

# AMCON LEGAL GROUP RETREAT

**Topic:**

## ***MAREVA INJUNCTION AS A TOOL FOR DEBT RECOVERY***

**Presented by:**

**DR. JOSEPH NWOBIKE, SAN, FCTI**

# MAREVA INJUNCTION AS A TOOL FOR DEBT RECOVERY

By Dr. Joseph Nwobike, SAN\*

## 1.00 INTRODUCTION

1.01 The aim of every legal system is not limited to speedy dispensation of justice but extends to ensuring that its orders, directions and verdicts are obeyed.<sup>1</sup> To achieve this end, certain enforcement machineries have been developed and/or evolved to ensure that courts do not only bark but bite as well. *Mareva* injunctions have appropriated a *niche* for itself among these enforcement mechanisms. The increasing cases where victorious litigants<sup>2</sup> find it difficult to recover the fruits of their victories due to the judgment debtor's swift removal and/or disposal of attachable assets from the jurisdiction of courts makes the option of *mareva* injunction enticing as a debt recovery mechanism.<sup>3</sup>

1.02 The preventive<sup>4</sup>, prohibitive and preservative implications of *mareva* orders<sup>5</sup> make it a veritable tool for debt recovery. The primary objective of *mareva* orders is to ensure that the defendant does not dissipate his assets or have same removed outside jurisdiction. The above exposes the ramifications of *mareva* injunctions. Therefore, a plaintiff/judgment creditor, in appropriate cases, achieves two (2) advantages from *mareva* orders vis: (1) prevention of the removal of assets from jurisdiction; and (2) prevention of transfer of the property in the assets to third parties within jurisdiction.<sup>6</sup> Thus, *mareva* orders exudes a semblance of a water-tight security<sup>7</sup> for the plaintiff/judgment creditor for the realisation of his judicial

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\* Dr. Joseph Nwobike, SAN, FCTI, FCI Arb (UK), Lead Counsel: Joseph Nwobike, SAN & Co. (Lagos & Abuja).

<sup>1</sup> See *Faluyi vs. Oderinde* (1987) 4 NWLR (Pt. 64) 155.

<sup>2</sup> Alternatively, Judgment Creditors.

<sup>3</sup> According to Chief Afe Babalola, SAN "Injunctions and Enforcement of Orders" Obafemi Awolowo University Press, Ile-Ife (2000) p. 120, a judgment creditor will only have a pyrrhic victory if the judgment debtor is not restrained, in deserving cases, from removing his assets against which the judgment may be executed from jurisdiction and out of the reach of the judgment creditor.

<sup>4</sup> See the classification of injunctions by the author in "Securing Assets for Execution: The Utility of the *Mareva* Option" in "Legal Essays in Honour of Chief Bolaji Ayorinde, SAN" The Imprematur, Lagos (2012) p. 156.

<sup>5</sup> "*Mareva Order*" and "*Mareva Injunctions*" will henceforth be used interchangeably depending on the contextual employment of the phrases.

<sup>6</sup> See *Sotuminu vs Ocean Steamship (Nig) Ltd* (1992) 5 NWLR (Pt. 239) 1 at 25.

<sup>7</sup> In *Felexstowe Dock and railway & Co. vs. United States Lines Inc.* (1988) 2 All ER 77, the court held that a *mareva* order is a form of security for the plaintiff that judgment, if in his favour, will be realised. It should be noted that the word "security" is used loosely, and not technically, here.

victory. Notwithstanding the above merits of *mareva* orders, it suffers certain significant limitations which shall be exposed in the course of this paper.

1.03 By the enactment of the Asset Management Corporation of Nigeria Act, 2010<sup>8</sup>, the status of *mareva* orders have been elevated from its common law and accorded statutory recognition and operation. The provisions of Sections 49 and 50 of the Act, not only codified the application of *mareva* orders but exposes the duality of its application to both proprietary and pecuniary assets.

