

One method by which a victim can assert some control over the bankruptcy process is by obtaining an appointment as an Inspector of the Estate.³⁷ At a first or subsequent meeting of creditors, the creditors may appoint one or more, up to a maximum of five, Inspectors of the Estate of the bankrupt. Inspectors are the supervisors of the Trustee in Bankruptcy and it is their function to instruct the Trustee to take whatever steps they consider appropriate in order to protect the Estate and the creditors.³⁸

It is important for the victim to realize, however, that he or she cannot accept the appointment as Inspector in order to merely further his or her own purposes and claims in the bankruptcy. Inspectors stand in a fiduciary relation to the general body of creditors and must perform their duties impartially and in the interests of the general body of creditors. An Inspector is required to make complete disclosure to the Trustee and his or her co-Inspectors of his or her position where there is a possible conflict of interest with respect to the administration of the Estate.³⁹ The victim should also realize that no Inspector is, directly or indirectly, capable of purchasing or acquiring for himself or herself or for another any of the property of the Estate for which he or she is an Inspector, except with the prior approval of the Court.⁴⁰

If the victim feels aggrieved by any decision of a Trustee in Bankruptcy, he or she may apply to the Court for directions.⁴¹

If the Trustee in Bankruptcy refuses to take any proceeding that in the opinion of the victim would be for the benefit of the Estate of a bankrupt, a creditor can apply to the Court for an Order authorizing him or her to take the proceeding in his or her own name and at his or her own expense and risk.⁴²

Distribution

It is the duty of the Trustee in Bankruptcy to realize on the assets of the Fraudster for all of its creditors, not merely the victim. If the

victim had pursued the Fraudster itself, it may be entitled to any and all recovery from the sale of assets. In a bankruptcy, the victim will only be entitled to a *pro rata* share, with the other creditors, from the proceeds realized from the sale of the Fraudster's assets.

Conclusion

The victim of a fraud has an arsenal of weapons available to him or her to obtain recovery. Bankruptcy is merely one of those weapons. It may not be appropriate in every situation, but the victim and his or her legal counsel should consider its advantages and disadvantages in every case of fraud.

MAREVA INJUNCTIONS

Innocent Mishandling of Client Funds Subject to a Mareva Injunction Leads to a Finding of Contempt of Court

David Crerar

D. Ross McGowan

Borden Ladner Gervais LLP

The recent English decision in *R. (Revenue & Customs Prosecution Office) v. Lloyds TSB Plc*¹ highlights the danger that even a well-intentioned financial institution may face if it fails to strictly obey a Mareva injunction order freezing the accounts of one of its clients.

The Plaintiff obtained an order freezing the accounts of a Lloyds Bank client. The order prohibited the client and all recipients from "dealing" in any way with the frozen funds, but the order permitted the client withdrawals for living expenses. The well-meaning bank manager, seeking to protect the bulk of the frozen funds from withdrawal by the client, and to avoid monitoring the

³⁷ *Ibid.*, s. 116.

³⁸ *Re Fishman* (1985), 56 C.B.R. (N.S.) 316 (Ont. S.C.).

³⁹ *Re Shannon*, [1932] 1 W.W.R. 12, (1931) 13 C.B.R. 291 (Alta. S.C.).

⁴⁰ BIA, *supra* note 1, s. 120.

⁴¹ *Ibid.*, s. 37.

⁴² *Ibid.* s. 38.

¹ [2007] EWHC 2393 (Admin.) ["*Lloyds*"].

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accounts, proposed to the client that those funds, totalling some £2 million, be transferred to another Lloyds account. The client agreed. Neither the client nor the bank informed or obtained consent from the prosecutor or the Court for this arrangement.

The Court condemned the bank's transfer of the funds as a "clear breach" of the order, and expressed surprise that the bank would do so without consultation with the crown prosecutor or the Court. Despite the bank's good intentions, the transfer of the funds was a deliberate act, in knowing breach of the terms of the order. The Court found the bank in contempt of court.

Given the bank's intentions, and given that no harm arose as a result of the transfer, the Court declined to impose a costs sanction on the bank. The Court indicated, however, that future mishandling of frozen accounts by banks would likely attract severe sanctions, given the clarification provided in the *Lloyds* judgment.

Unfortunately, there is no standard Mareva injunction order wording throughout Canada, and so each order must be carefully reviewed to ensure compliance. Generally, where an order permits the client to withdraw living (or other stipulated) expenses, the prudent course is to:

1. confirm proper service and then freeze all accounts identified in the order, and

consider whether the order impedes or affects the bank's lending status with the client and ability to access accounts to apply to client indebtedness to the bank;

2. have the client provide a summary of necessary living expenses, based on the wording of the order, and seek instructions and consent from the client to deal with the funds in such manner as most appropriate to manage the account during the term of the freeze, including obtaining written consent from the client to discuss such with counsel for the party that obtained the order;
3. propose to counsel for the party that obtained the order that funds be deposited on a monthly basis into a new account for the client's permitted use; and
4. do not move or release the funds until and unless the party that obtained the order provides written consent in accord with the order (if permitted by its terms), or the court approves such an arrangement.

The *Lloyds* decision makes clear that any institution receiving a freezing order must not just unilaterally implement what it believes to be a practical way of dealing with that order, but must ensure that the proposed mechanism is approved of by the party that acquired the order, or, if that party refuses, the court.

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