Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF **ORIGINAL TRADERS ENERGY LTD. and 2496750 ONTARIO INC.**

Applicants

BOOK OF AUTHORITIES OF THE OTE GROUP

March 13, 2023

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TAB 1

2018 ONSC 879
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Noreast Electronics Co. Ltd. v. Danis

2018 CarswellOnt 1684, 2018 ONSC 879, 289 A.C.W.S. (3d) 389

Noreast Electronics Co. Ltd. (Plaintiff) and Eric Danis, EAJ Technical Corporation, Anya Watson and 8339724 Canada Inc. (Defendants)

Sally Gomery J.

Heard: December 7, 2017
Judgment: February 5, 2018
Docket: 17-72985

Counsel: Ira Nishisato, Maureen Doherty, for Plaintiff
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Subject: Civil Practice and Procedure; Corporate and Commercial
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Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Anton Piller order — Employee, wife, and companies brought motion for order setting aside order — Motion dismissed on terms — Cell phone seized from employee's residence was to be returned to employee, though copy of electronic data on phone should be retained — Many of employee's assertions did not withstand scrutiny, and they were not material because they would not have caused prior judge to refuse to issue order — Employee's claim that E Corp. was merely middleman whose role had not been concealed was inconsistent with evidence indicating employer was purportedly dealing with Chinese suppliers directly when these suppliers had been instructed to take steps that assisted concealment — Employer had not been obliged to confront employee or suppliers with evidence before seeking court's assistance — Employer's concern about employee destroying evidence was reasonable given his efforts over seven-year period to conceal his involvement in E Corp.
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Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Mareva injunction freezing accounts of employee, wife, and companies — Employee, wife, and companies brought motion for order setting aside injunction — Motion dismissed on terms — If injunction currently affected registered education savings plan account, injunction should be modified so that it no longer did so — Many of employee's assertions did not withstand scrutiny, and they were not material because they would not have caused prior judge to refuse to issue injunction — Employee's claim that E Corp. was merely middleman whose role had not been concealed was inconsistent with evidence indicating employer was purportedly dealing with Chinese suppliers directly when these suppliers had been instructed to take steps that assisted concealment — Employer had in fact been overpaying for parts — Value of employee's shares was not material fact, and there was no evidence that shares had any value on open market or could function as security for any damages suffered by employer.
Remedies --- Injunctions — Availability of injunctions — Anton Piller orders — General principles
Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Anton Piller order — Employee, wife, and companies brought motion for order setting aside order — Motion dismissed on terms — Cell phone seized from employee's residence was to be returned to him, though copy of electronic data on it should be retained — Argument that traditional three-part test for interlocutory injunction had to be satisfied in addition to meeting specific test for Anton Piller order was rejected — Requirement of proving irreparable harm

was imbedded in recognized criteria for Anton Piller order — Similarly, exercising discretion inherent in test required court to balance potential harm to applicant if ex parte relief was not granted with harm inherent in execution of such order — It was hard to imagine situation where judge could conclude applicant met test but that balance of convenience favoured defendant.

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — General principles

Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Mareva injunction freezing accounts of employee, wife, and companies — Employee, wife, and companies brought motion for order setting aside injunction — Motion dismissed on terms — If injunction currently affected registered education savings plan account, injunction should be modified so that it no longer did so — Argument that traditional three-part test for interlocutory injunction had to be satisfied in addition to meeting specific test for Mareva injunction was rejected — Requirement of proving irreparable harm was imbedded in recognized criteria for Mareva injunction — Similarly, exercising discretion inherent in test required court to balance potential harm to applicant if ex parte relief was not granted with harm inherent in execution of such order — It was hard to imagine situation where judge could conclude applicant met test but that balance of convenience favoured defendant.

Remedies --- Injunctions — Availability of injunctions — Anton Piller orders — Threshold test — Real risk of removal or destruction of evidence

Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Anton Piller order — Employee, wife, and companies brought motion for order setting aside order — Motion dismissed on terms — Cell phone seized from employee's residence was to be returned to him, though copy of electronic data on it should be retained — Additional evidence obtained through execution of order strengthened employer's already strong prima facie case — Employee, wife, and companies had incriminating records or other evidence in their possession — It was inferred that if order had not been granted, there was real possibility that steps might have been taken to destroy or conceal incriminating records before discovery could take place — As pointed out in numerous authorities, court could infer risk of destruction of evidence from dishonest conduct and ease with which certain types of evidence might be removed or disposed of.

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Strong prima facie case

Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife — After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Mareva injunction freezing accounts of employee, wife, and companies — Employee, wife, and companies brought motion for order setting aside injunction — Motion dismissed on terms — If injunction currently affected registered education savings plan account, injunction should be modified so that it no longer did so — Employer had met its disclosure obligation when it applied for injunction, and employer continued to present strong prima facie evidence of fraudulent conduct by employee, wife, and E Corp. — Test for Mareva injunction did not require conclusion that employer would get all money claimed in its lawsuit — Based on evidence, employer's actual damages were serious.

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets — Miscellaneous

Inference — Employee had worked for employer since 1985 and owned 20 per cent of employer's shares through numbered company — In 2009, employer accepted suggestion from employee that it source parts from China, and employee assumed responsibility for procurement from five Chinese suppliers — In 2010, employee forwarded email purporting to be from Chinese supplier directing that payments to it be made to its company E Corp., which was actually owned by employee and his wife

— After discovering fraud in 2017, employer brought action against employee, wife, and companies for relief for fraud — Employer successfully brought motion for Mareva injunction freezing accounts of employee, wife, and companies — Employee, wife, and companies brought motion for order setting aside injunction — Motion dismissed on terms — If injunction currently affected registered education savings plan account, injunction should be modified so that it no longer did so — Real risk that employee, wife, and companies would attempt to dissipate or hide their assets or remove them from jurisdiction was inferred — Strong prima facie evidence of fraud was coupled with other circumstances that gave rise to risk to tip balance in favour of employer — Employee and wife used foreign corporation as vehicle for alleged fraud, and wife transferred funds from foreign corporation to accounts in United States — Employee, wife, and companies had over 30 bank accounts in their names in Canada and United States, and additional 20 or so investment accounts and credit card accounts.

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Rules considered:

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R. 39.01(6) — considered

MOTION by employee, his wife, and their companies for order setting aside Anton Piller order and Mareva injunction.

***Sally Gomery J.*:**

1 This is a motion by the defendants to set aside two *ex parte* orders: an Anton Piller order and a Mareva injunction (the "Orders").

2 Noreast Electronics Co. Ltd. ("Noreast") is an electronics manufacturer in Hawkesbury, Ontario. It is suing its former employee Eric Danis and his wife Anya Watson for fraud. The other two defendants in the lawsuit are companies owned and directed by Danis and Watson.

3 Noreast obtained the Orders on June 20, 2017 from Justice Ryan Bell. On June 21, 2017, they were served on the defendants. The Anton Piller order was executed, with a search being conducted at Danis and Watson's home and records seized. The Mareva injunction was served on the financial institutions where the defendants have accounts and these accounts were frozen. Noreast terminated Danis' employment the same day.

4 The Orders were continued on consent until a decision on this motion.

The approach to be taken on the motion to set aside

5 On a motion to set aside an *ex parte* order, the court considers not only the evidence before the judge who first issued the order, but any further evidence since submitted by the parties, including evidence obtained as a result of the order. [1]

6 An Anton Piller order or a Mareva injunction obtained may be set aside for three reasons:

1) In obtaining the order, the moving party failed to fully and fairly disclose all material facts.

2) Based on the evidence before the reviewing court, the test for an order is not met.

3) The order was executed improperly.

7 According to the defendants, the Orders should be set aside on all three of these grounds.

What evidence was before Justice Ryan Bell?

8 The defendants argue that Noreast failed to disclose various material facts when it obtained the Orders. My analysis must therefore begin by reviewing the evidence that was before Justice Ryan Bell.

9 Noreast relied on two affidavits in support of its motion: an affidavit from Irma Maxwell, a Noreast director and general manager of payroll, accounting and financial administration support services, and an affidavit from Gary Timm, a forensic accountant with Deloitte Forensic Inc.

The Maxwell affidavit

10 In her June 12, 2017 affidavit, Maxwell stated that Danis had worked for Noreast since 1985 and was currently its Director of Sales. In June 2017 he was earning a base salary of $46,820 plus a commission of 1.5% on all company sales. He is also a 20% shareholder of Noreast through his company 8339724. Watson has never worked for Noreast.

11 Maxwell said that Danis encouraged Noreast in 2009 to begin sourcing electronic components and other parts from China. When Noreast accepted this suggestion, Danis assumed responsibility for the procurement from five Chinese suppliers, handling all communications with them on Noreast's behalf. According to Maxwell, her colleagues suggested on several occasions that someone else from Noreast could assist him with purchasing from and invoicing of Chinese suppliers. Danis refused these offers, saying he was the only person who should deal with them.

12 In April 2010, Danis forwarded an email to Maxwell which he said was from a Chinese supplier. In this email, the supplier asked Noreast to start paying the amounts owed on invoices to the bank account of a company called EAJ Technical Corporation ("EAJ") at Wells Fargo Bank in Wyoming. An invoice with the new banking direction, on the letterhead of the Chinese supplier, was attached. The name "EAJ" was familiar to Maxwell since this same supplier had previously instructed Noreast to send payments to EAJER Industrial Limited at HSBC Bank in Hong Kong. Noreast accordingly did not question the supplier's new instruction to make payments to the EAJ account in Wyoming.

13 Maxwell said that, in the months and years that followed, Danis provided hardcopy invoices to Noreast for products sold by its Chinese suppliers. These invoices directed that payment was to be made to the same Wells Fargo account in Wyoming.

14 On March 22, 2017, Noreast received a package from one of its Chinese suppliers. Unusually, there was an invoice enclosed with the package. It looked different than the ones that Danis had been delivering to Noreast in the preceding seven years. The direction on the invoice said that payment should be made to a Chinese bank. The prices on the new invoice were half the amount as much as those on the invoices that Noreast was accustomed to receiving through Danis.

15 Maxwell's colleague did an internet search on EAJ and found a website where Danis was listed as its president. This prompted Noreast to begin investigating further.

16 In her affidavit, Maxwell identified potential sources for further information in the defendants' possession and control. She expressed the view that, if an Anton Piller order was not issued, Danis would destroy evidence.

The Timm affidavit

17 After Noreast discovered Danis' connection to EAJ, it retained Deloitte Forensic Inc. to conduct an investigation of purchases from Chinese suppliers between April 1, 2010 and May 10, 2017. Timm led the investigation. His team searched publicly available information, interviewed Maxwell and Noreast's IT director and reviewed Noreast's records of purchases from Chinese suppliers. In his June 9, 2017 affidavit, Timm stated that:

- EAJ was incorporated in Wyoming in March 2010. The only officer or director identified in the corporate filing is EAJ's secretary, Gerald Pitts. Pitts is the president of Wyoming Corporate Services, a company that helps incorporate companies whose directors, officers and shareholders wish to remain off the public record. Wyoming law does not require companies to disclose this information.

- Despite the lack of disclosure in EAJ's incorporation documents, Timm found records that linked Danis to EAJ. EAJ's 2015 annual report identified Danis as its president. Danis also identified himself as an EAJ director in an email to a third party, and filed a T4 for 2011 indicating he had received employment income of over $121,000 from Noreast.

- Timm also located a cheque record that linked Watson to Noreast.

- Beginning April 2010, Chinese suppliers began submitting invoices to Danis through his Noreast email account. These invoices directed payment to accounts in banks in China and Hong Kong. Danis forwarded these invoices to a personal email account, then created new invoices that looked like they were issued by the Chinese suppliers. These new invoices directed payment to EAJ's Wells Fargo account in Wyoming. Danis delivered hard copies of these invoices to Noreast for payment.

- The unit prices on these invoices were inflated by 20% to 200% above the prices on the invoices actually submitted by the Chinese suppliers. On the invoices Noreast was directed to make payments to the Wells Fargo account in Wyoming.

- Noreast made payments of USD $1,882,886 to the Wells Fargo account between April 8, 2010 and May 10, 2017;

- In emails to Chinese suppliers, Danis directed that any pricing must be given only to him and to no one else at Noreast, and that no invoices should be sent with their shipments.

- Danis and Watson had assets, including a house, a cottage, cars a boat and various bank accounts in Ontario.

Justice Ryan Bell's Orders

18 In granting the Mareva injunction, Justice Ryan Bell used the test set out in *Aetna Financial Services Ltd. v. Feigelman* and *Chitel v. Rothbart*.[2] She held that Noreast was entitled to an injunction because:

1) Noreast had demonstrated a strong *prima facie* case;

2) it had provided particulars of the claim against the defendants and a fair statement of the points that could be made against it by the defendants;

3) there were grounds for believing that the defendants had assets in Ontario;

4) there were grounds for believing that there was a risk of the defendants' assets being removed from the jurisdiction or dissipated or disposed of before judgment. In this regard, the judge noted the strength of the evidence of fraud, an important factor in a Mareva injunction; and

5) Noreast provided an undertaking as to damages.

19 Justice Ryan Bell held that Noreast had met the test for an Anton Piller order established by the Supreme Court of Canada in *Celanese Canada Inc. v. Murray Demolition Corp.* [3] She found that:

1) Noreast had demonstrated a strong *prima facie* case;

2) it had established serious damage as a result of the defendants' alleged misconduct;

3) there was convincing evidence that Danis had relevant evidence at his property because he used computers and email accounts to carry out the alleged fraud; and

4) there was real risk of destruction of evidence if the order was not granted, based on Danis' alleged misconduct and the fact that some of it was in electronic form.

Did Noreast fail to fully and fairly disclose material facts when it sought the Orders?

The disclosure obligation on an applicant for ex parte order

20 A party applying for an *ex parte* order is obliged to disclose all material facts relevant to the order sought. Rule 39.01(6) of the *Rules of Civil Procedure* provides:

> Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

21 Applicants for *ex parte* orders are required to make this disclosure because the respondent has no opportunity to present their version of the events. In the words of Justice Sharpe, "The situation is rife with danger that an injustice will be done to the absent party". [4]

22 Due to their draconian nature, the disclosure obligation is particularly important in the context of applications for Anton Piller or Mareva orders. An Anton Piller order permits an applicant to conduct a surprise search of the respondent's office or home. A Mareva injunction freezes the respondent's assets until trial. In granting such exceptional orders, the court must be certain that the supporting evidence gives it fair insight into both the applicant's case and the respondent's potential defence.

23 The applicant is accordingly "not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side." [5]

24 In order to ensure that all material facts are before the court, the applicant also has an obligation to conduct a reasonable investigation before seeking *ex parte* orders. As Justice Stinson observed in *Parallel Medical Services Ltd. v. Ward*:

> A judge hearing such a motion (not to mention the absent party who will be affected by any order granted) is at the mercy of counsel for the moving party and must expect and rely upon counsel's proper discharge of this important obligation. That obligation extends to fairly stating the case against granting the relief sought, and this can only be done where appropriate steps have been taken to verify the reliability of the information provided by the client and to determine what the defendant would likely say if given the opportunity to argue against the granting of the order. [6]

25 The applicant's disclosure obligation is, however, limited to *material* facts and the fruits of *reasonable* investigation. A fact is material if its non-disclosure could affect the outcome of the motion. [7]

Did Noreast fail to disclose material facts?