1.04 In this paper, attempts will be made to, evaluate the law, practice and procedure relating to *mareva* injunctions in Nigeria within the context of its effectiveness as a debt recovery machinery under the Act. The implications of the codification of powers of court to grant *mareva* orders in cases initiated by or for the Asset Management Corporation of Nigeria<sup>9</sup> will be examined to determine the adequacy or inadequacy of the said provisions in debt recovery proceedings. I shall conclude by advocating an amendment of the relevant sections of the Act to ensure the realisation of the policy and legal objectives behind the creation of AMCON.

## 2.00 DEFINITIONS AND ASSUMPTIONS

2.01 It has been suggested that definitions are not usually necessary in legal inquiries<sup>10</sup>, it is, however, sufficient to define injunctions as orders or decrees by which a party to an action is required to do, or refrain from doing, a particular thing.<sup>11</sup> Although injunctions may be preventive or compulsive in nature, *mareva* injunctions are usually preventive. The stereotypical nature of *mareva* orders, notwithstanding the discretionary powers of the court to grant or refused same, is based on the end which it seeks to achieve i.e restrain the removal or dissipation of assets belonging to a defendant or judgment debtor from or within jurisdiction. It must be clarified, before I go any further, that the grant of *mareva* orders is not limited to cases where judgment has been obtained by a judgment creditor but extends to cases where trial has not commenced or where trial has commenced but has not been

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<sup>8</sup> Hereinafter referred to simply as "the Act".

<sup>9</sup> Hereinafter referred to simply as "AMCON".

<sup>10</sup> See the observations of Justice Oliver Wendel Holmes in *Toner vs. Eisner* 245 US (1918) 418 at 425.

<sup>11</sup> See Osborn's Concise Law Dictionary (8<sup>th</sup> Edition) Sweet & Maxwell p. 178.

concluded. The Supreme Court made this point in *Sotuminu's* case (*supra*) when it held that *mareva* injunctions are grantable to restrain a defendant "from disposing of or dealing with any other assets within the jurisdiction of the court or removing or disposing out of the jurisdiction monies standing to the credit of the defendant even before a judgment against him."<sup>12</sup> Again, *mareva* injunctions can be made against third parties if it is shown that such third parties are in possession of assets belonging to the defendant which are likely to be disposed either by the third parties unilaterally or in connivance with the Defendant.<sup>13</sup> In *A.I.C Ltd vs. N.N.P.C* (*supra*) the Supreme Court, per Ejiwunmi, JSC, summarised the workings of *mareva* injunction as follows:

"From the several authorities to which I have referred above, it is manifest that *mareva* injunction applies in principle to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it, if it appears that the debt is due and owing, and therefore there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

2.02 The above exposition of the law reveals the anticipatory nature of *mareva* orders. It is the reasonable apprehension of dissipation of the defendant's assets that activates the grant of *mareva* injunctions. Therefore, the justification for the use of *mareva* injunctions can be found in public policy and the need to shield courts from ridicule.<sup>14</sup> This proposition can be gleaned from the dictum of Goff. J. in *A vs. C*<sup>15</sup> when he held thus:

"The principle underlying the jurisdiction is the prevention of an abuse, the abuse of a foreign resident causing assets to be removed from jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against him pending proceedings in this country."

The question may then be posed: Where do Nigerian courts derive their jurisdiction to grant *mareva* injunctions? The answer is simple – from the

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<sup>12</sup> In *Nippon Yusen Kaisha vs. Karageorgis* (1975) 1 WLR 1093, the court held that before a *mareva* injunction can be made before judgment, the debt must be due and owing.

<sup>13</sup> See *A.I.C Ltd vs. N.N.P.C* (2005) 5 S.C (Pt. II) 60.

<sup>14</sup> See Chief Afe Babalola, SAN "Injunctions and Enforcement of Orders" (*Ibid*) p. 135.

