 7 NWLR (Pt.1087) 592

[31] Sections 26, 28, 29 and 34 EFCC Act, 2004; See also sections 12 and 16 Terrorism (Prevention) Act, 2011. Where cash is recovered pursuant to search or arrest, it is meant to be paid into an escrow account by the law enforcement agency

[32] (1977) 3 AER 803

potential action claiming substantial relief which the court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary. In other words, in so far as a criminal charge was pending against the Appellant, it was irrelevant that the said charge was not pending before the judge that granted the Mareva order in a distinct and separate originating process.

Sections 49 and 50 of the Asset Management Corporation of Nigeria (AMCON) Act as amended[33] further donates special powers to AMCON as a statutory creditor to obtain *ex parte* Mareva Orders (freezing debtor's accounts, taking possession of a debtor's moveable or immoveable property against a debtor) from the Federal High Court without the need for filing any action immediately[34], thereby dramatically increasing the element of stealth, secrecy and lethal effect of this debt recovery tool against debtors.

Yet another aspect of the scope of Mareva injunction is the extent of the Mareva injunction on third party rights. A Mareva injunction requires to be drafted broadly and to encompass notification to any third party in whose hands assets of the Defendant may be located. To achieve the fundamental purpose of Mareva –i.e. prevent dissipation, disposal or subversion of assets- and avert controversy surrounding whether a third party had been notified of the order through service of same, the Plaintiff would also usually apply for leave to notify third parties and indeed the whole world via publication. Once a third party is notified- and not necessarily served- it becomes mandatory for the third party to strictly comply or face contempt proceedings and other civil liability[35].

On the other hand, it cannot be ignored that third parties may innocently and indeed very legitimately be entitled to hold, use and even dispose of assets being held by them which ostensibly may be perceived as belonging to the Defendant. For instance, a third party may be holding the Defendant's goods, shares or title deeds as a security or holding chattels by virtue of a relationship of bailment. Also the assets of a defendant may be loaded on a vessel belonging to a third party

[33] The Principal AMCON Act was first enacted in 2010 and has been amended in 2015.
[34] As a mechanism to prevent arbitrariness and lack of fair hearing, section 50 also provides that should the Corporation however fail to file a debt recovery action within 14 days, the said order would lapse.
[35] *Z v A* [1982] 1 AER 556, at 565

and on a time charter, or the Defendant may have genuinely issued a cheque to a trade creditor in the normal course of business prior to the grant of the Mareva.

The issue therefore is how to balance preserving the interests of the plaintiff pending outcome of decision of the court, protecting the integrity and not undermining the authority of the court's orders and judgment and protecting the rights of innocent third parties lawfully created in the course of commercial transactions. The courts have devised certain guidelines to balance these issues.

Firstly, a plaintiff seeking to obtain Mareva from a court must be ready indemnify third parties against any liability for obeying the order[36]. Further, the Plaintiff must be prepared to pay the third party all costs and expenses incurred by third party for compliance of the said order[37]. For instance, in the English case of *Clipper Maritime co. Ltd v Mineralimportexport,* the Plaintiff was required by the court to undertake to compensate the Port authorities for loss of income arising from the grant of the order not to remove the Defendants cargo loaded on board a certain vessel on time charter to the Defendants which was being loaded at the Port of Barry in Wales.

Further, in order to balance the respective competitive rights of the Plaintiff and third party's freedom of trade and interest in property, the courts have also held that where the effect of the Mareva injunction would substantially interfere with an innocent third party freedom of trade e.g. performance of a contract between the third party and the Defendant, or the business rights of an innocent third party, particularly in maritime cases, the third party rights would prevail[38]. This position of course would not usually apply to banks once the defendant's accounts are frozen with respect to drawing of cheques[39] before or after the injunction. But when the banks are previously already bound to indemnify third parties, for instance under a letter of credit or bank guarantee or bank draft arrangement, the injunction ought not to prevent payments or the bank honouring these instruments of commerce[40].

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[36] Please see *Sotiminu and Efe Finance* cases supra. Also please see *Abu Taha's case*
[37] See *Clipper Maritime Co. Ltd v Mineralimportexport* [1981] 3 AER 664
[38] *Galaxia v Mineralimportexport* [1982] 1 AER 796
[39] *Z v A supra at page 563*
[40] *Z v A at page 563 and 576*