26 The defendants say that Noreast failed to provide Justice Ryan Bell with material facts and to acknowledge that there could be an innocent explanation for the defendants' conduct. In their submission, Noreast mischaracterized EAJ's role in purchases from Chinese suppliers. They say that EAJ was acting as a wholesaler or reseller, and that the mark-ups on the prices charged by the suppliers reflected standard industry practice to recover administrative costs and a profit.

27 They also argue that Noreast had an obligation to further investigate the situation before seeking the Orders. Had it done so, it would have realised that Danis never deliberately hid his involvement with EAJ from Noreast. He was simply never asked about any connection he had with the company. When he first discussed the possibility of Noreast sourcing parts from China with his boss at Noreast in 2009, he was told that purchasing was not part of his role as a salesperson and that he would not be compensated for this work. As a result, he did his work for EAJ in his spare time.

28 Finally, the defendants argue that Noreast has not proved any damages, because it made the choice to purchase components at the prices proposed by EAJ, and there is no evidence that it overpaid. They also contend that Noreast failed to advise the Court about the value of Danis' shares in Noreast through the defendant numbered company. According to the defendants, these shares are worth over a million dollars, enough to offset any loss by Noreast. The shares furthermore function as security since Danis cannot sell them without the company's consent.

29 I find that many of the defendants' assertions do not withstand scrutiny. They are furthermore not material, because they would not have caused Justice Ryan Bell to refuse to issue the Orders.

30 The idea underlying the defendants' argument is that EAJ's role as a middleman was not hidden from Noreast. This idea is inconsistent with the evidence available when Noreast applied for the Orders. The invoices submitted by Danis were made to look as though they came directly from Chinese suppliers. They were on the suppliers' letterhead. The Wells Fargo account was described on the invoices as "Our Account". Nothing on the invoices indicated that prices had been marked up.

31 There was furthermore evidence that contradicts Danis' assertion that he never took active steps to conceal EAJ's role. He submitted misleading or false invoices. He directed the Chinese suppliers not to send their actual invoices with shipments of their products. He insisted to Maxwell and others that he personally handle all dealings with the suppliers.

32 The argument that Noreast did not necessarily overpay for seven years is also inconsistent with the evidence. The company was able to purchase components from the same Chinese suppliers, without any markup, prior to April 2010.

33 I do not accept that the value of Danis' shareholder interest in Noreast is a material fact. The only evidence of this value has been provided by Danis, who is neither an expert in business evaluation nor a disinterested party. There is also no evidence that the shares have any value on the open market or could function as security for any damages suffered by Noreast.

34 I am of course not making a finding that the defendants' activities were fraudulent. This is a determination that can only be made by a trial judge. But the evidence before Justice Ryan Bell strongly suggests fraud. I cannot fault Noreast for failing to tell the judge that there could be an innocent explanation for the defendants' conduct. An applicant's obligation of fair disclosure does not extend to speculating that there might be further evidence that would fundamentally contradict the initial findings of a reasonably comprehensive investigation.

35 I also reject the defendants' argument that Noreast was obliged to confront Danis or the suppliers with the evidence before seeking the court's assistance. In her affidavit, Maxwell said that she feared Danis would destroy records if he knew that Noreast had discovered his involvement in EAJ. Given Danis' efforts over a seven year period to conceal his involvement in EAJ, her concern was reasonable. That is one of the bases for the Orders.

Did Noreast otherwise fail to meet the conditions to obtain interlocutory relief?

36 The defendants argue that, in addition to meeting the specific tests for the Orders, Noreast had to satisfy the test for an interlocutory injunction established by the Supreme Court of Canada in *RJR Macdonald*. [8] In *Johnson v. Helo Enterprises Inc.*, Justice Smith held that an applicant for an Anton Piller order also had to show that it would suffer irreparable harm if the order was not issued, and that the balance of convenience favoured the applicant. [9] The defendants say that Noreast cannot satisfy either of these parts of the *RJR Macdonald* test. First, Noreast has, at most, suffered an economic loss. Second, the balance of convenience favours the defendants, because the execution of their Orders violates their privacy rights and deprives them of access to their own assets.

37 In my view, the requirement of proving irreparable harm is imbedded in the recognized criteria for the Orders. To obtain an Anton Piller order, an applicant must convince the court that there is a real risk of destruction of evidence if the order was not granted. If the applicant meets this part of the test, they have also shown the risk of irreparable harm, since in the absence of the order sought they would be unable to prove their case and limit further damages. To obtain a *Mareva* injunction, a court must find that the defendant might otherwise dispose of or dissipate their assets, or remove them from the jurisdiction. In other words, unless the order is issued, the applicant may lose any ability to ever execute an eventual judgment. This is again a form of irreparable harm.

38 Similarly, exercising the discretion inherent in the tests requires the court to balance the potential harm to the applicant if *ex parte* relief is not granted with the harm inherent in the execution of such orders. That is why applicants have the onus to make full disclosure and provide strong *prima facie* proof. It is hard to imagine a situation where a judge could conclude that an applicant had met the test for Mareva or Anton Piller orders but that, on the same evidence, the balance of convenience favoured the defendant. We are certainly not in such a situation in this case.

39 The defendants make a further argument regarding Noreast's right to injunctive relief. They contend that Noreast did not have clean hands, because it engages in unethical business practices.

40 The doctrine of clean hands does not mean that an applicant for equitable relief has to have led "a blameless life":

> The misconduct charged against the plaintiff as a ground for invoking the maxim against him must relate directly to the very transaction concerning which the complaint is made, and not merely to the general morals or conduct of the person seeking relief.... [10]

41 I do not see any link between the alleged misconduct by Noreast and the fraud allegations against the defendants. I accordingly reject the defendants' argument that Noreast was simply not entitled to any equitable order.

Does the evidence now before the Court justify the continuation of the Orders?

What further evidence is now before the Court?

42 The parties have filed further evidence since the Orders were issued. I have already alluded to the defendants' evidence. In Danis' affidavits, he denies that he ever sought to conceal his role in EAJ or that he was obliged to disclose it, since he had no formal contract of employment or fiduciary role within Noreast. He says that he was doing all of his work for Noreast in his spare time and therefore did not need to account to Noreast for it. He says that he remained at all times a dedicated and good employee.

43 At the same time, Danis contends that he was justified in concealing his link to EAJ given a hostile work environment at Noreast and his fear that he would be fired. He argues that Noreast was clearly satisfied with the prices it paid for to Chinese suppliers and the components it received from them, as it never sought to procure these same components from other sources after 2010.

44 In affidavits sworn by Watson, she says that she had only a modest administrative role in EAJ. She describes how the Orders were executed, and the impact this has had on her family.

45 New evidence filed by Noreast includes:

- Records showing Watson's extensive involvement in EAJ's operations. In addition to creating the invoices submitted to Noreast, she did all of EAJ's accounting and record keeping, and arranged for payments to Chinese suppliers on EAJ's behalf. Watson also dealt with and instructed EAJ's accountants, BDO, in the preparation of tax filings.

- A detailed account of Watson and Danis prepared the invoices delivered to Noreast. Watson admits that she created templates that looked as though they were issued by Chinese suppliers, and which described the EAJ Wells Fargo account as the suppliers' "USA sales office account". The prices she indicated on the invoices were provided to her by Danis. The markups were not shown on the invoices.

- Records showing that Watson received $847,156.34 in salary from EAJ from 2011 to 2016, which she deposited in various US bank accounts.

- Emails and other records showing that Danis and Watson took active steps to conceal their role in EAJ when the company was incorporated.

- An admission by Watson that she and Danis had no property, business or family in Wyoming, and a lack of any explanation for why they decided to incorporate EAJ there or give the company a name similar to EAJER.

- An admission by Watson that Noreast was EAJ's only customer and its only source of revenue.

- A list of over 30 bank accounts held by the defendants at financial institutions in the US and Canada.

Does the evidence now before the Court justify the Anton Piller order?

46 On all of the evidence now before the court, I find that Noreast has met the test for an Anton Piller order. The additional evidence it has obtained through execution of the order has strengthened its already strong *prima facie* case that the defendants were conducting a fraudulent scheme. It has evidence of actual or potential serious financial loss. The defendants have incriminating records or other evidence in its possession.

47 I infer, based on all of the evidence, a real possibility that the defendants may have taken steps to destroy or conceal incriminating records before discovery could take place, if the order had not been granted. As pointed out in numerous decisions, a court may infer a risk of destruction of evidence from a defendant's dishonest conduct and the ease with which certain types of evidence may be removed or disposed of. [11] In this case, the evidence shows that Danis misled Noreast about his role in EAJ, and what exactly EAJ was doing in connection with purchases from China.

Does the evidence now before the Court justify the continuation of the Mareva injunction?

48 The defendants concede that Noreast has proved that they have assets in Ontario and that it has given an undertaking with respect to damages if it fails to prove its case at trial. They argue however that Noreast has not met the other elements of the test for a Mareva injunction.

49 I have already concluded that Noreast met its disclosure obligation when it applied for the Orders, and that it has presented strong *prima facie* evidence of fraudulent conduct by Danis, Watson and EAJ. Whether or not Danis had a fiduciary obligation to Noreast is not determinative of its right to recover excess amounts paid to EAJ. The defendants contend that Noreast's claim for monetary damages far exceeds its actual losses. In my view, however, the test for a Mareva injunction does not require me to conclude that Noreast will get all of the money it claims in its lawsuit. Based on the evidence, its actual damages are serious.

50 This leaves the question of the dissipation or removal of assets, the fourth leg of the Mareva test. The defendants say there is no evidence of any real risk. They point out that Danis and Watson have their family residence, their four cars, their boat and most of their bank accounts in Ontario. They admit that Watson deposited the money she received from EAJ into U.S. bank accounts in Wyoming and Georgia, but say that it was subsequently flowed back to Canada.

51 Canadian courts have long debated what a plaintiff in a fraud case must prove the risk of dissipation or removal of assets. A plaintiff without any direct evidence may argue that the defendant's conduct makes them inherently untrustworthy. This has led to consideration of whether there is a "fraud exception" to the usual criteria for a Mareva injunction.

52 In *Sibley & Associates LP v. Ross*, Justice Strathy (as he then was) did a comprehensive review of the caselaw on this question. [12] He concluded that there was no broad fraud exception, although strong proof of fraud is relevant to the assessment of risk. In considering whether to grant or continue a Mareva injunction, he was of the view that:

> It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff. [13]

53 I agree. Using this approach, I infer a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction. Strong *prima facie* evidence of fraud is coupled with other circumstances that give rise to risk, including:

> 1) The use of a foreign corporation by Danis and Watson as a vehicle for the alleged fraud;
>
> 2) Watson's transfer of funds from that company to U.S. accounts; and
>
> 3) the existence of over 30 bank accounts in the name of the defendants in Canada and the U.S., and an additional 20 or so investment accounts and credit card accounts.

54 As Justice Strathy found in *Sibley*, the defendants' conduct in this case "bears the badges of fraud — a pattern of clandestine and deceitful action over a prolonged period of time, including the attempt to avoid detection by using a nominee or a "dummy" to conceal the fraudulent activity". [14] The defendants' activities in the U.S., and the complexity of their financial arrangements, tip the balance, tip the balance in favour of the plaintiff.

55 For all of these reasons, I conclude that the Mareva injunction should remain in place until the trial of the action.

56 If the injunction remains in place, defendants have asked that its scope be reduced. They say that the freezing order should not apply to accounts held solely by Watson, because she has "nothing to do" with the core litigation between Noreast and its former employee Danis. There are also some accounts held jointly by Watson and her children or father, and a Registered Education Savings Plan account.

57 Based on the evidence to date, it is absurd to say that Watson is not directly involved in the fraud alleged by Noreast. She was the direct recipient of most of EAJ's profits, as evidenced by her tax returns and her testimony on cross-examination.

Until the money transferred to her U.S. accounts can be traced, there is no way to know whether it ended up in accounts opened only in her name, or jointly with other family members. I am therefore not prepared to limit the scope of the injunction to accounts only in Danis' name.

58 If there is an RESP account that has been frozen as a result of the Mareva injunction, the scope of the order should be reduced to exclude it. It is not clear whether this is actually an issue. Watson says in her June 26 affidavit that RBC account no. [055 # omitted] holds funds for her son Caleb's educational plan investments. In her June 28 affidavit, however, she identifies it as a joint savings account. She says something similar in her June 26 affidavit about RBC account no. [668 # omitted], but then lists it as an account solely in her own name in her June 28 affidavit.

Did Noreast improperly execute the Anton Piller order?

59 The defendants say that Noreast executed the Anton Piller order improperly. They allege that the search of Danis and Watson's home on June 21, 2017 was improper because:

- Deloitte is Noreast's accounting firm and as such is not a neutral third party.
- Noreast's lawyers at Borden Ladner Gervais ("BLG") were inappropriately involved in the search and may have had access to privileged information as a result.
- certain records and items, such as personal and medical information and Danis' cellphone, were improperly seized.

60 Based on these allegations, the defendants say that the Court should set aside the Anton Piller order, require that all records seized be returned to them, and order Noreast to pay an unspecified amount of damages.

61 In her June 26 affidavit, Watson describes how the Anton Piller order was executed at the family home. A competing account is set out in affidavits by Paul Lepsoe, the Independent Supervising Solicitor named in the order, and Laura Peacock, a law clerk with BLG who attended the search. The Lepsoe and Peacock affidavits, which I prefer, establish that the order was executed in a professional and appropriate manner.

62 In light of my finding on this point, I need not consider what remedy could flow from an improperly executed Anton Piller order.

63 There is a debate about who owns a cellphone seized during the search. In light of this, the ISS should make a copy of any electronic records on the phone and return the device to Danis. I assume that Noreast has already cancelled its contract for services for the phone.

Conclusions

64 For the reasons set out above, I dismiss the defendants' motion to set aside the Orders. I direct that, if the Mareva order currently affects an RESP account, it should be modified so that it no longer does so. I also direct that the iPhone seized from Danis' residence be returned to him, although the ISS should retain a copy of electronic data on it.

65 In the motion, the defendants seek an order permitting them to withdraw $12,655 per month for living expenses. Such an order was in fact already issued, on consent, on November 28, 2017. In oral argument, the defendants' counsel said that the order was not enforceable, but did not provide any specifics. Should the defendants require a clarification of the existing order, they should submit evidence and argument in support.

66 If the parties cannot agree on costs, counsel for the plaintiff may file a draft bill of costs and submission of no more than three pages within the next seven days. Counsel for defendants will then have seven days to file responding submissions of no more than three pages.

Motion dismissed on terms.

Footnotes

1 *Alberta Treasury Branches v. Leahy*, [2002] A.J. No. 524 (Alta. C.A.), leave to appeal denied [2002] S.C.C.A. No. 235 (S.C.C.).

2 *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.); *Chitel v. Rothbart*, [1982] O.J. No. 3540 (Ont. C.A.).

3 [2006] S.C.J. No. 35 (S.C.C.) at para. 35.