<sup>15</sup> (1980) 2 All ER 347 at 351.

Constitution<sup>16</sup> as well as other laws made pursuant to it.<sup>17</sup> However, the procedure and conditions for the grant of *mareva* injunctions are regulated by the Rules of each court, case law, the principles of common law and equity. The courts are, however, admonished to proceed with caution, due to the fact that by “its very nature, *mareva* injunctions could be open to abuses”.<sup>18</sup>

## 2.03 What debt can be the subject of a *Mareva* Order?

Having demonstrated the legal consequence of *mareva* orders, it is pertinent to make it clear that, it is not in all cases where a plaintiff has alleged a debt against a defendant that a *mareva* order will be granted. In this light, it is the author’s view that, for a *mareva* order to be made in a suit, the debt, the subject matter of the suit, must not be apparently disputed. It must be made clear that, the word “disputed” in this context does not mean that the defendant does not have a defence to the claims of the plaintiff, rather that the plaintiff has a good case with a reasonable chance of success when placed side-by-side with the defence set up by the defendant. It, therefore, stands to reason that if the plaintiff’s case is “bogus and not worthy of belief”<sup>19</sup> on the face of it, *mareva* injunction will not be ordered. This position of the law is evident in the dictum of Aderemi, JCA (as he then was) in *Braithwaite vs. C.C.E.C.C*<sup>20</sup> where the learned Justice relied on the case of *The N. Edersa Chsen*<sup>21</sup> to state the test for determining if a case is disputed or not for the purposes of *mareva* injunction as follows:

“I consider that the right course is to adopt the test of a good arguable case in the sense of a case which is more than barely capable of serious and yet not necessarily one which the plaintiff believes to have a better than 50% chance of success.”

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<sup>16</sup> See Section 6(6)(a) and (b). Constitution of the Federal Republic of Nigeria, 1999 (as altered)

<sup>17</sup> See the provisions of Section 18 of the High Court of Lagos Law, Cap. H3, Laws of Lagos State, 2003; Section 13 of the Federal High Court Act, Cap. F.12, LFN 2004; Section 15 of the Court of Appeal Act, Cap. C.36 LFN 2004; Section 19 of the National Industrial Court Act, Act No. 1, 2006; Section 22 of the Supreme Court Act, Cap. S.15 LFN, 2004; Section 49 and 50 of the Asset Management Corporation of Nigeria Act, 2010, etc.

<sup>18</sup> See *Sotuminu’s case (supra)*.

<sup>19</sup> This was one of the reasons given by the Supreme Court in refusing the *mareva* injunction sought for in *Sotuminu’s case*. See also the case of *A.I.C Ltd vs.N.N.P.C* (2005) 5 S.C (Pt. II) 60 at 97, where the court held that, to be entitled to *mareva* injunction, the plaintiff’s case must “appear” on the face of it “that the debt is due and owing”.

<sup>20</sup> (2001) FWLR (Pt. 71) 1882 at 1890.

<sup>21</sup> (1984) 1 AER 398 at 404.

The above shows that before a *mareva* order is made, the case of the plaintiff must exhibit substance and cogency both in law and on the facts.

#### 2.04 Who can enforce repayment of a debt by way of *mareva* order?

Generally, there are two (2) classes of debts – contractual debt and judgment debt. There is a thin line of distinction between these types of debts. Whilst the former is a creation of contract, the latter is a result of judicial process and pronouncement after legal contest. From the above, and by necessary implication, it is the party being owed under the contract or its assignee that is clothed with the legal capacity to enforce a contractual debt, whilst it is the judgment creditor that has the prerogative to seek the enforcement of a judgment debt.<sup>22</sup>