This jurisprudential analysis by English case law stressing the need for enthronement of certain limitations to the impact of Mareva injunctions actually underlines the issue of protection that ought to be afforded to the constitutional right to property of citizens, including presumably suspect ones. The constitutional protection of right to property whether moveable or immoveable under the Nigerian Constitution envisages that every person has a right to acquire and own property anywhere as he or she pleases, and *a fortiori* to deal with same as deemed fit subject to the Constitution and policy consideration such as public order, safety and morality, etc[41]. The Nigerian Constitution envisaged that no moveable property or any interest in an immovable property shall be taken possession of compulsorily in Nigeria unless there is a need to do so by law.[42] But even when such is the case, possession or appropriation or compulsory acquisition is predicated on compliance with due process. To further enhance protection of the right to property, Section 44 of the Nigerian Constitution provides that any law which leads to wresting incidence of ownership (which is the right to deal with said property at will and pleasure) by way of compulsory takeover of possession of property from the owner must feature a provision for prompt payment of compensation as well as give such a person right of access to justice to challenge the interference with his interest in the property[43] or the quantum of compensation.[44] A corollary of the above under the laws relating to grant of an injunction (of which Mareva injunction is a specie) is the principle that an injunction would not lie against the exercise of a legal right by a person. This being the case, whilst the original intendment of the exception created by the courts under Mareva injunction application can be understood for persons taking assets outside jurisdiction before judgment, it is difficult to appreciate from a constitutional perspective or even an economic perspective the basis for such dangerous widening of scope of use of mareva injunction which unlike other forms of injunctions could have an extremely protracted length of life owing to a very cost intensive, bureaucratic justice system such as ours. In other climes like in the UK where this order has been developed as a temporary tool to arrest mobility of assets, the justice system as well as general information system is very efficient and very speedy.

[41] Constitution of the Federal Republic of Nigeria 1999 s 43
[42] Constitution of the Federal Republic of Nigeria 1999 s 44

[43] Constitution of the Federal Republic of Nigeria 1999 s 44(1)(a)
[44] Constitution of the Federal Republic of Nigeria 1999 s 44(1)(b)

Improper Use of Mareva injunction

In Nigeria, it can be observed that some of these important constitutional and economic checks have been deeply eroded such that property rights of the defendant as well as presumably innocent third parties and by extension incidence of fresh litigation and or viability of their businesses are deeply affected. Mareva seems to have become a tool for instance for a secured creditor to secure a better position than his security could have afforded him or to access assets belonging to third parties whether or not reasonably traceable to the Defendant or Defendant's assets. Mareva can be granted to a Plaintiff where same will simply provide some security to the plaintiff whenever it is just or convenient to do so! It may be argued that there are still some checks in place in expanding scope of use of Mareva. The Supreme Court in *A.I.C* v *NNPC*[45] envisaged circumstances whereby a third party may be affected by Mareva and lays the burden on the third party to apply as an intervener to discharge or vary the injunctive order by showing a title paramount to that of the defendant by, and a successful third party intervener may be awarded his costs against the plaintiff upon the indemnity basis.[46]

However, it is generally observed that Mareva seems to have become virtually unlimited in scope and stands as a formidable weapon at the firmament of injunctive reliefs for debt recovery purpose: it has ability to comprehensively paralyze, cripple the Defendant's business, trace assets in the hands of third parties whilst as well freezing cash and stalling virtually all disposal of properties is absolute and subject only to an adverse outcome of the pending suit. Naturally, it exacts tremendous pressure on the embattled debtor to take certain good faith steps to appease Plaintiff/creditor. The Plaintiff also where he is actually a secured creditor stands in a better position to realize his security since Mareva gives him an opportunity to attach assets which are not part of the litigation[47], setting aside cash in accounts of the Defendant to the tune of the debt owed and also give the creditor a clear ground to proceed with an identified target for execution at

[45] (2005) 11 NWLR (pt.937) 563
[46] Afe Babalola, *Injunctions and Enforcement of Orders*, Afe Babalola; Ibadan, 2007 pg.155
[47] See Section 25 Sheriff and Civil Process Act Cap xx LFN 2004; Efe Finance case supra

the point of judgment. However, even when he is an unsecured creditor, Mareva is then used to circumvent laid down rules of priority of claims.

For that reason, under Nigerian practice, more often than not, debt recovery agents have sought to use Mareva to give the plaintiff precedence or security interest with respect to the debtors frozen assets or at least circumvent general rules of treatment and ranking of creditors. It is also used in Nigeria by creditors and debt recovery agents to circumvent general rule of insolvency and collective proceedings which presuppose arguably an orderly, fair and equitable administration of the indebtedness of a business to ensure survival or recovery of the business or orderly realization and distribution of assets.

This is particularly prevalent in cases of receivership where an unsecured creditor may rush to the court and apply to obtain Mareva against the receiver of the debtor company, thereby securing himself a more advantageous position vis a vis other unsecured creditors and possibly the receiver and in the process also jeopardizing any possibility of implementation of business rescue by the receiver.

What is more the rate of its prolific use and grant is a cause for concern: it is not arguable that nuclear weapons are sparsely used in view of their devastating effect on the entire environment. In other words, whilst being imbued with the ability to resolve a conflict effectively, inherent in the nuclear weapon is its tremendous ability to create absolutely disastrous effects. In the same vein, Mareva is meant by its nature to be cautiously used and granted by the courts in order to avoid both interference with commerce, freedom of trade and business between persons, undue hardship, costs and loss of income to innocent third parties as well as unlawful interference with constitutional right to property before judgment, particularly in circumstances where no security has been offered. As Nnaemeka-Agu JSC stated[48] "…*the granting of such an injunction was a fundamental departure from the erstwhile general rule from the erstwhile general rule that a plaintiff would take his queue with other creditors of the defendant and if he obtained a judgment against the defendant he would simply, subject to the rules on priorities of debts, execute it on the defendant's available assets or on the person of the defendant* ".