4 *United States v. Friedland*, [1996] O.J. No. 4399, 1996 CarswellOnt 5566 (Ont. Gen. Div.) at para. 26.

5 *United States v. Friedland* at para. 27.

6 [2002] O.J. No. 1498, 2002 CarswellOnt 1181 (Ont. S.C.J.) at para. 18.

7 *Pazner v. Ontario*, 1990 CanLII 6649, (1990), 74 O.R. (2d) 130 (Ont. H.C.) at para. 11. See to the same effect *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2000] O.J. No. 4341 (Ont. S.C.J. [Commercial List]) at para. 39 and *Coupey v. Hamilton Police Services Board*, [2005] O.J. No. 2223 (Ont. S.C.J.) at paras. 37 and 40.

8 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

9 *Johnson v. Helo Enterprises Inc.*, 2012 ONSC 5186 (Ont. S.C.J.) at para. 34.

10 *Toronto (City) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.) at pp. 699-700.

11 *Dunlop Holdings Ltd. v. Staravia Ltd.*, (1981) Decision No. 1998 (C.A.) at 3, n 4-5; *Rank Film Distributors Ltd. v. Video Information Centre*, [1980] 2 All E.R. 273 (Eng. C.A.) at 286-87.

12 2011 ONSC 2951 (Ont. S.C.J.) at paras. 15 to 65.

13 *Sibley* at para. 63.

14 *Sibley* at para. 66.

TAB 2

2006 CarswellOnt 5787
Ontario Superior Court of Justice

Sabourin & Sun Group of Cos. v. Laiken

2006 CarswellOnt 5787, [2006] O.J. No. 3847, 151 A.C.W.S. (3d) 686

Sabourin and Sun Group of Companies (Plaintiff) and Judith Laiken (Defendant)

S.N. Lederman J.

Heard: September 14, 2006
Judgment: September 25, 2006
Docket: 00-CV-187887CM4

Counsel: Peter W.G. Carey, Konstantine J. Stavrakos for Plaintiff / Defendant by Counterclaim
Peter R. Jervis, Christine Snow for Defendant / Plaintiff by Counterclaim

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities; Insolvency

Related Abridgment Classifications

Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.i Strong prima facie case
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.ii Assets within jurisdiction
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iv Full and frank disclosure
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.v Miscellaneous
Securities
III Trading in securities
III.7 Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Strong prima facie case

2006 CarswellOnt 5787, [2006] O.J. No. 3847, 151 A.C.W.S. (3d) 686

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Assets within jurisdiction
Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets — Miscellaneous
Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Undertaking as to damages
Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Full and frank disclosure
Securities --- Trading in securities — Miscellaneous

***S.N. Lederman J.*:**

1 This is a motion by Judith Laikin ("Laikin") for an order to continue the *Mareva* injunction granted *ex parte* by C. Campbell J. on May 4, 2006 whereby he ordered *inter alia* that:

a) A Certificate of Pending Litigation be issued and registered against the "Mary Lake" property; and

b) The Sabourin Group be enjoined from disposing of any of their assets, including the "Sea Ray" boat.

2 Laikin states that in response to advertisements in the newspapers in respect of facilitating off-shore investing in the British Virgin Islands, she contacted the Sabourin Group who represented to her that they were experts in investing off-shore, that their business was well established and that they track investments in its client's account through a modern on-line trading system. As a result, Laikin transferred approximately $885,000 into various bank accounts held by the Sabourin Group at the Bank of Montreal in Toronto for these purposes. Ultimately, these funds were lost.

3 Through admissions made on discovery by Sabourin, it has been shown that:

a) Sabourin has had no professional or other formal training in respect of securities, investments or other financial matters;

b) Though Sabourin was to place Laikin's funds into off-shore investment accounts, the fact is that the funds never left Canada. Rather, they were deposited into Sabourin's account at the Bank of Montreal in Toronto and were pooled with his other general funds;

c) The investment account statements which had been emailed to Laikin by Sabourin and his staff made no sense and Sabourin could not explain the inconsistencies in such statements during his examination for discovery;

d) The Sabourin Group did not have any offices in any of the locations in the Caribbean that they purported to have. All of the offices were fictional. Sabourin admitted that the companies were shells and had been purchased for a nominal fee.

e) Sabourin was unable to identify a single trading agreement that the Sabourin Group had with any dealer to trade securities;

f) There was no investment account in the Caribbean in Laikin's name.

4 In effect, Laikin has alleged that her monies were never placed in any off-shore accounts, that no trading has ever taken place and that she has never received a proper accounting for the use of her funds. She has alleged that the Sabourin Group has fraudulently misappropriated her monies.

5 No affidavit from the Sabourin Group has been filed to contest any of these allegations. Rather, they take the position that there had been a serious material non-disclosure to the Court when Laikin obtained the *ex parte* order. In particular, they allege that she did not disclose to the Court that in a Family Law application against her ex-common law husband, Godfrey Tanku Tatsanbong ("Tanku") she blamed her entire loss on Tanku and not on the Sabourin Group and has indicated that he was solely responsible for the loss of her money and not the Sabourin Group. They also allege that there was a failure to disclose to the Court various emails from Laikin to the Sabourin Group which indicated that she, in fact, had a high degree of sophistication and knowledge about trading securities and in particular, taking short positions in the market. Such evidence is consistent, the Sabourin Group submits, with the fact that their defence has been that from the beginning, Laikin lost all of her money in high

risk trades on margin, taking short positions that relied upon their success on her and Tanku's gamble that the market would fall when, in fact, it did just the opposite. The Sabourin Group's position in essence, is that Laikin and/or her ex-common law husband, Tanku, proceeded to trade away all her money, mainly by adopting short positions on stocks in a rising market and, thus, were the authors of their own misfortune.

6 As to the issue of non-disclosure of Laikin's allegation that it was Tanku who was solely responsible for the losses, the Family Law Application materials were before Campbell J. and, indeed, paragraph 82 of the Factum filed in support of the *Mareva* injunction, reads as follows:

> During the course of those proceedings, Ms. Laikin had prepared affidavits on her own behalf which appeared to be contradictory to some of the statements that she had made in this action. In particular, some of the documents that were filed by Ms. Laikin in support of the Family Law Application stated that the losses that she had experienced with Sabourin and S & S Group were the result of Tanku's negligence and fraud. At the time that Ms. Laikin prepared those affidavits, she was confused about how the losses had occurred. She feared that Sabourin and Tanku may have somehow acted in cahoots in order to cheat her out of her money.
>
> Reference: Affidavit of Judith Laikin, sworn May 3, 2006, Motion Record of the Moving Party, Tab B, para. 119.
>
> Affidavit of J. Laikin, Exhibit "52" to the Affidavit of Judith Laikin, sworn May 3, 2006, Tab B52.

7 Accordingly, the position of the Sabourin Group that Laikin was holding Tanku fully responsible for the losses was appropriately disclosed when the *ex parte* order was obtained.

8 As to the alleged failure to put forth evidence in the form of the various emails which would indicate to the Court that Laikin had a certain level of knowledge with respect to trading in securities and in particular, short selling, it should be noted that the bases of the claim by Laikin are that there was never any trading account or trading in securities; that no off-shore investments were, in fact, made; that the trading offices in the British Virgin Islands were fictitious; and that the Sabourin Group took her money and co-mingled it with their own funds and misappropriated them for their own business and personal use. The issue in the case, therefore, is not whether Laikin, with the assistance of Tanku, had control of or managed the accounts and trades and all times gave direction with respect to the buying and selling of securities. Laikin's position is that there was never any trading in fact, and that the Sabourin Group simply stole her funds. That being so, the level of Laikin's knowledge in respect of trading in securities and whether she provided trading instructions become irrelevant.

9 In order to justify a *Mareva* injunction, the applicant must:

a) establish a strong *prima facie* case;

b) make a full and frank disclosure of all matters in her knowledge which are material for the motions judge to know;

c) give some grounds for believing that the defendants have assets in the jurisdiction; and

d) give grounds for believing that there is a risk of the assets being removed before any judgment can be satisfied.

10 Laikin has clearly established a strong *prima facie* case in this proceeding, demonstrating that her funds were not invested in off-shore investments as represented, that no real trading took place, and she has received no proper accounting for the use of her funds.

11 I am satisfied that Laikin has made ample disclosure in the proceeding and has not left out anything material to the issues in question.

12 Laikin has demonstrated that there are certain specific assets in this jurisdiction, including the Mary Lake property and the Sea Ray speed boat.

13 The Sabourin Group is in the process of selling a company to another party in a transaction that has yet to close.

14 Although there has been delay in bringing this *Mareva* injunction, it was adequately explained on the basis that certain information only came to the attention of counsel in recent months and no affidavit material has been filed by the Respondent to show that the Sabourin Group would in any way be prejudiced by the fact that such a delay has taken place.

15 The fact that there were phantom trading offices off-shore in the name of the Sabourin Group, raises concern and a real risk that assets may be removed out of Ontario. Moreover, it is instructive that when prior certificates of pending litigation came off other properties, the properties were quickly disposed of.

16 Given the fact that Laikin is insolvent, it would be wrong to deny her a *Mareva* injunction to which she would otherwise be entitled on the grounds that her undertaking as to damages would be of little value. Accordingly, the necessity for an undertaking as to damages is dispensed with in this case.

17 The elements for obtaining a *Mareva* injunction have been satisfied and the order of Campbell J. should be continued until the trial, or until further order of this Court.

18 I am inclined to order that costs of the motion be reserved to the trial judge, but if counsel wish to assert a different position they may file written submissions within 30 days.

End of Document

TAB 3

2020 ONSC 4402
Ontario Superior Court of Justice

Total Traffic Services Inc. v. Kone

2020 CarswellOnt 10412, 2020 ONSC 4402, 321 A.C.W.S. (3d) 349

Total Traffic Services Inc. (Plaintiff / Moving Party) and Tami Kone AKA Tami Hore AKA Tami Hore-Kone AND Michael Kone (Defendants / Responding Parties)

V. Christie J.

Heard:
Judgment: July 17, 2020
Docket: CV-20-999

Counsel: Andrew M. Mae, for Plaintiff, Moving Party

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets
Headnote
Remedies --- Injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets
Plaintiff was family owned pavement marking contractor company — Defendant was employed as bookkeeper — Plaintiff alleged that defendant issued numerous cheques to herself from defendant's business account without any authority to do so — Plaintiff brought motion for mareva injunction — Motion granted — There was genuine risk of dissipation or removal of assets — There was strong evidence that defendant mislead and concealed her removal of money from company for more than 1.5 years — Plaintiff demonstrated willingness to deceive and mislead, leading to risk that assets be hidden in attempt to defeat plaintiff's claim.
Table of Authorities
Cases considered by *V. Christie J.*:
Aetna Financial Services Ltd. v. Feigelman (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985 CarswellMan 379 (S.C.C.) — referred to
Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — referred to
RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, 1994 SCC 117 (S.C.C.) — followed
SFC Litigation Trust (Trustee of) v. Chan (2017), 2017 ONSC 1815, 2017 CarswellOnt 4336, 46 C.B.R. (6th) 253, 137 O.R. (3d) 382 (Ont. Div. Ct.) — referred to
Sibley & Associates LP v. Ross (2011), 2011 ONSC 2951, 2011 CarswellOnt 4671, 334 D.L.R. (4th) 645, 106 O.R. (3d) 494 (Ont. S.C.J.) — considered
Statutes considered:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

2020 ONSC 4402, 2020 CarswellOnt 10412, 321 A.C.W.S. (3d) 349

Generally — referred to

MOTION by plaintiff for mareva injunction.

***V. Christie J.*:**

1 The Plaintiff requests a *Mareva* Injunction and other associated injunctive relief in this urgent motion, brought *ex parte*. The original Notice of Motion received by the Court listed only Tami Kone (aka Tami Hore aka Tami Hore-Kone) as the Defendant, however, the statement of the claim listed both Tami Kone and Michael Kone as the Defendants. It was also clear to this Court, from the written materials, that it was the intention of the Plaintiff to include both parties as Defendants. This issue was raised with counsel for the Plaintiff during the teleconference call and, subsequently, amended motion materials were provided that listed both Defendants.

2 A brief recitation of the facts will provide context to this motion. The Plaintiff is a family owned pavement marking contractor company. Peter Brousseau is the president of the company. Meghan Brousseau is the wife of Peter and the vice-president of sales for the company. The Defendant, Tami Kone, was employed by the Plaintiff from October 15, 2016 to July 13, 2020 as a bookkeeper / administrator. Initially, Ms. Kone assisted the Plaintiff's former vice president, Janet Brousseau, with the company's accounting. However, when Janet Brousseau became ill in the fall of 2018, and her hours of work were reduced, Ms. Kone began to work more independently. By January 2019, Janet Brousseau was not involved with the business at all and in fact passed away in April 2019.

3 Based upon some investigations that the Plaintiff has commenced, it is alleged that from October 2018 to June 2020, Tami Kone issued numerous cheques to herself from the Plaintiff's business account, without any authority for doing so, which were deposited in her bank accounts at Scotiabank and CIBC. The cheques totalled $312,076.02, however, Ms. Kone recently made a partial repayment of $64,112.05, leaving a balance owing of $247,963.97. It must be noted that at paragraph 54 of Peter Brousseau's affidavit, it states that the total amount of loss is $252,313,05, after taking into account the repayment. During the conference call, counsel for the Plaintiff pointed this out to the court as a clerical error and that, in fact, the correct remaining loss is as reflected in the spreadsheet attached at Exhibit B to that affidavit, which confirms the remaining loss to be $247,963.97.

4 Based on the Plaintiff's review of the accounting records to date, it would appear that Ms. Kone may have taken steps to hide her activity by inputting incorrect information into the company's accounting records and changing or manipulating the information on cheques and cheque stubs.

5 This all came to light when, on or around June 23, 2020, Meghan Brousseau noticed that two company cheques, in the amount of $79,648.01 and $14,464.00, had been written out to Tami Kone and cashed by her. Ms. Kone was questioned about this by Meghan and Peter Brousseau, at which time she advised that she had mistakenly written cheques to herself, as the cheques looked identical to her husband's business cheques, and offered to repay the amounts immediately. She continued to work for the company. Over the next two weeks, Ms. Kone made various promises to repay the money, however, there were a number of excuses given for the delay in doing so.

6 Finally, on July 10, 2020, Ms. Kone deposited $64,112.05 into the Plaintiff's bank account, although she advised that she deposited the full amount owing. When later questioned about the shortfall on July 13, 2020, she suggested that the amount may have been written down incorrectly. Further, on the same day, Ms. Kone was confronted by Peter Brousseau, Meghan Brousseau and the company's account, Rob Neahr, with other cheques that were written to her from the company. She acknowledged that the bank deposit details on the back of the cheques were for her bank accounts. However, she suggested that the cheques may have been written by her in error or in some cases simply had no explanation. She absolutely denied that she had "embezzled" any funds and said she would need to attend at her bank to look into this matter. It must also be noted that in oral submissions during the teleconference, counsel for the Plaintiff noted that in summarizing the meeting of July 13, 2020, the affidavit failed to mention that, during that meeting, Ms. Kone had referred to her inheritance from a family member which was in excess of $200,000. This reference was captured in the notes taken by Rob Neahr, attached as Exhibit "O" to the affidavit (page 198 of the Motion Record).