#### 3.00 SOURCES OF THE RIGHT TO SEEK RECOVERY OF DEBT

The age long doctrine of privity of contract postulates that, it is only parties to a contract that are clothed with the requisite *standi* to demand and enforce contractual provisions and assurances.<sup>23</sup> Therefore, a person who is not party to a contract cannot approach a court for the enforcement and/or recovery of contractual debts. The difficulty which this principle of law exacts on AMCON is colossal since it, oftentimes, is not a party to the initial loan agreement between the creditor banks and their debtor customers. However, just as every general principle of law, the doctrine of privity of contracts is not immutable but permits of certain exceptions. The most popular of these exceptions are Novation<sup>24</sup> and Assignment<sup>25</sup>. In the Nigerian judicial clime, it is doubtful if transfer of contractual interests by means of an assignment is valid having regard to the requirement of *concensus ad idem* at the creation of the contract. The argument for this position is

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<sup>22</sup> See the definition of “Judgment Creditor” under Section 19 of the Sheriffs and Civil Process Act, Cap. S.6, LFN 2004, where a judgment creditor was defined as “Any person for the time being entitled to enforce a judgment.”

<sup>23</sup> See *C.A.P Plc vs. Vital Investment Ltd* (2006) 6 NWLR (Pt. 9760) 220.

<sup>24</sup> Novation is a principle of law that permits parties to a contract to, by mutual agreement/concensus, vary the terms of the contract in any material respect. Under this principle, It is required that written contracts must be varied by written memorandum or agreement. See *Prospect Textiles Mills vs. I.C.I Plc England* (1996) 6 NWLR (Pt. 457) 668 at 682 and *Union Beverages Ltd vs. Owolabi* (1988) 1 NWLR (Pt. 68) 128 at 137.

<sup>25</sup> Assignment, on the other hand, envisages a situation whereby a party to the contract, with or without the consent of the other party to the contract, transfers his rights and interests in a contract to a third party for consideration.

that, since the third party was not present at the creation of the contract and did not have “a meeting of the minds” with the parties on the terms thereof, such third party cannot derive, demand and/or enforce any right thereunder. Again, this position is not immutable; by the principle of Variation<sup>26</sup> parties may agree to amend their contract as they wish. The principle of variation finds justification in the latin maxim *eodem modo quo, oriter eodem modo dissolvitur* (i.e what has been effected by agreement can be undone by agreement)<sup>27</sup>. It is, however, important to point out that, just as in the case of novation, for a variation to be valid, both parties to the contract must agree to it.

3.01 Since my interest in this paper relates primarily to the viability of *mareva* orders as a debt recovery tool for AMCON, I shall restrict the discourse hereunder to the applicability or otherwise of the above principles to cases commenced by or for AMCON. It will be observed, from practice, that in most cases pending before courts wherein subject debts in the cases have been assigned to AMCON, no fresh agreements (tripartite or otherwise) were drawn up by the parties to reflect the aberrant interest of AMCON into the debtor-creditor relationship existing between the creditor bank and its debtor customers.

3.02 **The position under the Act.**

The Act has introduced the concept of “statutory creditorship”<sup>28</sup> into the Nigerian legal landscape. By this introduction, the requirement of mutual agreement of parties before a contract can be altered has been dispensed with. Therefore, a creditor bank can now unilaterally transfer its interest, rights and liabilities in a loan contract to AMCON without the need to consult with its debtor customer. The point being made above is captured in Sections 24 - 47 of Part IV of the Act. The only duty imposed on the creditor bank in this regard is to notify its debtor customer of the transfer of the debt to AMCON and not to seek its consent or concurrence. Sections 24, 25(1) and 33(1) of the Act provides as follows:

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<sup>26</sup> See Sagay’s “Nigerian Law of Contract” Spectrum Books Limited, Lagos (1993) 534.

<sup>27</sup> See the dictum of Lord Esher, MR in *Yarmouth vs. France* (1897) 19 Q.B.D. 647 at 653, where the learned Justice made it clear that “Latin maxims are most oftentimes invariably misleading.”

