

## **Close Ties to China Too Speculative to Establish Interlocutory Mareva Injunction in Patent Infringement Action**

A Mareva injunction, named after the English Court of Appeal decision *Mareva Compania Naviera SA v International Bulkcarriers SA*, 1 [1980] 1 All ER 213, is a form of interlocutory injunction which freezes a party's assets so that they cannot be removed from the jurisdiction or dissipated in order to thwart a potential judgment. As this remedy is an exception to the fundamental principle that a plaintiff is not entitled to a remedy or execution against a defendant's assets before having established the defendant's liability, the courts have imposed a strict test for its issuance, the overriding consideration being a real risk of the assets being removed from the jurisdiction or dissipated in order to frustrate a judgment.

In a recent case in the context of a patent infringement action, *Unilin Beheer BV et al v Triforest Inc et al*, 2017 FC 76, Gascon J of the Federal Court held, following established principles, that to obtain an interlocutory Mareva injunction, the plaintiff must provide clear and convincing evidence of a "real risk" of the expatriation of assets by the defendant in order to avoid a judgment. Gascon J was not satisfied that the plaintiffs (collectively Unilin) provided such evidence and hence denied Unilin's motion for an interlocutory Mareva injunction. Gascon J also found that Unilin failed to provide clear and non-speculative evidence to establish irreparable harm for an interlocutory injunction.

### **Background**

Unilin commenced a patent infringement action against Triforest Inc and its directors (collectively, Triforest) and Molson International Trading Inc regarding Unilin's patents on glueless locking technology for laminate floors. Triforest, based in Canada, sells laminated flooring products imported from Chinese manufacturers. Its directors are also shareholders of the Chinese manufacturers. Unilin obtained an *ex parte* interim Mareva injunction order against Triforest. It then moved for an interlocutory Mareva injunction relying on Triforest's bank records obtained through the execution of the interim order, and for an interlocutory injunction against all defendants.

### **Interlocutory Mareva Injunction**

Gascon J found that Unilin failed to show 1) there was a real risk that Triforest was about to remove their assets from Canada or were otherwise dissipating or disposing of their assets, 2) Triforest did this in a manner clearly distinct from their usual or ordinary course of business or living, 3) so as to render the possibility of future tracing of the assets remote, if not impossible, or for the purpose of avoiding the possibility of judgment.

In particular, Gascon J found too speculative Unilin's suggestion that Triforest' close ties to China raised a significant risk of transferring their assets out of Canada. While Unilin pointed to instances of significant deposits, withdrawals, and transfers in Triforest's bank records, Gascon J concluded there was no evidence that these were not Triforest's usual methods of transferring assets and running its business. Gascon J also noted that Triforest's personal and business ties to Canada do not suggest an imminent flight or dissipation of assets to avoid judgment.

## **Interlocutory Injunction**

Gascon J found that Unlin did not meet the tripartite test for issuing an interlocutory injunction, in particular the irreparable harm and balance of convenience elements of the test.

Regarding the serious issue prong, Gascon J held that a strong *prima facie* case of patent infringement does not necessarily equate to a blatant infringement and that the other two elements of the test must still be satisfied.

Through an affidavit of its in-house counsel, Unlin alleged four heads of irreparable harm: 1) loss of goodwill and reputation, 2) loss of market share and of existing and potential customers, 3) springboarding into the post-patent market, and 4) defendants' inability to pay an eventual judgment. Gascon J dismissed these allegations as mere speculation. He also found that the alleged harm was all quantifiable.

Lastly, Gascon J found that the balance of convenience favoured the defendants as refusing an interlocutory injunction would maintain a *status quo* and the defendants would be able to carry on their business, while damages would remain as a remedy for Unilin.

Triforest was represented by Deeth Williams Wall LLP's Gervas Wall, Junyi Chen and Lauren Lodenquai.