7 After attending at the bank, also on July 13, 2020, Ms. Kone advised Peter and Meghan Brousseau that she had $285,000 in an RRSP which she could use to start repaying the Plaintiff, however, her husband would need to sign something at the bank to release the funds. Without any prior mention of the involvement of police, Ms. Kone asked if she could have a few days to go through the records before the police were called. On that day, July 13, 2020, Ms. Kone was terminated for cause.

8 Having reviewed the company's accounting records, a review which is continuing, the Plaintiff claims that since October 2018, Tami Kone has issued numerous cheques to herself in the amount of $312,076.02. The Plaintiff claims that Ms. Kone was able to do this in a number of ways:

a. Peter Brousseau, and perhaps Janet Brousseau, would sign blank cheques to allow Ms. Kone to pay legitimate expenses for the business, not for payment to herself;

b. The Plaintiff alleges that some of the signatures appear to be forgeries;

c. The Plaintiff alleges that Ms. Kone concealed her activities by falsifying the plaintiff's financial records, to which she had full access.

9 On July 14, 2020, when Peter Brousseau followed up with Ms. Kone by text about her plans for repayment with the use of her investment, she said that the investment was in an RRSP and it would take a couple of days. She advised that her husband was angry with her and asked her to leave the house. She stated that "this is all my fault" and that she did not know whether to go to the bank or to the police to "come clean".

10 While Michael Kone is not alleged to have been directly involved in removing funds from the company, the Plaintiff claims that the fraudulently obtained funds were provided by Ms. Kone to her husband, Michael Kone, either directly or through gifts. The Defendants own two relatively new vehicles, a mobile home trailer and a new speedboat. The new boat was paid for largely with cash and a bank draft. Ms. Kone's taxable income from the company in 2019 was $59,190.00. Her husband is self-employed as a carpenter / deck builder. The Defendants live with Mr. Kone's mother. The Plaintiff asserts that the purchases were made with the money taken from the company.

11 This matter has been reported to police and is under investigation. No criminal charges have been laid.

12 In order for an interlocutory injunction to be granted, the moving party must meet the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), which is as follows:

a. The Plaintiff must put forward a claim which is not frivolous or vexatious, but which raises a serious question to be tried, or in some circumstances, a strong *prima facie* case;

b. The Plaintiff must establish irreparable harm, in other words, that damages would be an inadequate remedy if the Plaintiff succeeds; and

c. The Court must consider the balance of convenience, in other words, must consider which party will suffer the greater harm from the granting or refusing of the injunction.

13 In this case, requesting a *Mareva* Injunction, the Plaintiff is required to demonstrate more than a serious question to be tried. The Plaintiff must demonstrate a strong *prima facie* case. See: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.).

14 It is the view of this court that the Plaintiff has met the threshold for the *Mareva* Injunction that they seek. As for the strength of the case:

a. The documentary evidence shows numerous and sometimes very large cheques written to and deposited by Tami Kone. When some of these cheques are compared to the company accounting records, the entries, inaccurately, suggest that these payments went to others, demonstrating deceit.

b. When asked to repay the amount from the two cheques that were initially discovered, Ms. Kone delayed the repayment, made excuses for the delay, did not pay the promised amount, and made excuses for the shortfall.

c. Ms. Kone admitted that the deposits were made to her account.

d. On July 14, 2020, Ms. Kone made some inculpatory statements about her behaviour.

15 As for the harm that will result if the relief is not granted, the court has considered the following:

a. If the claim is true, Ms. Kone has shown an ability to conceal and mislead her employer over a prolonged period of time. She may apply the same ingenuity to conceal or dispose of these improperly obtained funds.

b. If assets are disposed of or bank accounts are hidden, there would appear to be no other way for the Plaintiff to recoup their losses.

16 As for the balance of convenience, this court must determine which of the parties will suffer greater harm. On the one hand, the Defendants will have most, if not all, of their assets tied up. Having said that, however, the Defendants will have the ability to request funds for certain uses. On the other hand, if the assets are disposed of, the Plaintiff may have permanently lost any ability to regain what they have lost through completely dishonest means by a trusted employee. It must also be noted that the Plaintiff has provided an undertaking as to damages if any are incurred by the Defendant.

17 In addition to the above, in the case of a *Mareva* injunction, the Plaintiff must meet the *Chitel* test. See *Chitel v. Rothbart*, 1982 CarswellOnt 508 (Ont. C.A.) . The Plaintiff must make full and frank disclosure of all material matters, as well as give particulars of the claim. This court has no reason to believe that the Plaintiff has misstated the factual basis for the claim. The claims have been substantially backed up by documentary evidence. Clarifications were also made during oral submissions.

18 The Plaintiff must also show the existence of assets and a genuine risk of dissipation or removal of assets:*SFC Litigation Trust (Trustee of) v. Chan*, [2017] O.J. No. 1540 (Ont. Div. Ct.). The granting of a *Mareva* Injunction is more readily justified where the Plaintiff's right is specifically related to the asset in question.

19 The documentary evidence supports that cheques from the company were deposited into the accounts of the Defendants. The documentary evidence supports that in recent times the Defendants were able to make large purchases with cash and bank drafts. The documentary evidence also supports that there was an attempt to conceal the fact that these cheques were written to Ms. Kone as inaccurate information was written the company's records. Ms. Kone has shown a willingness to deceive and mislead, leading to a risk that the assets may be hidden or concealed in an attempt to defeat the Plaintiff's claim. The Defendant has delayed and made excuses in making the repayment that was made. As stated in *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.) para 63 "It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff". There is strong evidence that Ms. Kone misled and concealed her removal of money from this company for more than a year and a half. It would appear that she was able to dissipate the assets from this company quite successfully.

20 In all of the circumstances, the Plaintiff has fully established the basis for a *Mareva* Injunction in this case.

21 In addition to the *Mareva* Injunction, this court has inherent jurisdiction to make an ancillary order that is necessary to give effect to a *Mareva* injunction and may grant any other ancillary order that is appropriate in the circumstances. The Plaintiff requests that this court make some ancillary orders, including

a. Ordering that the Plaintiff may register purchase money security interest (PMSI) liens against the defendants and the "moveable" assets (as set out in Schedule 1) under the PPSA; and

b. Ordering that the Plaintiff may retain possession of Ms. Kone's laptop and take an image of the data on the hard drive.

22 It is the view of this court that this further relief should not be granted on this *ex parte* motion. Other than the Court's inherent jurisdiction, there would appear to be no authority, or at least none provided, to support a PMSI lien in this case. I would also note that the evidence suggests that it is quite possible that Ms. Kone obtained her vehicle by using her inheritance. With respect to the personal laptop computer, there is no evidence that there is anything on this computer related to the claims made. At this point, that would simply be speculation. Further, allowing the Plaintiff's to retain the laptop, copy the laptop, and, perhaps to share that information with the police, could raise serious privacy concerns and *Charter* concerns. It is the view of this court that it would be inappropriate for the Court to use its inherent jurisdiction to make such an order on this *ex parte* motion.

23 For all of the foregoing reasons, and having considered the totality of the circumstances, there will be an Order as follows:

Mareva Injunction

1. THIS COURT ORDERS that the defendants, and their servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, and any and all persons with notice of this injunction, are restrained from directly or indirectly, by any means whatsoever:

a. selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of the defendants, wherever situate, including but not limited to the assets and accounts listed in Schedule "A" hereto;

b. instructing, requesting, counselling, demanding, or encouraging any other person to do so; and

c. facilitating, assisting in, aiding, abetting, or participating in any acts the effect of which is to do so.

2. THIS COURT ORDERS that paragraph 1 applies to all of the defendants' assets whether or not they are in their own names and whether they are solely or jointly owned. For the purpose of this order, the defendants' assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The defendants are to be regarded as having such power if a third party holds or controls the assets in accordance with her direct or indirect instructions.

Ordinary Living Expenses

3. THIS COURT ORDERS that the defendants may apply for an order, on at least twenty-four (24) hours notice to the plaintiff, specifying the amount of funds which the defendants are entitled to spend on ordinary living expenses and legal advice and representation.

Disclosure of Information

4. THIS COURT ORDERS that the defendants prepare and provide to the plaintiff within seven (7) days of the date of service of this order, a sworn statement describing the nature, value, and location of their assets worldwide, whether in their own names or not and whether solely or jointly owned.

5. THIS COURT ORDERS that the defendants submit to examinations under oath within seven (7) days of the delivery by the defendants of the aforementioned sworn statements.

6. THIS COURT ORDERS that if the provision of any of this information is likely to incriminate the defendant, they may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information.

Wrongful refusal to provide the information referred to in paragraph 8 herein is contempt of court and may render the defendants liable to be imprisoned, fined, or have their assets seized.

Third Parties

7. THIS COURT ORDERS that the Bank of Nova Scotia and the Canadian Imperial Bank of Commerce (Laurentian Bank of Canada) (the "Banks") to forthwith freeze and prevent any removal or transfer of monies or assets of the defendants held in any account or on credit on behalf of the defendants, with the Banks, until further Order of the Court, including but not limited to the accounts listed in Schedule "A" hereto.

8. THIS COURT ORDERS that the Banks forthwith disclose and deliver up to the Plaintiff any and all records held by the Banks concerning the defendants' assets and accounts, including the existence, nature, value and location of any monies or assets or credit, wherever situate, held on behalf of the defendants by the Banks.

Alternative Payment of Security into Court

9. THIS COURT ORDERS that this order will cease to have effect if the defendants provide security by paying the sum of $300,000 into Court, and the Accountant of the Superior Court of Justice is hereby directed to accept such payment.

Variation, Discharge or Extension of Order

10. THIS COURT ORDERS that anyone served with or notified of this order may apply to the court at any time to vary or discharge this order, on providing four (4) day's notice to the plaintiff.

11. THIS COURT ORDERS that the hearing to extend this order be heard by the court on July 24, 2020 at 9:30 am, or such other suitable date and time to be arranged by the parties, and which shall take place by teleconference or Zoom, as the parties request. The parties must confirm and coordinate this extension hearing with the court office. If the Plaintiff does not apply for an extension of this Order within ten (10) days hereof, this Order will terminate.

12. THIS COURT ORDERS that the costs of this motion be reserved to be determined by the court at a later date.

Motion granted.

End of Document

TAB 4

2014 ONSC 701
Ontario Superior Court of Justice

Rana v. Malik

2014 CarswellOnt 1173, 2014 ONSC 701, 238 A.C.W.S. (3d) 207

Muhammad Ayub Rana and Khurshid Anwar Dost, Plaintiffs and Bashir Ahmed Malik, Fehmida Malik also known as Fahmeeda Malik, Ruby Malik, and Ravi Investment Corporation, Defendants

Nightingale J.

Heard: January 17, 2014
Judgment: January 31, 2014
Docket: CV-13-322

Counsel: P. Amey, for Plaintiffs
D.G. Bent, for Defendants, Bashir Malik, Fehmida Malik, and Ruby Malik

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts; Evidence; Torts

Related Abridgment Classifications

Financial institutions
IX Banking records
IX.3 Disclosure of records by bank
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.c Miscellaneous
Remedies
II Injunctions
II.5 Anton Piller orders
II.5.c Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Miscellaneous

Setting aside — Plaintiff R and defendant BM were shareholders in defendant R Corp. — Defendant FM and RM were BM's wife and daughter — R purchased half-interest in business inherited by FM — Plaintiff D became part owner of this business and R made further investment — D had given $185,000 to RM for business but RM misappropriated these funds — R Corp. sold commercial property and became mortgagee — BM allegedly never provided financial information relating to R Corp. or business — Plaintiffs commenced action against defendants for accounting and damages — Plaintiffs successfully brought ex parte motion for, inter alia, Mareva injunction restraining defendants from dealing with any of their assets — Individual defendants brought motion for order setting aside Mareva injunction — Motion dismissed on terms — Individual defendants were allowed to withdraw specified amounts for specified purposes but Mareva injunction was otherwise upheld — Plaintiffs established strong prima facie case of entitlement to accounting — BM had clearly thwarted plaintiffs' attempts to obtain financial information — Plaintiffs established strong prima facie case of fraudulent conversion and lengths to which RM and BM would go to hide their dishonesty — Plaintiffs had not failed to disclose material information at ex parte hearing — Fact that misappropriated amount was only $185,000 did not justify limiting scope of Mareva injunction — Extent of dishonesty was very significant and there was real risk of dissipation.

Remedies --- Injunctions — Availability of injunctions — Anton Piller orders — Miscellaneous

Setting aside — Plaintiff R and defendant BM were shareholders in defendant R Corp. — Defendant FM and RM were BM's wife and daughter — R purchased half-interest in business inherited by FM — Plaintiff D became part owner of this business and R made further investment — D had given $185,000 to RM for business but RM misappropriated these funds — R Corp. sold commercial property and became mortgagee — BM allegedly never provided financial information relating to R Corp. or business — Plaintiffs commenced action against defendants for accounting and damages — Plaintiffs successfully brought ex parte motion for, inter alia, Anton Piller order allowing plaintiffs to seize evidence from defendants' premises — Individual defendants brought motion for order setting aside Anton Piller order — Motion dismissed on terms — Part of order granting plaintiffs same degree of access to seized documents as defendants was temporarily suspended but Anton Piller order was otherwise upheld — Plaintiffs established strong prima facie case of entitlement to accounting — BM had clearly thwarted plaintiffs' attempts to obtain financial information — Plaintiffs established strong prima facie case of fraudulent conversion and lengths to which RM and BM would go to hide their dishonesty — RM and BM had been involved in destruction of relevant documents and creation of false documents relating to funds provided by D — RM and BM had also provided false affidavit evidence on this issue — Plaintiffs had not failed to disclose material information at ex parte hearing — Defendants failed to establish any improprieties in manner search was conducted.

Financial institutions --- Banking records — Disclosure of records by bank

Norwich order — Setting aside — Plaintiff R and defendant BM were shareholders in defendant R Corp. — Defendant FM and RM were BM's wife and daughter — R purchased half-interest in business inherited by FM — Plaintiff D became part owner of this business and R made further investment — D had given $185,000 to RM for business but RM misappropriated these funds — R Corp. sold commercial property and became mortgagee — BM allegedly never provided financial information relating to R Corp. or business — Plaintiffs commenced action against defendants for accounting and damages — Plaintiffs successfully brought ex parte motion for, inter alia, Norwich order requiring defendants' financial institutions to produce financial information — Individual defendants brought motion for order setting aside Norwich order — Motion dismissed on terms — Norwich order was temporarily suspended pending discoveries — Plaintiffs established bona fide claim against defendants — Plaintiffs had indirect relationship with financial institutions since that was where plaintiffs' money went — Financial institutions had been sole practicable source of information available in light of BM's refusal to provide financial information — Defendants could be indemnified for cost of disclosure — Public interest at present time favoured allowing discoveries to proceed in normal course.