<sup>28</sup> This is a coinage by the author to explain the position of AMCON in the contractual relations between banks and their debtor customers.

- “24. The Central Bank of Nigeria may designate through guidelines any class of bank assets as eligible bank assets.
- 25(1) The Corporation may, subject to the provisions of this Act, within 3 months of the designation of any asset as eligible bank asset in pursuance of section 24, specifying a class of bank assets as an eligible class of bank assets, purchase, on a voluntary basis, eligible bank assets from any eligible financial institution desirous of disposing of such eligible bank assets at a value and price to be determined in accordance with the provisions of section 28 of this Act provided that the Central Bank of Nigeria may extend the period specified in this section for a further period not exceeding 3 years.
- 33(1) As soon as possible, after the acquisition of an eligible bank asset from an eligible financial institution, the eligible financial institution shall notify the relevant debtor, associated debtor and guarantor or surety of the debtor and any other person that the Corporation directs, of the acquisition of the eligible bank asset by the Corporation.”

3.03 From the foregoing, it is clear that the consent or concurrence of the debtor is not a requirement for a valid transfer of interests in a debt to AMCON by a creditor bank. The question may then be asked: Can a bank transfer a debt to AMCON during the pendency of a suit bordering on the said indebtedness in view of the common law principle of *lis pendens*?<sup>29</sup> A critical examination of the provisions of Part IV, especially Sections 25(1) of the Act, will reveal that they donate a blanket right of assignment and acquisition to the bank and AMCON respectively. The absolute nature of those provisions leaves no one in doubt that the draftsmen did not anticipate and intend that the common law rule of *lis pendens* will apply to defeat them. It is, therefore, the author’s view that any transfer under the radical provisions of Section 25(1) of the Act will take effect irrespective of the pendency of any suit at the time of the transfer.

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<sup>29</sup> *Lis pendens* is a common law rule which postulates that when parties have submitted a subject matter to the court for determination, parties to the suit must refrain from taking steps with regard to the property the subject matter of the suit and from transferring the property in dispute to third parties during the pendency of the suit. See *Osagie vs. Oyeyinka* (1987) 3 NWLR (Pt. 59) 144 at 156.

In this section, I shall succinctly examine the legal regime and procedural requirements for the grant of *mareva* injunctions with particular reference to the provisions of the Act and its subsidiary legislations.

4.01 The general rule is that an application for *mareva* injunction is made *ex parte*.<sup>30</sup> However, in certain cases, the court may direct that such application be made on notice having regard to the facts and circumstances of each case.<sup>31</sup> The conditions for the grant of *mareva* injunction are as follows:

- i. the existence of a strong case against the defendant;
- ii. the existence of a justiciable cause of action against the defendant;
- iii. the existence of a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain against him;
- iv. the making of full disclosure of all material facts relevant to the application;
- v. giving full particulars of the assets within the jurisdiction of the court and against which the order is sought;
- vi. the balance of convenience must be on the side of the applicant; and
- vii. preparedness of the applicant to give an undertaking as to damages in the event that the order ought not have been made in the first place.<sup>32</sup>

4.02 By the provisions of Section 61 of the Act, the Court vested with jurisdiction to adjudicate over disputes arising from the application of the Act is the Federal High Court. It is also imperative to point out that the Act did not stop at stating the court with jurisdiction to hear matters therefrom but makes robust and specific provisions guiding the application and grant of *mareva* injunctions. Sections 49 and 50 of the Act provides as follows:

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<sup>30</sup> See *Sotuminu's case (supra)*

<sup>31</sup> See Halbury's Laws of England (4<sup>th</sup> Ed) Vol. 24 Butterworths, London (1991) pp. 455 – 456 para. 866. See also *Braithwaite vs. C.C.E.C.C (supra)* p. 1891. In fact, in this case the court of appeal expressed the contrary opinion that *mareva* injunctions ought to be sought by motion on notice. However, this decision stands alone on this point.

