# Appeal Court provides guidance on non-compliance with Mareva orders

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A *Mareva* order is a powerful tool in civil litigation. It freezes a defendant's assets to prevent dissipation prior to a trial. However, if a defendant fails to comply with a *Mareva* order, how should a plaintiff respond, especially if the plaintiff has obtained evidence of non-compliance through executing the *Mareva* order itself, or wishes to obtain further evidence of the defendant's non-compliance?

A recent decision of Ontario's Divisional Court relating to a contempt motion (*Sakab Saudi Holding Company v. Saad Khalid S Al Jabri*, 2023 ONSC 2488) provides helpful guidance on this topic. The Divisional Court's decision also signals that, as a practical matter, a plaintiff seeking to enforce compliance with a *Mareva* order should consider less drastic remedial measures.

## Background

In January 2021, the plaintiffs commenced an action against the defendants, alleging a multi-billion dollar fraud. At the outset, the plaintiffs obtained a *Mareva* order. In addition to freezing the assets of the primary defendant, the *Mareva* order required him to provide a sworn asset declaration within ten days and to submit to cross examination. The primary defendant was cross-examined twice, and he continued to provide further written answers into mid-August 2021.

In late August 2021, the plaintiffs brought a contempt motion against the defendants on the basis that assets frozen by the *Mareva* order were being used to pay the primary defendant's legal and living expenses. Some of the evidence that the plaintiffs sought to rely on for this contempt motion had been obtained pursuant to the production obligations imposed by the *Mareva* order.

The plaintiffs and defendants brought a series of motions before the Superior Court, two of which were the subject of the appeal:

- a motion by the defendants to strike the "compelled evidence" obtained pursuant to the *Mareva* order on the basis that it violated their *Charter* rights against self-incrimination, to silence, and to fundamental justice; and

- a motion by the plaintiffs requiring the production of further evidence of non-compliance for use on the pending contempt motion. The motion judge dismissed both motions, and the Divisional Court in turn granted leave to appeal.

# The appeal

In a detailed set of reasons, the Divisional Court dismissed the defendants' appeal and allowed the plaintiffs' appeal.

The Divisional Court's reasons offer guidance into three important matters:

- how the principle of against self-incrimination can be engaged in civil contempt proceedings;
- how a party can develop an evidentiary record in support of a contempt motion;
- how non-compliance with a *Mareva* order can be dealt with practically, without resort to contempt motions.

## 1) Self-Incrimination in Contempt Proceedings

The Divisional Court agreed that the plaintiffs were entitled to rely on the so-called "compelled evidence" obtained pursuant to the *Mareva* order. The court rejected an argument based on section 7 of the *Charter* and expressly analogized to circumstances to regulatory regimes such as the *Income Tax Act* which establish parallel administrative and criminal enforcement powers. The court also rejected an argument based upon section 13 of the *Charter*.

In allowing the plaintiffs' appeal, the Divisional Court concluded that the motion judge erred by refusing to order production from the defendants in furtherance of the contempt motion. Importantly, the Divisional Court agreed that the contempt motion in question was "coercive" (i.e. intended to encourage compliance with the *Mareva* order) rather than "penal" (i.e. intended to impose punishment for non-compliance). The Divisional Court held that where "the contempt motion is predominantly coercive, then the nature of the proceedings has not been "transformed" to criminal", and that as a result, the *Charter* protection against self-incrimination (section 11(c)) did not apply.

The Divisional Court's decision is a reminder that, although civil fraud matters may resemble criminal fraud matters in some respects, a plaintiff is entitled to exercise broad discovery rights, except in rare circumstances where criminal self-incrimination protections are truly engaged. As the Divisional Court explained: "compelled information is inherent to the civil litigation process."

## 2) Building an evidentiary record for contempt motions

The Divisional Court provided a helpful roadmap for building an evidentiary record on a contempt motion, whether the contempt motion is "coercive" or "punitive" in nature. The court explained that, even if "court finds that the predominant purpose of the contempt motion is penal", which would engage protections against self-incrimination, "then the moving party may pursue alternative approaches to obtain evidence for the contempt motion."

The Divisional Court identified *Anton Piller* orders and orders for third party production as alternate means available where a contempt motion is penal in nature, the court underscored that it: “is not the case that a moving party’s ability to assemble evidence is brought to a halt by commencing a contempt motion”, adding that “the moving party may seek the court’s aid in obtaining evidence where the responding party will not agree to provide that evidence.”

## 3) Remedies short of contempt: A better way forward?

Notably, the Divisional Court emphasized that a contempt motion need **not** have been the recourse pursued by the plaintiffs to rectify the defendants’ non-compliance with the *Mareva* order.

The Divisional Court explained that: “it was open to the court below to restrict the moving parties to a motion for “non-compliance” rather than “contempt” and to restrict the nature of the remedies to coercive rather than punitive remedies.” The Divisional Court added that because non-compliance with *Mareva* orders occurs “frequently” in the context of paying for a defendant’s legal expenses, a motion judge “should take a swift and practical route to compel the party to bring themselves into compliance”, especially in case managed proceedings such as those on the Commercial List.

The Divisional Court’s decision is a helpful reminder that if a plaintiff seeks to enforce compliance with a *Mareva* order through measures less severe than a contempt motion, complex disputes about self-incrimination can be avoided. As the Divisional Court observed, had the plaintiffs done just this, “perhaps some of the current difficulties – and resulting litigation delay – could have been avoided.”

It bears noting that the contempt proceedings in this case could also have been avoided if the defendants had sought a court order authorizing the release of funds subject to a *Mareva* order to pay for their living expenses and legal fees. This is a routine process, and plaintiffs frequently consent to such relief. However, for reasons that are unclear, the defendants chose not to seek such a variance order, as noted in a related decision by Justice Cavanagh of the Superior Court.

For any questions about *Mareva* orders, reach out to any of the author or key contacts listed below.

By

Adrian Pel

Expertise

White Collar Criminal Defence and Corporate Investigations, Disputes, Fraud

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## BLG Offices


**Calgary**

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

**Ottawa**

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

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1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
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T 604.687.5744
F 604.687.1415

**Montréal**

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

**Toronto**

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749



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