Table of Authorities

Cases considered by *Nightingale J.*:

Adobe Systems Inc. v. KLJ Computer Solutions Inc. (1999), 166 F.T.R. 184, 1999 CarswellNat 2490, 1999 CarswellNat 732, [1999] 3 F.C. 621, 1 C.P.R. (4th) 177 (Fed. T.D.) — referred to

Bell Expressvu Ltd. Partnership v. Morgan (2008), 2008 CarswellOnt 1898, 65 C.P.R. (4th) 316, 58 C.P.C. (6th) 324 (Ont. S.C.J.) — considered

Celanese Canada Inc. v. Murray Demolition Corp. (2006), 215 O.A.C. 266, 2006 CarswellOnt 4623, 2006 CarswellOnt 4624, 2006 SCC 36, 50 C.P.R. (4th) 241, 269 D.L.R. (4th) 193, 30 C.P.C. (6th) 193, 352 N.R. 1, [2006] 2 S.C.R. 189 (S.C.C.) — followed

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — followed

Glaxo Wellcome plc v. Minister of National Revenue (1998), 162 D.L.R. (4th) 433, 1998 CarswellNat 2801, 1998 CarswellNat 1388, 147 F.T.R. 309 (note), 20 C.P.C. (4th) 243, 81 C.P.R. (3d) 372, 228 N.R. 164, 7 Admin. L.R. (3d) 147, [1998] 4 F.C. 439 (Fed. C.A.) — followed

Pulse Microsystems Ltd. v. SafeSoft Systems Inc. (1996), [1996] 6 W.W.R. 1, 47 C.P.C. (3d) 360, 134 D.L.R. (4th) 701, 67 C.P.R. (3d) 202, 110 Man. R. (2d) 163, 118 W.A.C. 163, 1996 CarswellMan 214 (Man. C.A.) — referred to

MOTION by defendants for order setting aside Anton Piller order, Mareva injunction and Norwich order.

***Nightingale J.*:**

1 The personal defendants bring this motion to set aside the order of Mr. Justice Turnbull dated October 17, 2003. That order obtained by the plaintiffs without notice to the defendants granted a Mareva Injunction to the plaintiffs essentially restraining the defendants from dissipating or dealing with any of their assets wherever situated in the world including without limitation,

bank accounts which may have received investment funds provided by the plaintiffs related to a Rice Mill business in Pakistan or to Ravi Investment Corporation.

2 In this action, the plaintiffs claim damages and an accounting regarding those investments totalling over $2.7 million and over $1 million respectively and for fraudulent conversion of $185,000 by the defendants.

3 Turnbull J.'s order also included an Anton Pillar order requiring the defendants to permit the plaintiffs' representatives to enter the house of the defendants and remove into the custody of the Independent Supervising Solicitor (ISS) any documents, computers, electronic media etc. listed specifically in a schedule which the plaintiffs' lawyers believed to be evidence.

4 Lastly, Turnbull J.'s order also included a Norwich order essentially requiring specified financial institutions to disclose and deliver up to the plaintiffs all records held by them with respect to the assets and accounts of the defendants and including the account of the Rice Mill business in Pakistan.

5 The search of the defendants' house was completed by the plaintiffs in the presence of their ISS on October 21, 2013. The parties agreed on consent to a continuation of the order of Turnbull J. with certain amendments on October 25, 2013. The motion came up again on December 2, 2013 but because of late delivery of very significant and relevant information described below, it was adjourned for hearing to January 17, 2014 again with some consent terms reached to amend the original order.

6 The defendant's position was that the order of Turnbull J. should be rescinded in its entirety and that the plaintiffs' motion to continue all three types of orders therein should also be dismissed. They allege the plaintiffs failed to make full and frank disclosure, did not establish the required strength of their case including a real risk of dissipation or removing of assets from Ontario or a real possibility the defendants will destroy evidence, among other reasons.

7 The plaintiffs' position is that all three types of orders granted by Turnbull J. were properly obtained and the Anton Pillar order properly executed and should not be set aside.

8 The ISS has obtained copies of the documents seized from the defendants' premises and returned the original documents to the defendants. The plaintiffs have not yet received copies of those documents from the ISS and as indicated herein, no doubt some of them have significant relevance to this lawsuit. The plaintiffs are very concerned for reasons indicated below about potential destruction of these documents and evidence as there is significant evidence of a substantial fraudulent conversion committed by the defendants including the admitted destruction of very relevant documents and the reasonable possibility that that will continue in the future.

9 With respect to the Norwich order, the plaintiffs' position is that although a few of the banks which received notice of Turnbull J.'s order complied with it, others did not or alternatively were told not to once it was realized that the Anton Pillar order search obtained of the defendants' premises on October 21, 2013 likely has provided some of the defendants' banking documentation.

10 Accordingly, plaintiffs' counsel is not asking for an order that the banks immediately comply with Turnbull J.'s Norwich order until such time as they have the opportunity to review the actual banking and financing documents seized from the defendants' house. It may be that significant banking records that were seized from those premises, the existence of which the plaintiff had no prior knowledge, can dispense with the necessity of the banks having to comply with the Norwich order.

11 Accordingly, their request is to essentially suspend that portion of the original order leaving it open to the plaintiffs to renew their motion for compliance if it is still necessary depending on what documentation is actually provided from the seizure conducted of the defendants' residence.

Analysis

12 The parties agree that I am hearing the plaintiffs' motion to extend and the defendants' motion to rescind the order of Turnbull J. on a de novo basis as to the law and facts involved. I am entitled to consider any additional evidence properly introduced by the plaintiffs to support the original order as the issue is whether on all the evidence and argument adduced by

the parties, the original order is appropriate. *Pulse Microsystems Ltd. v. SafeSoft Systems Inc.*, 1996 CarswellMan 214 (Man. C.A.); *Adobe Systems Inc. v. KLJ Computer Solutions Inc.*, 1999 CarswellNat 732 (Fed. T.D.).

13 The facts presented to Turnbull J. resulting in his order are summarized as follows:

Ravi Investments- Guelph Plaza

14 The plaintiff Muhammad Rana (Rana) and defendant Bashir Malik (Bashir) in 2005 incorporated the defendant Ravi Investment Corporation (Ravi) as equal shareholders to purchase a commercial plaza in Guelph for $1,100,000. Bashir did all the banking and accounting transactions as he was an accountant and had sole signing authority on Ravi's bank account. Rana stated in the original affidavit that Bashir failed to provide Rana with any Ravi financial statements prepared by Bashir. Bashir denies that in his present affidavit but produced no supporting documents.

15 The plaza sold in February 2013 for $1,425,000 including a vendor take back mortgage of $1,068,000. Ravi didn't have the funds to close the sale and obtained a mortgage for $163,000 to do so by way of monies advanced from a corporation owned by Bashir's adult children, all unknown to Rana. Bashir has retained all monies received by Ravi by way of mortgage payments from the new owner and has refused to disclose to Rana any financial information concerning Ravi's operations except for a $40,000 short-term loan from Ravi Bashir provided to Rana in September 2011.

16 Bashir states that he did provide a 2006 financial statement to Rana for Ravi but Rana continued to deny on cross examination that he received those financial statements since he trusted his friend Bashir.

17 Rana seeks and is obviously entitled to an accounting of this Ravi investment. There was no significant nondisclosure to Turnbull J. initially of all relevant facts in support of the plaintiff's position and in outlining the defendants' position with respect to that investment.

Pakistan Rice Mill Business

18 The main issue between the parties pertains to the significant investment of the plaintiffs in a rice mill business in Pakistan in 2008.

19 The original affidavit evidence of the plaintiffs provided to Turnbull J. was that Rana at Bashir's request in 2008 agreed to become a partner with Bashir's wife Fehmida in a rice mill in Pakistan that Fehmida had inherited. He paid $120,000 making him a 50% partner with Fehmida.

20 Rana initially swore he never received a copy of the deed as proof that one half title of the property was ever transferred to him. Bashir has contradicted that evidence and produced a deed purportedly registered on November 17, 2008 which he said he gave to Rana when he visited Bashir on February 20th 2009. Rana disputes he ever received a copy of the deed at that time saying Bashir only waived a paper at him.

a) Rana /Dost $185,000 Investment

21 In 2011, the plaintiff Dost was asked by Bashir to become an investor/partner in the rice mill and invested on behalf of himself and Rana a further $1 million. That was not disputed by the defendants who agreed that Bashir's duties were to provide accounting services in Canada for the Pakistan rice mill business based on the financial records provided to him by the local bookkeeper from the mill premises. He was also to keep Rana apprised daily of the mill activities regarding rice purchases, sales, expenses and any related activity.

22 The Plaintiffs' original affidavits confirmed that of this $1 million investment, $185,000 was paid by him directly at Bashir's request in late 2011 to the defendant Ruby Malik, Bashir's adult daughter. These funds were to be forwarded by her to the rice mill bank account in Pakistan. The plaintiffs' evidence was that Dost requested proof that Ruby Malik had in fact forwarded these funds as he had not received confirming bank slips of this investment although he had for the balance of his $1 million investment. No such proof was forthcoming prior to this lawsuit and he believed that Ruby and Bashir had misappropriated

this $185,000. Their affidavit originally before Turnbull J. confirmed that the plaintiffs believed they were defrauded of this $185,000 which was likely very relevant and significant evidence that Turnbull J. relied on in granting his entire order.

23 What is most significant for this motion before me is that the evidence now establishes even more clearly that that is indeed what happened.

24 Ruby Malik swore in her affidavit of November 14, 2013 that she owned and operated a foreign exchange business known as K-2 Foreign Exchange Inc. (K2) in Toronto from 1995 to 2011 when she alleges she shut it down because of difficulty competing with other businesses. She said that business transferred money from customers in Canada to other places including Pakistan. K-2 had an agency relationship with Noble Exchange International (Noble) in Pakistan and K-2's profits were based on the exchange rate between the currencies of Canadian dollars and Pakistani rupees.

25 Her affidavit confirmed that she did receive three postdated cheques from Dost payable to her totaling $185,000 as he said and that Rana requested that these funds be transferred to the rice mill in Pakistan to buy rice. She swore that she arranged that transfer through Noble and the monies were actually delivered to the rice mill as evidenced by the signed receipts on Noble letterhead that were attached as an exhibit to her father's affidavit.

26 She denied the plaintiffs' allegation that she misappropriated these funds by stating that neither she nor any family member received the funds delivered to her.

27 Bashir Malik then swore an affidavit the following day November 15, 2013 which appears to somewhat contradict his daughter's affidavit. He said, without any source of his belief including Ruby Malik, that after depositing the funds into her account, Ruby then instructed K-2's transfer agent in Pakistan Noble to make the payment to the rice mill out of the "accumulated credit" K-2 had with Noble. He then attached to his affidavit three documents on Noble letterhead signed by the bookkeeper of the rice mill Mustaq Malik acknowledging to Noble the receipt of three payments totalling $185,000 dated November 23, 26 and December 2, 2011.

28 Bashir said the plaintiffs were fully aware of that which was emphatically denied by both of them.

29 In fact, when Ruby Malik was cross-examined on her affidavit, she admitted that the plaintiffs' three cheques of $185,000 were in fact placed by her into her own personal investment account for herself and her adult siblings. She never told Rana that. The money never left Canada.

30 In cross-examination, despite her earlier affidavit, she now suggested that Noble owed K-2 an unknown amount of money but at least $185,000. She said Noble in fact took its own money and paid the rice mill. She did not say that in her initial affidavit and in fact had stated the money she received from Dost of $185,000 was delivered through Noble to the rice mill.

31 Incredibly, she then said she destroyed all of the records of K-2 in December 2011 and the company went out of business which simply defies logic. She provided no documents or explanation as to why Noble owed K-2 anything let alone over $185,000. The flow of money was always from K-2 to Noble and it is hard to understand how Noble could owe any substantial amount of money to K-2 in the first place.

32 Although this evidence is bad enough to confirm her misappropriation of those funds at Bashir's direction, in cross-examination she made matters worse for herself. She admitted she was involved in getting the three "receipts" of those funds on the Noble letterhead attached to Bashir's affidavit as they needed to prove that the payments were made. She also said the signatures on them were those of Chaudry Ejaz who she knew as the owner of that company.

33 The plaintiff Dost, being concerned that these Noble receipt letters were forged and false, had copies forwarded to Mr. Ejaz in Pakistan. Shortly before the return of this motion on December 3, 2013, the plaintiffs provided a letter from Mr. Ejaz that made it very clear that the three Noble receipt letters provided by Bashir were bogus and fake and that Ejaz had no knowledge of any such payments allegedly made by his company to Mustaq Malik of the rice mill business. He had no record of those transactions and stated that the Noble letter pads used for these fraudulent receipts were stolen from his office. A

follow-up affidavit of Mr. Ejaz dated November 30, 2013 was provided to the court on Dec. 3, 2013 confirming that evidence. His signature on that affidavit is markedly different than his apparently forged signature on the three receipt letters on Noble letterhead tendered by the defendants.

34 I admitted that evidence as it was obviously very significant and adjourned the motion at the defendants' request so they could respond to or explain that very specific and clear evidence of forgery by way of delivering further affidavit evidence.

35 When the matter came back on January 17, 2014, the court was advised that the defendants were not going to provide any responding affidavit material to explain or contradict that Ejaz evidence.

36 In particular, what is most telling is that the defendant Bashir effectively runs the rice mill company in Pakistan and provides instructions and directions to his brother Mustaq Malik. Mustaq is obviously involved in the creation of the three apparently false Noble receipts.

37 Despite the obvious direct communication on a regular basis between Bashir Malik and Mustaq Malik, no responding affidavit was provided from Bashir Malik or Mustaq Malik even though Bashir has access to the financial records of the rice mill and could have likely produced the original ledgers confirming this "credit" transfer if it ever existed. The logical conclusion and inference are that that Bashir Malik and Ruby Malik fraudulently converted that $185,000 investment to their own personal use, swore false affidavits themselves for this motion and then had the manager at the Pakistan rice mill business create a false and forged set of documents to help them deny their actions during this proceeding.

38 This evidence in my view clearly establishes the plaintiffs' strong prima facie case of fraudulent conversion by the defendants and the lengths they will go to hide their dishonesty. It also indicates clearly their ability and willingness to create and/or alter documents to hide their dishonesty and destroy them if necessary for that purpose just as Ruby Malik swore that she did when there was no legitimate reason for doing so.

39 The defendants' submission and argument essentially was that even if this was a cover up of $185,000 fraudulently converted plaintiffs' funds, that should not mean that the plaintiffs should be entitled to a Mareva Injunction against all of the defendants' assets worldwide and that the plaintiffs and the court should be satisfied at worst with an injunction against only some of the defendants' assets here in Ontario.

40 I disagree with the defendants' position for the following reasons.

41 Can there be any clearer evidence of a false affidavit than paragraph 8 of Ruby Malik's affidavit of November 14, 2013? In there, she swore that "contrary to the allegations by the plaintiffs, neither I nor any other family member kept or received the funds delivered to me as above." (i.e. the three post-dated cheques from Dost payable to her totaling $185,000 in November 2011).

42 The clear evidence of a creation of false and forged documents and destruction of financial records both pertain to the defendants' assets on a worldwide basis and not just those in Ontario. That evidence also relates to the obvious prior experience and ability of the defendants to transfer assets in and out of Ontario for any reason or at any time.