<sup>32</sup> See *Efe Finance Holdings Ltd vs. Osagie, Okeke, Otegbola & Co.* (2000) 5 NWLR (Pt. 658) p. 536 at 548.

- “49(1) Where the Corporation has reasonable cause to believe that a debtor or debtor company is the *bona fide* owner of any movable or immovable property, it may apply to the Court by motion *ex parte* for an order granting possession of the property to the Corporation.
- (2) The Corporation shall serve a certified true copy of the order of the Court issued pursuant to subsection (1) of this section on the debtor or the debtor company.
- (3) The Corporation shall commence debt recovery action against the debtor or debtor company in respect of whose property an order subsists pursuant to subsection (1) of this section within 14 days from the date of the order, failing which the order shall lapse.
- 50(1) Where the Corporation has reasonable cause to believe that a debtor or debtor company has funds in any account with any eligible financial institution, it may apply to the Court by motion *ex-parte* for an order freezing the debtor or debtor company’s account.
- (2) The Corporation shall commence debt recovery action against a debtor or debtor company whose account has been frozen by a Court order issued under subsection (1) of this section within 14 days from the date of the order, failing which the order shall lapse.”

4.03 The above shows that, the Act has largely codified the common law practice that applications for *mareva* injunctions are to be made by motions *ex parte*. The Act, however, draws a distinction between tangible properties (movable and immovable properties) and funds in accounts with financial institutions. This distinction, however, is cosmetic as the conditions for the grant of *mareva* injunctions in both classes of assets are the same. It is important to state that, by the AMCON Practice Directions, 2013 (made pursuant to the Act), a court, whilst making a *mareva* order, may require that the defendant/judgment debtor to disclose information as to the location of any of his property or funds, which are the subject of the *mareva* order being made. Part XIII Rule 13.1 (1)(h)(i)(ii) and (i) provides as follows:

“13.1(1) the court may grant the following interim remedies:

- (h) a *Mareva* or freezing injunction-
- (i) restraining a party from removing from the jurisdiction assets located here; or
- (ii) restraining a party from dealing with any assets whether located in the jurisdiction or not;
- (i) an order directing a party to provide information about the location of relevant property or assets or to provide information about the location of relevant property or assets which are or may be the subject of an application for a *Mareva* or freezing injunction.”

This is a novel introduction and marks a departure from the common law rule that a defendant cannot be compelled to disclose information which will be prejudicial to his interest.<sup>33</sup> Despite the above observation, it is to be stressed that, applications for *mareva* injunctions are not granted as of course. In other words, it is not automatic that once an application is made under the Act, it must be granted. The court still has to consider whether or not the application satisfies the conditions for its grant. To that extent, I hold the view that the Act has really not introduced anything new from the common law position.

4.04 Having discussed the procedural requirements for the grant of *mareva* injunctions, it is pertinent to state that a court granting the said injunction retains the power to refuse to make the said order and/or discharge same where already made.<sup>34</sup> Some of the conditions for the refusal or discharge of *mareva* injunctions include:

- i. where the plaintiff/judgment creditor in seeking the said orders, suppressed, withheld and/or failed to disclose material facts;
- ii. where facts were not withheld but misrepresented by the plaintiff/judgment creditor;
- iii. where the court lacks jurisdiction to hear the substantive matter;
- iv. where the grant of the order will amount to an abuse of court process due to the pendency of an earlier suit seeking to recover the same debt;

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<sup>33</sup> See *Lister vs. Stubbs* (1890) 45 Ch.D 1 at 14.

<sup>34</sup> See *Nwakonobi vs. Udeorah* (1991) 9 NWLR (Pt. 213) 85.

