

## FINANCIAL SERVICES LITIGATION BULLETIN

Spring 2007

### HOUSE OF LORDS HOLDS THAT A BANK OWES NO DUTY OF CARE TO BENEFICIARIES OF MAREVA ORDERS

#### INTRODUCTION

A British bank recently won a significant ruling regarding asset freezing orders (typically referred to as Mareva Orders). In *Customs and Excise Commissioners v. Barclays Bank plc*, the House of Lords unanimously held that the bank did not owe a duty to the beneficiary of two Mareva orders to take reasonable care to comply with the orders. This is the only decision to date delivered by England's highest court on the issue of a bank's separate duty in tort to beneficiaries of Mareva orders. Considering the heavy influence of English decisions on economic loss jurisprudence in Canada and the British origin of *Mareva* orders, it is very likely that this decision, and its reasons, will be influential should a similar case appear before a Canadian court. As such, *Barclays* should be welcome news to the banking industry.

#### FACTS IN *BARCLAYS*

In January 2001, Brightstar Systems Ltd. ("Brightstar") and Doveblue Ltd. ("Doveblue") were customers of Barclays Bank plc ("Barclays Bank" or the "Bank"), holding two separate bank accounts with significant balances. However, both companies owed the Customs and Excise Commissioners (the "Commissioners") large sums of unpaid value added tax. The Commissioners applied for and successfully obtained Mareva orders against each of the two companies. Both Mareva orders were addressed to the defendants with each order specifying the numbered account held by the companies with the Bank, with one even identifying the branch.

The first order was served on the Bank at noon on January 29, 2001 and the second order in the morning of January 30, 2001. The Bank had taken routine steps to freeze the accounts. However, several hours after being served with the respective orders, the Bank, through "operator error", allowed funds to be paid out of the accounts.

Eventually, the Commissioners obtained judgment against the two companies, which remained unsatisfied. The Commissioners then commenced an action against Barclays Bank for the damages they suffered as a result of the Bank's failure to comply with the Mareva orders.

The specific question before the House of Lords was whether a bank served with a Mareva order owes an independent duty of care to the beneficiary of the order to take reasonable care to ensure that no payments are made out of the account.

#### THE HOUSE OF LORDS' DECISION

The House of Lords unanimously held that the Bank owed no duty of care to the Commissioners, and dismissed the Commissioners' claim with costs. The Bank found four key reasons militating against the finding that a duty of care was owed by the Bank to the Commissioners:

- There was neither assumption of responsibility by the Bank nor detrimental reliance by the Commissioners.
- The mere service of the Mareva orders could not in itself generate a duty of care.

- It would not be fair, just or reasonable to impose a separate and private duty on the Bank in favour of the Commissioners with respect to the Mareva orders.
- The consideration of incrementalism in the law does not favour finding a duty of care.

## CONCLUSION

As the issue of a bank's independent duty to the beneficiary of a Mareva order has not been decisively addressed by the Canada courts, the *Barclays* decision will likely be important in shaping the direction of the Canadian jurisprudence in this area. Applying the analytical framework that the Supreme Court of Canada usually engages in economic negligence cases, one can expect that the court is likely to reach the same result as the House of Lords in *Barclays* in holding that a bank owes no duty of care to the beneficiary of a Mareva order.

*Written by Rebecca Huang and Brett Harrison*

---

*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

---

© Copyright 2007 McMillan Binch Mendelsohn LLP

## WHO WE ARE

*For more information please contact your McMillan Binch Mendelsohn lawyer or one of the members of the Financial Services Litigation Group listed below:*

Lisa Brost	416.865.7186	<a href="mailto:lisa.brost@mcmbm.com">lisa.brost@mcmbm.com</a>
Hilary E. Clarke	416.865.7286	<a href="mailto:hilary.clarke@mcmbm.com">hilary.clarke@mcmbm.com</a>
Erin Cowling	416.865.7868	<a href="mailto:erin.cowling@mcmbm.com">erin.cowling@mcmbm.com</a>
Lee-Anne Graham	416.865.7147	<a href="mailto:lee-anne.graham@mcmbm.com">lee-anne.graham@mcmbm.com</a>
Jeffrey B. Gollob	416.865.7206	<a href="mailto:jeff.gollob@mcmbm.com">jeff.gollob@mcmbm.com</a>
Brett G. Harrison	416.865.7932	<a href="mailto:brett.harrison@mcmbm.com">brett.harrison@mcmbm.com</a>
Rebecca Huang	416.865.7101	<a href="mailto:rebecca.huang@mcmbm.com">rebecca.huang@mcmbm.com</a>
Andrew J. F. Kent	416.865.7160	<a href="mailto:andrew.kent@mcmbm.com">andrew.kent@mcmbm.com</a>
Cleo C. Kirkland	416.865.7010	<a href="mailto:cleo.kirkland@mcmbm.com">cleo.kirkland@mcmbm.com</a>
Lisa H. Kerbel Caplan	416.865.7803	<a href="mailto:lisa.kerbel.caplan@mcmbm.com">lisa.kerbel.caplan@mcmbm.com</a>
Daniel V. MacDonald	416.865.7169	<a href="mailto:daniel.macdonald@mcmbm.com">daniel.macdonald@mcmbm.com</a>
Paul G. Macdonald	416.865.7167	<a href="mailto:paul.macdonald@mcmbm.com">paul.macdonald@mcmbm.com</a>
Alex L. MacFarlane	416.865.7879	<a href="mailto:alex.macfarlane@mcmbm.com">alex.macfarlane@mcmbm.com</a>
Jason Murphy	416.865.7887	<a href="mailto:jason.murphy@mcmbm.com">jason.murphy@mcmbm.com</a>
Scott Oldewening	416.865.7176	<a href="mailto:scott.oldewening@mcmbm.com">scott.oldewening@mcmbm.com</a>
Lisa Parliament	416.865.7801	<a href="mailto:lisa.parliament@mcmbm.com">lisa.parliament@mcmbm.com</a>
Leonard Ricchetti	416.865.7159	<a href="mailto:leonard.ricchetti@mcmbm.com">leonard.ricchetti@mcmbm.com</a>