(b) Balance of Plaintiffs' Rice Mill Investment

43 The evidence before Turnbull J. which was subsequently undisputed, was that the plaintiffs' had invested (including the initial $120,000 investment by Rana and the $1.1 million investment by Dost in November 2011 both described above) the total sum of $2.7 million in the rice mill from August 2008 to February 2013 as a capital investment and not as a loan.

44 The evidence is also not disputed by the defendants that after 2008 when the Fehmida inherited the rice mill land, building and equipment, she made no further investment.

45 The original evidence provided and eventually not disputed was that the interests of the investors in the rice mill were to be allocated based on their actual contributions. Rana and Dost accordingly became the majority partners in that business because of their $2.7 million contribution.

46 The plaintiffs made it clear in their affidavit material before Turnbull J. that they were asking for an accounting of their investment in the rice mill partnership. They indicated that the defendant Bashir received all of the banking records and daily sales records from the Pakistan business and prepared the statements. Bashir admits that.

47 The plaintiffs however stated they did not receive the financial statements of the business for the year-end dates of August 31, 2012 or 2013. The year-end statement for August 31, 2011 was the last one produced by Bashir to the plaintiff Rana sometime between May and December 2012.

48 The plaintiffs' affidavits stated that in the spring of 2013 they made repeated requests of Bashir for financial information and banking documents concerning the rice mill. Bashir has not provided any financial statements for the year-ends of the business of August 2012 and 2013 or any of the records that would be used to create those financial statements although he admits having access to them. The evidence was that in May 2013 Bashir stated in a letter to Rana that the rice mill was now generating a huge profit but he did not provide any particulars.

Dost Pakistan trip May 2013

49 The plaintiffs 'evidence disclosed that in late May 2013. Dost spoke to Bashir to advise he would be visiting Pakistan and the rice mill. He told Bashir he wanted to review the rice mill's financial documentation. Bashir then provided him with Mustaq Malik's Pakistan telephone number and said that there would be no problem with his reviewing such financial documentation. Again, Mustaq is Bashir's brother.

50 At the mill in Pakistan, Dost asked Mustaq, the general manager/ CEO of the rice mill, to see the bank statements. Mustaq told him that he had faxed them all to Bashir and then when asked for copies, now said he had purolated those documents to Bashir.

51 Dost then suggested that he and Mustaq go to the bank to review the documents but was told, as indicated in paragraph 44 of his affidavit, that Mustaq had received a fax from Bashir the previous Saturday (one day after Dost had informed Bashir of his plans to attend at the mill) in which Bashir instructed Mustaq not to give any bank statements business records to Dost. Dost was told that Bashir said that "Dost is nobody, he is not a partner, he is just an investor" to justify denying him any financial disclosure. Dost was denied access to those rice mill records while there based on the express instructions of Bashir.

52 Bashir in his responding affidavit simply stated that he was unaware of Dost's visit before he arrived and that he knows nothing of the alleged discussions of Dost with the rice mill's manager. He baldly denies the allegations in paragraphs 45, 46, 47 and 49 of the plaintiffs' affidavit which included a denial of Dost's evidence that he was only able to briefly see the ledger book of the rice mill before it was snatched it away from him by Mustaq who said he was not allowed to show this to him.

53 What is most significant is that Mr. Bashir did not refer to or deny the contents of paragraph 44 of the Dost affidavit described above. That failure to deny that affidavit evidence, explain it or provide any contrary evidence from Mustaq denying it, although likely readily available to Bashir because of his regular contact with him, logically leads to the conclusion that Bashir had in fact agreed and told Dost that he could look at all the rice mill financial information in Pakistan but then refused to do so and instructed his employees by fax not to permit it.

June 21, 2013 Meeting- transfer of rice mill funds

54 The plaintiffs' evidence also disclosed on June 21, 2013, Rana and Dost met with Bashir in Richmond Hill. This was a civil meeting during which the plaintiffs informed Bashir that they were uncomfortable with his lack of financial disclosure. As a result, Bashir agreed to provide disclosure of the financial records of the business. He stated that there was a huge profit made

on the 2011 crop that was not sold until March 2013. Bashir then agreed to transfer 70 million rupees (approximately $700,000) from the rice mill joint account Bashir signed with Mustaq to Dost's joint account.

55 On June 25, 2013 Bashir however provided a letter to Rana to sign which instructed the rice mill to transfer all of its profits for 2013 which were stated to be 50 million rupees, not the 70 million rupees he had earlier agreed to. Rana crossed out "all" and substituted the words "part of the profit" as Bashir had said that the rice mill made 70 million rupees in profit from the November 2011 crop.

56 The evidence before Turnbull J. was that Bashir did not make any such transfer of funds and now told Rana he would not transfer the money. Bashir has not made any transfer of any of the funds since and thereafter blocked the plaintiffs' telephone and fax numbers and refused to respond to any of their letters.

57 The plaintiffs' lawyers wrote to Bashir to attempt to obtain a proper accounting of the rice mill operations including production of the banking documents.

58 Bashir, despite the admitted facts, responded through his lawyer in a letter that Bashir was an employee of the plaintiff and the plaintiff owed him over $600,000 in back pay, that he had no knowledge of the capital investments made by partners to the rice mill, he had no banking information related to the rice mill and suggested that further requests for disclosure be made to the rice mill directly, all of which was obviously false.

59 The defendants' response in his affidavit was to deny any agreement by him to transfer gross revenues from the rice mill bank account to the Dost bank account. He suggested that when he advised his Pakistani employees Mustaq and Naveed about this request, they told him it was not possible as there would be no money to operate the mill and that they would have to wait until the rice sales were conducted, financial statements prepared and net profit determined.

60 In response to these very specific paragraphs of the plaintiffs in their separate affidavits detailing the agreement by Bashir to transfer 70 million rupees into Dost's joint account, Bashir offered nothing in his affidavit other than a bald denial of paragraphs 53, 54, 55 and 56 of the Dost affidavit.

61 What is significant is that Bashir never tendered any affidavit evidence directly from bookkeeper and manager of the rice mill business in Pakistan to confirm that they had been asked by Bashir to transfer the money and that they said, as suggested by Bashir, that it couldn't be done because of business reasons.

62 To date, no financial records or banking records of the rice mill operation have been provided to the plaintiffs since 2011 notwithstanding their financial investments of over $2.7 million as majority shareholders. The evidence discloses that Bashir has control over the rice mill bank account opened in December 2008 in the joint names of himself and Mustaq Malik and has possession of all of the financial records of rice mill to the exclusion of the plaintiffs Rana and Dost.

Mareva Injunction

63 The Ontario Court of Appeal in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.) confirmed that Mareva Injunctions may be granted if the following criteria are met:

> i) The plaintiff must establish it has a strong prima facie case on the merits by making full and frank disclosure of all material facts within his knowledge including providing particulars of the claim against the defendant, the grounds of his claim and the amount and fairly stating the points made against him by the defendant.
>
> ii) The plaintiff should give some grounds for believing the defendants have assets here. As much precision as possible regarding those assets is required so that the injunction can be directed towards a specific asset.
>
> iii) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The material must persuade the court that the defendant is removing or there is a real risk that he is

about to remove his assets from the jurisdiction to avoid a judgment or that the defendant is otherwise disposing of his assets, out of the ordinary course of business, so as to render a future tracing impossible or remote.

iv) The plaintiff must satisfy the court that it will suffer irreparable harm if the relief is not granted.

v) The plaintiff must show in all circumstances that the balance of convenience favours the granting of the injunction pending trial of the issues between the parties.

vi) The plaintiff must give an undertaking as to damages.

Strong Prima Facie case

64 The plaintiffs' evidence before Turnbull J. which clearly established a strong prima facie case is even stronger now. The defendants Bashir and Ruby Malik together decided not to forward the plaintiffs' $185,000 rice mill investment to the Pakistani business but kept it themselves in the personal account of Ruby Malik for her and her children's benefit. They then initially attempted to say the money had been transferred to Pakistan when it had not and created false documentation through their employees in Pakistan to suggest a credit arrangement to deny their conversion of the funds. Lastly, Ruby Malik swore an affidavit saying she had destroyed the K2 records which makes no business or common sense. That evidence combined clearly shows the lengths the defendants will go to try and deflect the serious allegations against them.

65 The plaintiffs are clearly entitled to an accounting of their investments in both Ravi Investments and in the rice mill operation and are entitled to immediate production of the financial and banking records with which Bashir initially agreed to provide. Notwithstanding that initial agreement, the evidence suggests that he arranged to have his employees in Pakistan refuse Dost proper production of those documents and the logical inference is that he would not want the plaintiffs to see the true state of the financial affairs of the rice mill business.

66 Lastly, Bashir agreed to transfer significant funds as profits to the plaintiffs in June 2013 to which they were likely entitled and then refused to do so based on the alleged advice of his employee in Pakistan who was involved in the creation of false and forged documents.

67 The defendants' position is that the plaintiffs did not disclose to Turnbull J. their knowledge of the location of the business records at the mill or that they had other business interests in Pakistan which gave them ready access to professional advisors. They failed to make full and frank disclosure of that to Turnbull J. and the Mareva Injunction should be set aside.

68 I disagree. In fact as noted above, Dost specifically disclosed his visit to the mill in May 2013 to see the financial and banking records but was refused by the mill CEO on the instructions of Bashir. In addition, just because Rana and Dost had professional advisors in Pakistan on other matters, it does not follow that that would have granted them any entitlement to get access to the records that were being refused by the defendants.

Defendants' assets

69 The plaintiffs only have knowledge of the defendants' residence in Richmond Hill registered in the name of Fehmida Malik. They do not have the updated details of any bank accounts of the defendants personally or any updated banking records of Ravi Investments or the rice mill operation. The defendants have provided no disclosure of any financial records since the last statement of August 2011, any rice sales, purchase and inventory records, details of monies paid out to the employees and/or the defendants or how much funds, if any, are still in the accounts of the rice mill or in other accounts as directed by the defendants.

70 The defendants have made no effort in their affidavit material to disclose the whereabouts of the profits of the rice mill operation including to what extent they may have received any of those funds to which the defendants were entitled either before or after this litigation commenced.

71 The evidence disclosed that the plaintiffs have no knowledge of any other of the defendants assets or their exact location other than described above and in fact have been rebuffed in their attempts to obtain that information by the defendants as it relates to the assets and profits of the rice mill business in Pakistan.

72 In my view, given this evidence, it was appropriate for Turnbull J. to grant the Mareva Injunction with respect to all of the defendants' assets and not just those within the jurisdiction. It is also appropriate that the injunction be continued on those assets at this time subject to the defendants' option to have this matter reconsidered once they decide to make complete and accurate disclosure of their assets especially as they relate to the rice mill business and all funds generated therefrom to the plaintiffs.

73 The defendants state that the original order requiring the defendants to disclose details of all of their worldwide assets within seven days is too wide and not reasonable suggesting at worst the order should have been restricted to disclosure of the details of the bank records noted in schedule B.

74 I disagree as the claim specifically referred to fraudulent conversion of monies by the defendants of $185,000 and damages for breach of fiduciary duties of $3 million with respect to the rice mill business in Pakistan.

Real Risk of Dissipation of Assets

75 The evidence discloses that the defendants ordinarily reside in Ontario. However they have significant family and business connections in Pakistan. Bashir operates the joint account in Pakistan with Mustaq for the rice mill business. Bashir travels regularly to Pakistan and in the past, with the assistance perhaps of his daughter Ruby, has transferred significant monies including up to $2.7 million of the plaintiffs from his own bank accounts to Pakistan.

76 The $185,000 of the plaintiffs that he directed to be held by Ruby Malik personally for herself may still be in Ontario but a quick electronic transfer of those funds to Pakistan is certainly more than just a possibility if this court does not prevent that now.

77 Bashir obviously controls or has significant say in the release of monies from the rice mill business in Pakistan. The logical inference is that he could direct that money be paid to him, his family or be placed into others' accounts around the world simply by instructing his employees there to do so putting those assets beyond the plaintiffs' reach.

78 The actions of the defendants Bashir and Rudy of creating forged documents to hide or misrepresent their fraudulent conversion of the plaintiffs funds, their ability and experience to transfer investments quickly in and out of Canada, Bashir's refusal to transfer the approximately $700,000 to Dost when he had agreed to with no indication where those funds are now, and their destruction of the records of K2 in my view establishes the real risk of dissipation of assets by the defendants.

Irreparable Harm, Balance of Convenience and Undertaking

79 The defendants suggest that the plaintiffs have not established any irreparable harm requiring the granting of a Mareva Injunction.

80 The evidence discloses that the defendants have some assets in Ontario including a house registered in the sole name of Fehmida Malik. The plaintiffs would have significant difficulty recovering their $2.7 million investment in Pakistan if defendants were allowed to remove their assets from Ontario or be able to dispose of their worldwide assets. In my view, the evidence and actions of the defendants referred to in my reasons above have established that the risk of the defendants transferring their assets to place them beyond the reach of the plaintiffs is more than simply mere speculation. Bashir, not Fehmida, has been and is the one likely in control of the Rice Mill business, finances and bank accounts.

81 The same applies with respect to the balance of convenience. With respect to the defendants' assets, any inconvenience to the defendants can be discharged by the appropriate allocation of funds for the defendants' personal living expenses and the legal expenses to defend this litigation. The plaintiffs have already consented to in the past and are prepared to do on a continuing basis.

82 If and when the defendants provide proper disclosure of the financial and banking records of the Rice Mill operation, the location of the significant profits allegedly made from that business and proof that none of that improperly went into accounts for their personal benefit, it may be appropriate for either party to consider a further motion to revisit that issue at that time.

83 The plaintiffs both provided unqualified written undertakings to the court to abide by any subsequent orders of the court as to damages suffered by the defendants as a result of the granting of any injunctive order.

84 I am satisfied that they appear to have the financial ability to honour that undertaking and the defendants took no position otherwise on this motion.

85 The parties agreed on consent to vary Turnbull J's order by order granted on October 25, 2013 allowing the defendants to withdraw $15,000 for ordinary living expenses and a further $20,000 for legal expenses from Ruby Malik's bank account at BMO.

86 The order was subsequently amended as well on December 3, 2013 allowing for a payment of an additional $12,000 for ordinary living expenses and $35,000 for legal expenses from the same account.

87 The plaintiffs concede the defendants should be entitled to withdraw $5000 per month for continued living expenses from that account commencing January 14, 2014 which appears to be a reasonable figure and is so ordered. The defendants did not disclose any details of their actual income they have including the source but there was some evidence that suggested that Bashir earns $50,000-$60,000 per year and Ruby earns in the area of $40,000 per year.

88 The parties agree that I order accordingly that the defendants are allowed a further withdrawal of $100,000 for their legal expenses to be paid out in equal quarterly instalments of $25,000 over the next year commencing January 14, 2014.