- v. where the grounds of belief that the defendant/judgment debtor will remove his assets from jurisdiction or transfer same to third parties are unreasonable<sup>35</sup>;
- vi. where the plaintiff's case does not have a reasonable chance of success<sup>36</sup>;
- vii. where the action for debt recovery is not filed within fourteen (14) days from the date of the order; and
- viii. where any condition(s) imposed by the court in making the order are not fulfilled within the time specified by the court.<sup>37</sup>

It should be noted that the above conditions are not exhaustive and the list of instances upon which a *mareva* injunction may be refused or discharged should not be taken as closed.

## 5.00 MY POLEMICS

Arising from the functionality and consequence of *mareva* orders discussed above, it is indisputable that *mareva* injunctions are a veritable tool for debt recovery. Notwithstanding the merits of the *mareva* option, it suffers certain insidious setbacks which evokes a re-think of its efficacy before deployment as a debt recovery tool.

- 5.01 The most significant shortcoming of *mareva* orders is its ranking in priority *vis-à-vis* other security interests. The first observation to be made is that, *mareva* orders are orders *in personam* and not *in rem*<sup>38</sup>. Therefore, the workings of this order act to restrain the defendant/judgment debtor from taking steps to remove his assets from jurisdiction. A *mareva* order attaches itself to the person of the defendant/judgment debtor but does not attach to the asset(s) *qua* asset(s). The implication of the above is that, a third party who has an independent security interests in the asset(s) is at liberty to proceed against the said asset(s) notwithstanding the existence of a *mareva* order against the defendant/judgment debtor in relation to the particular asset. For instance, if there exists a prior or

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<sup>35</sup> See Section 49 and 50 of the Act.

<sup>36</sup> See *A.I.C Ltd vs. N.N.P.C* (2005) 5 S.C (Pt. II) 60 at 97. See also *Sotuminu's* case.

<sup>37</sup> See *Nwakonobi vs. Udeorah* (1991)(*supra*).

<sup>38</sup> Orders *in personam* are orders made against a particular person and binds only the person it is directed against, whilst orders *in rem* are orders made binding on the whole world.

subsequent legal mortgage, charge or debenture over the defendant/judgment debtor's assets and undertakings in favour of a third party, the subsistence of a *mareva* order by a court over the said assets and undertakings in favour of a plaintiff/judgment creditor, will not preclude the third party from taking over the asset and realising his security upon the crystallisation of same. In other words, the holder of a legal interest in assets subject to a *mareva* order is entitled, in law, to the realisation of the security over the assets under *mareva* order. It is also submitted that the holder of an equitable interest in an asset will also enjoy priority over the beneficiary of a *mareva* order over the same asset(s).

5.02 Further to the above, the question may be asked: Who, between a judgment creditor who has obtained a *garnishee* order absolute against the asset(s) of the defendant/judgment debtor and a beneficiary of *mareva* order, has priority over the assets of a defendant? The answer to this question is to be found in the nature of the security<sup>39</sup> possessed by each of the parties i.e the judgment creditor and beneficiary of a *mareva* order. As have been stated above, *mareva* orders are orders *in personam* and do not attach to the asset over which it is made. The order only restrains the defendant from dissipating the subject asset(s). The implication of this is that, the beneficiary of a *mareva* order acquires no proprietary interest in the asset(s) the subject of order. Conversely, a *garnishor*<sup>40</sup> acquires proprietary interests in assets the subject of the *garnishee* orders. The reason for this position of the law is simple – a *garnishee* order absolute attaches<sup>41</sup> to the asset(s) over which it is made as against the person of the *garnishee*, thereby creating security and proprietary interests in the asset(s) to the benefit of the judgment creditor/*garnishor*.<sup>42</sup> The author is also of the view that *mareva* orders do not

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<sup>39</sup> One of the principal attributes of "security" is the creation of a "security interest" in the item of the security. For a fuller reading of the nature and attributes of "security" see I.O Smith's "Nigerian Law of Secured Credits" Ecowatch Publications Limited, Lagos (2001) pp. 4 – 8; Jelili Omotola's "The Law of Secured Credit" Evans Brothers (Nigeria Publishers) Limited (2006) pp. 1 – 4; R.M Goode "Legal Problems of Credit and Security" (2<sup>nd</sup> Ed) Sweet and Maxwell (1988) p. 1.

