

Mt Uriwaki Enterprises Pty Ltd v. Baxter

National Court
Hinchliffe J.
14 December 1988

Pleading and practice—injunction—Mareva injunction—whether non-citizen without permanent employment should suffer “freeze” of bank accounts—whether allowances for living expenses and legal fees should be excepted.

Pleading and practice—Mareva injunction—whether “new” law should be established in Papua New Guinea.

¹⁰ Facts:

The applicant (the first defendant) had liquid assets with certain banks (A.N.Z., P.N.G. Banking Corp., and Niugini Lloyds International Bank, the second, third, and fourth defendants). The plaintiff's substantive claims against the first defendant were set down to be heard in January 1989. An injunction restraining the first defendant's three bankers had been in place since January 1988.

²⁰ The defendant was not a citizen, he had no permanent employment, he had financial obligations in a nearby country, and he had only been in Papua New Guinea for two years. There were no reported cases in Papua New Guinea where a plaintiff, pending trial, had been granted an injunction freezing the defendant's assets.

The first defendant sought an order setting aside the injunction of January 1988.

HELD:

Although the “Mareva injunction” is “new” law insofar as reported cases in Papua New Guinea have not been so expressed, the above-named procedure is “the practice in this court”.

A Mareva injunction will be granted where:

- (1) it appears likely the plaintiff's substantive case will prevail;
- (2) the defendant has assets within the jurisdiction; and
- (3) there is reason to believe that defendant will remove them out of the jurisdiction (or dispose of them within the jurisdiction).

Cases referred to in judgment:

There were no cases referred to in judgment, but see *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* (The Mareva) (1975) [1980] 1 All E.R. 213.

Counsel:

P. Payne for the plaintiff
R. Thompson for the first defendant

HINCHCLIFFE J.:**Judgment:**

This matter comes before me by way of two notices of motion. One by the plaintiff moving the Court for orders, *inter alia*, as follows:

1. That the first defendant be restrained until further order from withdrawing or otherwise dealing with monies deposited in the name of the first defendant with the third and fourth defendants.
2. The orders of 27 January 1988 be discharged.
3. The order of 17 May 1988 be confirmed.

The second notice of motion is by the first defendant who moves the Court for orders, *inter alia*, as follows:

1. The injunction granted by this Honourable Court pursuant to an Order made on 27 January 1988, be set aside.

The matter has now been fixed for trial at Waigani on 11 January 1989, although when the present applications were filed it was thought by the lawyers that it would not be reached for trial until at least March 1989, if not even later. It would seem that because the trial is now less than a month away a certain amount of the urgency has gone. Needless to say both lawyers pursued their applications yesterday with considerable vigour.

It also seems that since the injunction on 27 January 1988 everyone was of the view that Mr. Baxter was unable to have access to his account with the third or fourth defendants. That is made clear by the terms of the order of Los J. on 17 May 1988 when he allowed the first defendant to withdraw up to K200 per month from the fourth defendant.

But the actual wording of the order of 27 January 1988 only concerns funds leaving the jurisdiction. It was a "Mareva" injunction. Needless to say it may well be that it was the intention of the lawyer and myself on 27 January that funds be frozen within the jurisdiction as well. I cannot remember.

Clearly Los J. dealt with the application on 17 May as if all funds had been frozen. He certainly did not consider at the time that the order of 27 January should be set aside in full but he did allow, as stated, the first defendant to withdraw K200 per month from his account with the fourth defendant.

There is no doubt that the injunction has been in place for some considerable time but at least there is now a trial date fixed. I suspect that the first defendant has had many changes of lawyers because he has not been able to provide the required funds as part payment of fees. Even though the plaintiff's lawyers were criticized for not having the matter listed, I am not satisfied that the criticism is warranted. Mr. Howard's affidavit of 8 December 1988 indicates a certain amount of fairness on his part towards the first defendant and it also indicates that there have been problems contacting the first defendant's lawyers. It also seems that the first defendant's lawyers have not responded to a request for documents.

Ms Thompson, who now appears for the first defendant, has made submissions that the order of 28 January 1988 should be set aside and that no further injunctions should be fixed.

I have had the opportunity, overnight, to peruse the file and even though the statement of claim needs some work done on it, I am of the view that the orders of

this Court on 27 January 1988 and 17 May 1988 were proper.

Ms Thompson has also submitted that to concede to the first order sought in the plaintiff's notice of motion would be establishing new law in Papua New Guinea, although it is not new law as far as Australia and the United Kingdom are concerned. I am of the view that although there may not be any reported cases regarding the "new" law, it has been the practice in this Court to freeze funds as sought in the plaintiff's said notice of motion.

90 I am of the view that a Mareva injunction should be granted where it appears likely that the plaintiff would recover against the defendant for a certain or approximate sum and there are reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, wholly or in part, but might deal with them, whether by removal out of the jurisdiction or disposing of them within the jurisdiction so that they were not available or traceable when the judgment was given against him.

100 The defendant has only been in the country, it seems, for two years. He is a foreigner without permanent employment. Clearly there is a possibility that he would have to return to Australia, either at the direction of the Papua New Guinea Government or because of his own economic situation. I find it difficult to accept that he would be successful in taking out Papua New Guinea citizenship (see the first defendant's affidavit of 29 November 1988) when he has only been in the country for a relatively short time.

I also note in paragraph 33 of the first defendant's affidavit of 5 May 1988 that he owes Hindmarsh Adelaide Building Society (that is, in Australia) K9,388 plus interest. He says: "My financial situation is placing me in danger of losing my house which is the subject of a mortgage. . . . My indebtedness for the last eight months stands at K3,720 plus 18% interest".

110 I would have thought that that in itself should cause the first defendant to transfer all his funds, held by the fourth defendant, out of the jurisdiction. Taking all the matters into account I am of the view that I should grant orders as sought in 1, 2, and 5 of the plaintiff's notice of motion and vary the order of 17 May 1988 so that the first defendant is able to withdraw K500 in December 1988 and K400 in January 1989 from his account with the fourth defendant. I further vary the said order of 17 May so that the defendant is able to withdraw K2,000 from his aid account with the fourth defendant to be paid directly to Messrs Young & Williams on account of legal fees to prepare his case for trial.

Orders accordingly.