Anton Pillar Order

89 In order to obtain an Anton Pillar order, the plaintiff must satisfy the following four essential conditions:

i) the plaintiff must demonstrate a strong prima facie case;

ii) the damage to the plaintiff by the defendant's alleged misconduct must be very serious;

iii) there must be convincing evidence that the defendant has in its possession incriminating documents or things;

iv) there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

Celanese Canada Inc. v. Murray Demolition Corp., 2006 SCC 36 (S.C.C.) .

90 Anton Pillar orders should not be set aside absent exceptional circumstances such as material nondisclosure or scandalous or abusive behavior.

Bell Expressvu Ltd. Partnership v. Morgan, 2008 CarswellOnt 1898 (Ont. S.C.J.)

91 The evidence described above in reference to the Mareva Injunction applies similarly to the Anton Pillar motion. The plaintiff has established a strong prima facie case.

92 The defendants' misconduct caused very serious damage to the plaintiffs given their misappropriation of the plaintiffs' $185,000 and potentially much more significantly the balance of their $2.7 million investment in the Pakistan rice mill. The defendants' refusal to provide disclosure of all relevant financial and banking documents for the rice mill could result in the plaintiffs' inability to prove its case either on liability or damages.

93 The initial evidence before Turnbull J was that Bashir could have the financial and banking records of the rice mill operation and that the banking records of the personal defendants and Ravi Investments could likely be at the Defendants' house.

94 The search conducted of the premises confirm that some of those documents were in fact located in the house owned by Fehmida Malick and from which Bashir carried out his accounting practice. There is evidence that the defendants and ISS have some of the relevant banking and financial records which satisfies this third condition. The plaintiffs have only received a cursory list from the ISS as to what was seized and is in their possession including some banking records of rice mill.

95 The plaintiffs have also established the real possibility that the defendants may destroy these documents. They have destroyed K-2 documents in the past under their admission when there was no business purpose for doing so and which documents would likely have been crucial evidence regarding the plaintiffs' $185,000 converted by the defendants.

96 Moreover, as indicated above, the defendants' attempt to deceive the plaintiffs and this court by creating forged and false documents only confirms a pattern of dishonesty and deception. The logical inference is that there is a substantial risk that the defendants will destroy the evidence sought by the plaintiffs.

97 Lastly, the evidence of Heather Alexander who was present during the search confirmed that Ruby Malik attempted to mislead her by suggesting there was only one laptop and one desktop computer in the residence whereas the search eventually resulted in locating eight.

98 The plaintiffs retained Ross & McBride to act as ISS for the execution of the Anton Pillar order. The plaintiffs, as indicated above, provided the required undertaking with respect to the defendants' damages because of the injunctive order.

99 I disagree with the defendants that the plaintiffs breached the search terms of the Anton Pillar order justifying a setting aside of the order.

100 The order expressly permitted two representatives of the plaintiffs to attend on the search in addition to their lawyers and computer experts. The order did not prohibit Rana and Dost attending on the search. The ISS supervised the search and did not have an issue with that. The evidence discloses that when they attended, their actual involvement in the search was minimal at best and when the defendants objected to their being there, they immediately stopped and left. There is no evidence that Rana or Dost or their lawyers reviewed at any length any documents seized.

101 The defendants allege that their daughter Nadia who came on-site that morning after the search commenced was wrongfully prevented from leaving. Firstly, there is no suggestion she was physically detained and there is no affidavit from her to that effect. I am satisfied from the plaintiffs' affidavit material that she was simply asked to listen to the explanation of the ISS for approximately one hour regarding the purpose of the search but she was never detained.

102 The defendant objected to the search starting at 8:30 AM and finishing at 6:30 PM. The times used were reasonable in the circumstances and there is no merit to that position.

103 The defendants also objected to the fact that the entire house was searched rather than simply two offices in the house. Again, the purpose of the search was to locate incriminating relevant evidence that might otherwise be destroyed and no one knew exactly where that would be.

104 The seized computers were immediately returned to the defendants after being copied. The defendants objected to $8865 in cash being taken. In fact, the plaintiffs immediately consented at the scene to $250 being used to pay a trade worker and the balance of the funds were returned in their entirety to the defendants four days later.

105 There is no basis for the defendant's position that the search was improperly conducted or that there was abusive or malicious behavior on the part of the plaintiffs or their representatives.

106 Turnbull J.'s order required the ISS to retain custody of the evidence with the defendants and their lawyers to be provided with reasonable access to that evidence for the purpose of examining and make copies of it. The defendants apparently have already taken advantage of that proviso.

107 Turnbull J.'s order paragraph 23 separately provides the plaintiffs and their lawyers to have the same type of access to those documents.

108 Any concern the defendants may have with respect to the plaintiffs' ability to gain access to totally irrelevant evidence obtained on the execution of the Anton Pillar order can be addressed by my temporarily suspending paragraph 23 of Turnbull J.'s order and requiring the defendants to deliver their statement of defence, affidavit of documents and copies of all Schedule A documents by February 28, 2014 which I hereby order. That would give defense counsel ample opportunity to review all of that evidence and documentation that was seized and is now back in his possession and include all relevant documents in his affidavit of documents. He could then also provide a reasonable explanation why the documents seized but not included in his schedule A documents are not relevant.

109 The plaintiffs could then determine their course of action including a motion to remove the suspension of paragraph 23 of this order and/or require the defendants to deliver a further and better affidavit of documents with the court having the opportunity if necessary to review and inspect the withheld documents at that time.

Norwich Order

110 Turnbull J.'s order required the financial institutions listed in schedule B to disclose and deliver up within five days any and all records held by those institutions concerning the assets and accounts of the defendants but also included for Mustaq Malik, the Pakistan rice mill and Ravi Investments including the statements from 2008 to the present.

111 The Ontario Court of Appeal decision of *Glaxo Wellcome plc v. Minister of National Revenue*, [1998] 4 F.C. 439 (Fed. C.A.) established the threshold requirements of a Norwich order as follows:

a) the plaintiff must have a bona fide claim against the wrongdoers. The evidence above establishes that to my satisfaction.

b) the plaintiff must share some sort of relationship with the third parties. In this case, substantial investment monies of Rana and Dost of approximately $2.5 million were clearly paid to the bank accounts of Bashir and an additional $185,000 into the bank account of Ruby which are the banks against which disclosure is sought.

c) the third-party is the only practicable source of the information available. The plaintiffs have no personal right of access to any of the accounts of Ravi Investments or the Pakistan rice mill business as Bashir has signing authority on them. The evidence clearly establishes he has refused despite his agreement to the contrary to disclose the relevant financial and banking information notwithstanding plaintiffs' entitlement to those records and the right to at least an accounting of significant investment funds owed to them. The plaintiffs do not know the extent or accuracy of any record-keeping by Bashir and his conduct and that of others while in charge of the rice mills' finances, bank accounts and profits. As indicated in these reasons, the banks in question should be required to disclose the information.

d) the respondents can be indemnified for the cost of disclosure which is the case here.

e) a weighing of the public interest in favour of or against disclosure.

112 Turnbull J.'s Norwich Order predated the actual execution of the Anton Pillar search. There are apparently some banking documents retrieved as a part of that seizure but the plaintiffs do not have the details or the full extent of them. Some banks have complied with the Norwich order to provide disclosure to the ISS of their banking records but no such documents have yet been provided to the plaintiffs.

113 The plaintiff is not seeking a requirement that the banks comply with the Norwich order at this time. The same factors with respect to temporarily suspending the release of the Anton Pillar evidence to the plaintiffs can apply to the Norwich order and disclosure of the banks' financial records.

114 The defendants may ultimately be proven to be correct in their position that allowing the seizure of the defendants' copies of the bank records during the search of their residence and at the same time requiring the banks to produce them may be "judicial overkill"

115 In my view, the appropriate weighing of the public interest regarding disclosure by the banks can be met at this time by the temporary suspension of paragraph 40 of the order Turnbull J. Upon the plaintiff's receipt of the statement of defence, affidavit of documents and copies of the Schedule A documents from the defendants by February 28, 2014, the parties would be at liberty to bring a motion to remove or otherwise change this suspension of that order on providing the appropriate evidentiary reasons for doing so at that time.

Conclusion

116

(a) The defendant's motion to set aside the ex parte order of Turnbull J dated October 17, 2013 is dismissed.

(b) Subject to subparagraphs c and d herein, the order of Turnbull J of October 17, 2013 as amended by the orders of Nightingale J. of October 25, 2013 and December 3, 2013 shall remain in effect.

(c) Paragraph 34 of the order of Turnbull J. is amended allowing the defendants to withdraw $5000 per month for ordinary living expenses commencing January 15, 2014 and a further $100,000 by way of quarterly payments of $25,000 each commencing January 15, 2014 for legal expenses.

(d) Paragraphs 23 and 40 of the order of Turnbull J. are hereby suspended on a temporary basis pending any further motion the parties are at liberty to make with respect thereto after the defendants provide their statement of defence, affidavit of documents and copies of the schedule A documents by February 28, 2014.

(e) If the parties require a specific and only source of the funds payable under paragraph c above or further directions with respect to the terms of this order, they can make arrangements for those submissions through the trial coordinator's office in Brantford.

(f) If the parties cannot agree on the issue of costs, the plaintiffs can provide their brief written submissions of no more than three pages in length plus a bill of costs within 10 days. The defendants shall have 10 days thereafter to respond in a similar fashion.

Motion dismissed.

TAB 5

1982 CarswellOnt 508
Ontario Supreme Court [Court of Appeal]

Chitel v. Rothbart

1982 CarswellOnt 508, [1982] O.J. No. 3540, 141 D.L.R. (3d) 268, 17 A.C.W.S. (2d) 200, 30 C.P.C. 205, 39 O.R. (2d) 513, 69 C.P.R. (2d) 62

Chitel et al. v. Rothbart et al.

MacKinnon A.C.J.O., Arnup and Goodman JJ.A.

Heard: October 12, 1982
Judgment: December 2, 1982

Proceedings: affirmed *Chitel v. Rothbart* ((1982)), 1982 CarswellOnt 404, 36 O.R. (2d) 124, 27 C.P.C. 90 ((Ont. H.C.))

Counsel: *Charles B. Cohen*, Q.C., for plaintiffs-applicants.
R. Alan Harris, for defendants-respondents.

Subject: Intellectual Property; Civil Practice and Procedure; Property

Application to continue an interlocutory injunction.

The judgment of the Court was delivered by *MacKinnon A.C.J.O.*:

1 This Court is in a rather unusual position on this appeal. The application before us is by the plaintiffs to continue an interlocutory injunction until the trial of the action. The application originally came on before Mr. Justice Anderson, [reported (1982), 36 O.R. (2d) 124, 27 C.P.C. 90], who referred it to this Court under the provisions of s. 34(1) of the Judicature Act, R.S.O. 1980, c. 223. He was of the view that there was a divergence in the cases at the High Court level concerning the principles upon which a Judge's discretion should be exercised in the granting of an interlocutory injunction. He felt there was now the necessity for an authoritative statement on the subject at the appellate level. He had particular regard to the proliferation of the now commonly called "Mareva" injunction.

2 In the instant matter an ex parte injunction was granted by Mr. Justice Galligan on January 29, 1982 restraining the defendants from disposing of their assets or of any property under their control or authority. It was continued by Mr. Justice Hughes and by Mr. Justice Steele until the application was heard by Mr. Justice Anderson on March 22nd. Mr. Justice Anderson continued the injunc tion until the determination of this reference but amended it so that the defendant Rothbart would not be prevented from disposing of his professional earnings.

3 The material before Mr. Justice Galligan consisted of an affidavit of the plaintiff Chitel to which were attached two documents as exhibits. Since that time there has been a further affidavit of the plaintiff, an affidavit by Carol Grace Rothbart, the wife of the defendant Rothbart, and the cross-examinations on the affidavits. At the time of the argument before Mr. Justice Anderson a draft statement of claim was placed before him. When the matter came before us we were referred to the amended statement of claim and the statement of defence and counterclaim which had by then been served and filed.

4 This action is going on to what, obviously, will be a long and complicated trial and it must be emphasized that I am not making any final determination of any of the issues of fact between the parties. I am only stating my view and conclusion on how the issues relevant to this motion appear to me in light of the applicable principles and the material filed at this time.

5 I say at the outset that in my view the affidavit of the plaintiff Leona Chitel did not make the necessary full and frank disclosure of all the relevant facts nor of the expected position of the defendant, required for the obtaining of an ex parte

injunction. We were advised during the argument that the plaintiff, at the same time as seeking the ex parte interim injunction, was also seeking an order under the Absconding Debtors Act, R.S.O. 1980, c. 2. Mr. Justice Galligan, while granting the interim injunction, refused to make the order asked for under the Absconding Debtors Act.

6 In her affidavit the plaintiff makes it appear that the defendant Rothbart was her personal physician who held a position of trust with her and her family and who had often been entrusted with handling the plaintiff's personal financial affairs. She then referred to two specific share lots, X.R.G. Inc. and Sungate Resources Inc., which she swore were hers. She alleged that he had pledged the shares, for which he had given her written receipts, as security to his bank but that he had undertaken to return them. She alleged that he had either stolen or acquired them by fraud, having asked her to lend him the X.R.G. shares in July 1981, and having agreed in the fall of 1981 to deposit the Sungate shares with her bankers in Switzerland.

7 The reason given for the application for the ex parte injunction and the application for an order under the Absconding Debtors Act was that the defendant Rothbart had a confined airline passage to Zurich, Switzerland for the next day (January 30, 1982) with arrangements to visit his parents in South Africa. The plaintiff stated her belief that the defendant was planning to leave Canada and not return and that he planned to dissipate his assets in Ontario.

8 The defendant returned to Canada after the visit to his parents. The plaintiff swore a further affidavit on March 18, 1982, stating that she was advised by her solicitors, who had searched the title, that the defendant had transferred his half interest in the matrimonial home to his wife Carol Grace Rothbart by transfer dated December 7, 1981, the transfer being registered in the land titles office on December 11, 1981. The plaintiff commenced a further action on February 25, 1982 against the defendant and his wife asking that the transfer be set aside as a fraudulent conveyance. Counsel for the plaintiff advised us that a lis pendens had been registered against the title of the land and that the transfer was no longer of any relevance or concern so far as this application for a continuation of the injunction was concerned.

9 In this connection I should state that Mrs. Rothbart gave in her answers on the cross-examination on her affidavit a plausible and acceptable explanation for the transfer to her by her husband of his interest in the matrimonial home. It may be that her explanation will be blown out of Court at the trial but, on the present record, had it been necessary, I would not have weighed the transfer in considering whether there was sufficient evidence to warrant the granting of an interlocutory injunction, Mareva or otherwise.

10 In her affidavit Mrs. Rothbart also stated that her husband, to her knowledge, never had any plans to leave his position on the staff of Scarborough General Hospital, which position he had held for 12 years. She swore that his plans to take time off from his practice in February of 1982 had been arranged long in advance of his departure.

11 Counsel for the plaintiffs makes much of the fact that the defendant Rothbart had not sworn and filed an affidavit in reply to the plaintiff's affidavit. However, if the defendant can establish an arguable position and effectively weaken or destroy that of the plaintiff by cross-examination, an affidavit in reply or contradiction is unnecessary. As I have already stated, the plaintiff was less than frank with the Court in representing her position by way of affidavit to Mr. Justice Galligan and this lack of frankness was compounded by the position taken by her counsel on the cross-examination on her affidavit.