<sup>40</sup> In *garnishee* proceedings, the judgment creditor is referred to as "*garnishor*" whilst the third parties who are in possession of the assets of the judgment debtor sought to be *garnisheed* are referred to as "*garnishees*". Therefore, a "*garnishor*" is a judgment creditor who has obtained *garnishee* orders against the *garnishees*.

<sup>41</sup> See the decision of the court in the cases of *U.B.A vs. Ekanem* (2010) 6 NWLR (Pt. 1190) 207 at 220 and *S.T.B Limited vs. Contract Resources (Nig.) Limited* (2001) 6 NWLR (Pt. 708) 115.

<sup>42</sup> See Skyes & Walker "The Law of Securities" (5<sup>th</sup> Ed) Law Book Company Limited (1993) p. 12.

qualify as security cognisable for the purposes of priority of interests<sup>43</sup> because it fails the “registrability” and “transferability” tests.<sup>44</sup> Since the beneficiary of a *mareva* order can neither register nor transfer the interests created by the order, *mareva* orders cannot qualify as a “security” *strictu sensu* and cannot take priority over other security interests. In any event, the beneficiary of a *mareva* order does not qualify as a secured creditor in winding-up proceedings.<sup>45</sup>

5.02 It is, therefore, the view of the author that, the provisions of Sections 49 and 50 of the Act, as presently worded, are unhelpful to AMCON in its quest to retain, secure and realise any judgment that might be given in its favour. On the premise of the above, the author proposes an amendment to the extant provisions of Sections 49 and 50 of the Act to better protect the interest of AMCON in subsequent legal contests. The amendment, if carried out, will donate to AMCON, when armed with a *mareva* order, statutory priority over all existing and future interests, whether legal or equitable, over assets named in the order. The amendment proposed should read thus:

“Any order of *mareva* injunction or freezing order obtained pursuant to the provisions of this Part shall have priority over any prior and future legal and/or equitable interest(s) created or arising under or from any other law, contract or judgment.”

5.03 The above proposed amendment will significantly place AMCON on a strong footing against competing security interests and ensure that its interests in the assets, the subject of the *mareva* order, are secure and removed from the reach of rival security interest holders.

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<sup>43</sup> The author is by this view not oblivious of the proposition of D. Allan in “Security: Mysteries, Myths and Monstrosities” Monash L.R (1989) p. 345 that “anything that performs the function of a security must be a security”.

<sup>44</sup> These tests are to the effect that a security must be registerable in law as well as transferable by the holder of the security to realise his security. In the holder cannot do either of this, his security cannot be said to be a security in law or is, at best, a bare security. For a better understanding of these tests see the texts referred to in footnote 39 above.

<sup>45</sup> See *Omojasola vs. Plison Fisko (Nig.) Ltd* (1990) 5 NWLR (Pt. 151) 434 at 443.

CONCLUSION

From the above, it has been shown that, despite the allure of *mareva* injunctions as a debt recovery mechanism, its use may expose the beneficiary to deleterious consequences when faced with rival security interests in the same asset(s). I have strived to, in the course of the preceding discourse, bring to the fore the strengths and weaknesses inherent in the *mareva* option, generally and as codified in the Act, with a view to making recommendations which will advance the interest of AMCON in related litigations. It remains to be submitted that, the amendment proposed will serve the dual purpose of preserving the assets of a defendant/judgment debtor within jurisdiction and ensure that the interest of AMCON ranks above and takes priority over other security interests in the assets, whether existing, futuristic, legal or equitable. The author, therefore, recommends that AMCON pursues the implementation of those recommendations in order to position itself at a vantage point in future legal contest.

Thank you.