[48] Page 25 Paras. F-H

Mareva injunctions are the nuclear bomb of litigation. It upsets everything. It elevates an unsecured creditor to a secured creditor of sorts even before judgment. It further upsets the rules of priority of claims and as such must be handled carefully.

Further, in the absence of our courts taking the lead in a judicious regulation of the urge of a Plaintiff to "*press that nuclear button*" Mareva more often than not are now indiscriminately used by creditors to bring Defendants to their knees without balancing the immediate objective of recovery with the business medium to long term interest of having access to their assets for the purpose of generating cash flow to meet obligations not just to the possibly unsecured plaintiff but also to other creditors some of whom may be secured.

Even though by its nature, a tremendous deal of discretion and caution is to be exercised by the courts before its grant, it is observed that Mareva is invoked almost in very liberal manner, particularly where there is no evidence that the Defendant in question is a foreigner or intends to take assets out of jurisdiction. For instance, whilst the courts ought to be thoroughly satisfied that the cumulative conditions for grant of Mareva injunction are satisfied by positive evidence (i.e. the subject matter of the suit, "the debt" must not be disputed by both parties and be obviously worthy of belief prima facie, threat of removal or danger of absconding by Defendants, full disclosure of facts, undertaking as to damages etc, [49]) it is observed in practice that mere averments stated in relevant affidavit are deemed reasonable by the Courts to be successful.

Perhaps the point above is best illustrated by the approach of the courts in the *Trade Bank Plc v Barilux (Nig.) Ltd case* where the Court of Appeal upheld the decision of the trial court refusing the application of the bank to vacate the order of Mareva injunction obtained against the bank accepting the trial court's assessment that the order should not be perturbed to ensure that the appellant does not remove assets outside jurisdiction in excess of N2 Million even though the Court of Appeal found that the evidence before the lower court showed that the bank had not less than N200 Million in its credit as deposit with the Central Bank of Nigeria Stabilisation Vault, with a preceding yearly profit after tax of N24.9 Million against gross earnings of N395.4 Million. In other words, the Defendant was not distressed or posing a reasonable threat of absconding with

[49] See Sotiminu's case supra

assets etc. The Defendant was also not a foreigner but fully subject to the Nigerian jurisdiction, yet the Court of Appeal upheld mareva injunction as appropriate.

Similarly in many of the quasi criminal cases where law enforcement agencies prefer a charge against an accused, the Courts are meant to critically weigh the propriety and accuracy of a Mareva application by the law enforcement agencies to attach the properties and freeze the funds of a presumably innocent accused person. Particularly where the particulars and evidence supplied can show the cash, assets and properties prima facie as being associated with proceeds of crime, there should be no need granting blanket Mareva injunctions over all the assets of such accused person, thereby jeopardizing the rights of such accused person to defend him or herself from unproven allegations[50]. Only the impugned assets need be frozen, even then, there should be living allowances for the accused person to enable him or her pay legal fees and obtain relevant quality counsel to defend the criminal charge.

Further, it is our respectful view that Mareva injunction are not tool for debt recovery for certain complex commercial transactions such as Project Finance by reason of the nature of these transactions where returns on investment are based on cash flow and revenue from the Project itself which involves intricate and complex legal rights of the plaintiff, several other lenders, contractors, investors and other third parties etc such that the Mareva injunction would constitute a substantial interference on these third parties business rights and lead to further losses and even destruction of the business potential of the project.

CONCLUSION

The Nigerian landscape shows that the English procedure for grant of Mareva injunction has been fully adopted and in some areas expanded by statute and case law. Mareva over the years has

[50] It is also regrettable that statutory provisions creating interim powers of attachment of law enforcement agencies and courts do not expressly make provision for living allowances and expenses, attorneys fees for persons being investigated and prosecuted for crimes

simply become a tool of predilection in debt recovery in Nigeria and seems to have grown from being exceptionally granted to being liberally granted by the court at the instance of counsel/recovery agent in proceedings in court. It also nowadays serves as a critical means for a creditor to trace assets and gauge the magnitude and nature of assets available as well as the level of indebtedness to other creditors and the risk of the defendant not having substantial assets to satisfy the judgment.

However, despite its numerous appeal as a debt recovery instrument, it is also often abused by creditors and sought to be converted from a preservatory order to one that would help a creditor change his status as a creditor in terms of priority of interest.

It must be remembered in the final analysis that no matter how seductive, injunctions –including Mareva injunctions- cannot obliterate uncertainties in economic activities where there is a dispute. Neither can even a final judgment except it is not appealed against, which is often not the case in Nigeria. It follows that debt recovery practitioners should endeavor to efficiently and properly employ interlocutory remedies such as Mareva injunctions and fast track procedures or form of actions available under the Rules of Court to achieve the results desired by their client.

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