12 On the cross-examination, after counsel for the plaintiff refused to allow her to answer a number of questions, and sought to limit the cross-examination to the two stocks mentioned in the plaintiff's affidavit, the following took place between counsel:

> MR. HARRIS: You have made in paragraph two of Mrs. Chitel's affidavit, allegations that would indicate and giving flavour, that Dr. Rothbart was the guiding influence of Mrs. Chitel, and I am entitled to show that the exact opposite was in fact the case, and as Mrs. Chitel has already stated, Dr. Rothbart was not experienced in the stock market. My purpose is to show that Mrs. Chitel not only was very experienced in the market, but that she knew all these promoters, she worked with them, she referred to them, as her partners, as she has already testified, that she guided Dr. Rothbart throughout.
>
> MR. COHEN: The only thing that Dr. Rothbart has done in this case, is worked himself into the complete trust of this woman, so that she trusted him.

MR. HARRIS: On the contrary, I am entitled to show that the exact opposite is the case, and that Dr. Rothbart was in the trust, and trusted Mrs. Chitel.

MR. COHEN: Then he had better file an affidavit, because you're not going to be ...

MR. HARRIS: I am entitled to cross-examine on this affidavit, and if you continue to advise the witness not to answer the questions, it will be obvious that your purpose is not to allow the court to see the full truth of this matter for the purposes of this injunction. If you are intent to drop your application for an injunction, and go forward with the law suit, say so on the record.

13 Counsel for the defendant made clear his purpose in the cross-examination which was a proper and legitimate purpose, indeed a necessary purpose if those were his instructions and if he was to discharge his responsibilities properly. By that stage the plaintiff's counsel had already advised her not to answer 18 questions in some 12 pages of transcript. After the discussion noted he continued, throughout the cross-examination, to advise his client not to answer relevant questions. In many instances, he answered questions himself, making statements of fact on the record which were not sworn to by the plaintiff, or immediately re-examined her in the course of her cross-examination in order to elicit the answer he obviously felt would recapture some ground lost in the cross-examination.

14 Counsel seemed to have confused, in part at least, the right to limit "fishing expeditions" on examination for discovery with a severe limitation on the extent of proper cross-examination. Counsel at trial would not, on any and every pretext, seek to frustrate proper cross-examination. If he did, he would be quickly corrected by the trial Judge. Because a Judge is not present does not mean that a counsel, who is an officer of the Court, should take a different position. He should not answer some obviously significant question himself before the witness answers, unless it is done by agreement with counsel for the other side, nor lead his witness immediately after the witness has given a damaging answer to explain the answer. Nor should he interrupt and prevent, time after time, questions from being answered, although a legitimate ground has been given for their being asked. It seems to me that this is so in all cases, but particularly where ex parte injunctions have been granted. In such cases the matter is one of urgency which should be determined as quickly as possible by the Court without the party restrained being forced to bring interlocutory motions and appeals in order to get the answers of the deponent to relevant questions. I have digressed to a certain extent but I think it important that a practice not develop which would debase the value of the right to cross-examine and effectively frustrate its legitimate purpose.

15 In any event, from the answers that were secured, it is now clear, despite the implications in the plaintiff's affidavit, that the defendant was not her doctor who had, by virtue of that relationship, established himself in a position of trust with her. It appears that the plaintiff, rather than being a novice in financial matters relying on Dr. Rothbart for advice, had been an experienced stock trader and possibly stock promoter for over 30 years. She admitted that she had advised Rothbart on a number of stocks in which she had an interest. It was also revealed for the first time on her cross-examination that she controlled a Swiss company, Garadur Anstalt, in which she placed some of her share holdings from time to time and which had purchased some of the shares in issue on her instructions. This is not the mark of a financial neophyte. The company was later joined as a plaintiff. The defendant Rothbart, with his father, also controlled a Swiss corporation, the defendant Roprop Foundation Inc., and apparently transactions on behalf of Chitel and Rothbart between their Swiss corporations were not uncommon.

16 After reading the transcript of the cross-examination it is difficult to understand just what moneys were paid for what amount of shares and for what purpose the shares were "loaned" to the defendant. However, in my view, it is not necessary to analyze at this stage the complicated transactions between the parties. While we had this application under reserve counsel for the plaintiff wrote us to say that the plaintiff had made an error in the number of shares that were involved in the transactions. In this she apparently now concurs with the defendant's calculations although she does not resile from the position that the shares, whatever their number, were stolen from her or obtained from her by fraud. The explanation given for the error is that her affidavit was completed in haste on January 29, 1982. That does not explain the nine month delay in correcting the error. The late acknowledgement of the error only confirms the unease I would have in relying on an affidavit which is clearly deficient or misleading in material aspects.

17 There is no evidence that the individual defendant intends to leave the country or is dissipating his assets. The plaintiff at no time in these proceedings, by way of affidavit or by her answers on cross-examination, points to any specific assets which are in danger of being dissipated which she wishes frozen. Indeed, apart from his income, which counsel for the plaintiff advises us he agreed to release from the interim injunction, and the defendant's half-interest in the house already transferred to his wife, which it is also agreed is not relevant to these proceedings, there is no evidence that the defendant has any assets at all.

18 There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an ex parte interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendants' position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the Court on material facts in the original application, the Court will not exercise its discretion in favour of the plaintiff and continue the injunction.

19 The relationship between the parties in the instant case was obviously more complicated, complex and extended than that implied in the affidavit. The shares referred to in the plaintiff's affidavit were only a part of the complicated transactions between the parties. The plaintiff's affidavit was inaccurate at least insofar as it was incomplete in material aspects and it was misleading, if only by implication, in leaving the impression that the plaintiff, as a patient of a medical doctor, relied on the defendant for his financial advice and that the defendant took advantage of that reliance. The cross-examination, insofar as it was allowed to proceed, showed that the plaintiff was an experienced trader in stocks, advising the defendant on certain financial speculations, and that the plaintiff and defendant were partners or joint venturers in a number of stock speculations.

20 Because of the failure to make full disclosure with the resulting incomplete and misleading picture of the relationship between the parties, I would not exercise my discretion to order continuance of the injunction until the trial of the action. I hold this opinion whatever view may be taken of the Mareva form of interlocutory injunction.

The Mareva Injunction

21 This conclusion would be sufficient to dispose of this application but, as I noted earlier, the matter comes before us because Mr. Justice Anderson was of the opinion that earlier cases dealing with Mareva injunctions, particularly *Mills & Mills v. Petrovic* (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.), if followed, would mandate a continuation of the injunction. He was of the view that the law of this province with respect to interlocutory injunctions exhibits some confusion. He went on to say "[t]here is a dearth of authority at the appellate level. It appears to me that authoritative guidance is much needed". I have made it clear that because of the nature of the material in support of the application and its serious deficiencies, which were not apparent at the time of the granting of the interim injunction, I would not continue the injunction. Accordingly, anything I may have to say as to Mareva injunctions is not necessary to my decision. However, out of deference to Mr. Justice Anderson's request and in view of the fact that the matter only came before us because he felt that some extended form of Mareva injunction might apply, I shall deal with that issue.

22 Counsel for the plaintiff opened his submissions on the law by saying he did not need to rely on the developing Mareva principle. He argued that there were two recognized exceptions to the general law as stated in *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (C.A.). The first exception is where the asset being "frozen" by the interlocutory injunction is the very subject- matter of the litigation and it is in danger of being dissipated. That is not the case here.

23 The second exception is where there is a strong prima facie case made out of theft or fraud. In support of this proposition he referred us to *Campbell v. Campbell* (1881), 29 Gr. 252. This was a suit for alimony instituted by the plaintiff against her husband and a brother-in-law of her husband in the course of which she sought to impeach a conveyance executed by her husband to his brother-in-law. The plaintiff alleged that the conveyance was the result of a conspiracy to defeat her in her attempt to compel payment of alimony if she was successful in her alimony action. It was admitted that there was a conspiracy between the defendants to deal with the husband's land so as to prevent the plaintiff from recovering any alimony. Boyd C. held (p. 255) that:

> ... where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under

> the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of the judgment for the amount claimed.

24 It would be difficult to conceive of a stronger case for the intervention of the Court than *Campbell v. Campbell*. I have no reason to doubt that the Court would take the same position today if similar facts were to arise, and hold that such an order was "just or convenient". In the instant case, of course, there is no admitted fraud and there is certainly no evidence of further intended alienation of any specific property by a co-conspirator in the fraud.

25 It may be that *Mills & Mills v. Petrovic*, supra, the case which Mr. Justice Anderson felt was wrongly decided on the facts, is a case similar to *Campbell v. Campbell*. Unhappily the reported facts are not given in detail but it appears that the female defendant, while employed as the plaintiff firm's accountant, was charged with stealing $100,000 from it. It also appears that prior to trial, she and her husband were attempting to sell their house which they jointly owned and one can surmise that it was being alleged that some of the money stolen went into the purchase of this home. Apparently this was their only asset.

26 The plaintiff there sought to restrain the sale of the house pending the outcome of the action for return of the moneys allegedly stolen. The learned motions Court Judge said that the evidence of theft was very strong but stated that he did not wish to prejudge the issue which was then pending in the criminal Courts. However, later in his reasons he states (p. 40 C.P.C.) "it does not appear to me to be an unreasonable extension of the principle...*to permit equity to give a person who has been defrauded or stolen from by a defendant* some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues." (The italics are mine.) In this passage he appears to be making a finding for the purposes of the civil action that a theft had been committed. It may be that the facts justified the order made but, in any event, that is not this case.

27 In dealing generally with interlocutory injunctions, I note that, until recently, it was accepted that the applicant had to first establish a prima facie case before the Court looked to and considered the other factors. In 1975, the House of Lords in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, rejected the "prima facie" test and held that the applicant need only satisfy the Court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" (p. 510 All E.R.) before the Court turned to a consideration of the other relevant factors. The House of Lords' concern was that Courts were trying cases (at length) at this early stage on incomplete evidence and were undertaking "what is in effect a preliminary trial of the action on evidential material different from that on which the actual trial will be conducted..." (p. 509). Lord Diplock, speaking for the Court, also noted that the interlocutory injunction is given on affidavits that have not been "tested by oral cross-examination" (p. 509). The significance of the word "oral" was not explained.

28 Although the *Amer. Cyanamid* case has been followed in this province, it has been properly emphasized by Cory J., speaking for the Divisional Court in *Yule Inc. v. Atl. Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725, that the remedy must remain flexible and that the *Amer. Cyanamid* test may not be a suitable test in all situations. That there are exceptions to or qualifications of the test is noted by Lord Diplock himself in *N W L Ltd. v. Woods; N W L Ltd. v. Nelson*, [1979] 1 W.L.R. 1294, [1979] 3 All E.R. 614 at 625:

> My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co v Ethicon Ltd*, [1975] A.C. 396, [1975] 1 All E.R. 504, to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co v Ethicon Ltd*, which enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

29 It is my view, without stating any final opinion on the subject, that the availability of the cross-examination transcript makes more legitimate a preliminary consideration by the motions Judge of the merits of the case. Whatever the test may be regarding the granting of interlocutory injunctions generally, in my view, the granting of a Mareva injunction, under special and limited circumstances, requires that the applicant establish a strong prima facie case.

30 The almost exponential growth of the Mareva injunction and the extension of the grounds for such injunctions, seemingly without regard to long-established principles, has raised questions, and caused critics to describe them (as indeed did the Motions Court Judge in the Court below), as being "tantamount to execution before judgment". That, strictly speaking, is not so. What such orders do is tie up the assets of the defendant, specific or general, pending any judgment adverse to the defendant so that they would then be available for execution in satisfaction of that judgment. It is certainly ordering security before judgment.

31 The cases dealing with Mareva injunctions have been much canvassed and I do not propose to run through them all again. It had been the traditional view in England, as well as in this province, that an interlocutory injunction would not be granted to restrain a defendant from disposing of his assets or removing them from the jurisdiction prior to judgment. However, the modern departure from that view has its genesis in a trilogy of cases: *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, [1975] 2 Lloyd's Rep. 137 (C.A.), heard May 22, 1975; *Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A.; The Mareva*, [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.), although reported in 1980 was heard June 23, 1975; and *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, [1978] Q.B. 644, [1977] 3 All E.R. 324 , [1977] 2 Lloyd's Rep. 397 (C.A.), heard March 2 to 9, 1977.

32 These cases and those which follow them establish that, in a proper case, a Mareva injunction may be granted as an exception to the general rule. Such an injunction is not now restricted to foreign defendants, but rather is extended to defendants within the jurisdiction under special and limited conditions formulated in these cases.

33 In *Nippon Yusen Kaisha v. Karageorgis*, supra, the defendants had chartered a number of the plaintiff's ships. They did not pay the charterparty fee and attempts by the plaintiff to locate the defendants were unsuccessful. The plaintiff believed "and rightly believe[d]" (p. 283 All E.R.) that the defendants had funds in the banks in London and feared that those funds would be transmitted out of the jurisdiction unless something was done. Accordingly, an ex parte application was brought to restrain the defendants from disposing of or removing any of their assets from the jurisdiction. Donaldson J. refused the application and the plaintiffs appealed. In the course of his short reasons for judgment, Lord Denning M.R. said this (p. 283 All E.R.):

> We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. We were told that Chapman J in chambers recently refused such an application. In this case also Donaldson J refused. We know, of course, that the practice on the continent of Europe is different.
>
> It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case. There is a strong prima facie case that the hire is owing and unpaid. If an injunction is not granted, these moneys may be removed out of the jurisdiction and the shipowners will have the greatest difficulty in recovering anything. Two days ago we granted an injunction ex parte and we should continue it.

34 Approximately a month later a similar problem was again before the Court of Appeal in the *Mareva* case, supra. The plaintiff shipowners issued a writ against the defendants claiming for unpaid hire and damages for repudiation of a charterparty. On an ex parte application, Donaldson J. granted an injunction until 1700 hours on June 23rd restraining the charterers from removing or disposing out of the jurisdiction moneys standing to the credit of the charterers' account at a London bank. Donaldson J. refused to extend the injunction beyond that time and the plaintiff appealed. In the course of somewhat lengthier reasons than in the earlier case Lord Denning M.R. stated (pp. 214-15 All E.R.):

> So they have applied for an injunction to restrain the disposal of those moneys which are now in the bank. They rely on the recent case of *Nippon Yusen Kaisha v. Karageorgis* [[1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093]. Donaldson J felt some doubt about that decision because we were not referred to *Lister & Co. v. Stubbs* [(1890) 45 Ch. D. 1, [1886-90] All E.R.

Rep. 797]. There are observations in that case to the effect that the court has no jurisdiction to protect a creditor before he gets judgment. Cotton LJ said [45 Ch. D. 1 at 13, [1886-90] All E.R. Rep. 797 at 799]:

> I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.

And Lindley LJ said [45 Ch. D. 1 at 15, [1886-90] All E.R. Rep. 797 at 800]: '... we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the Appellants ask us to stretch it...'

Donaldson J felt that he was bound by *Lister & Co v Stubbs* and that he had no power to grant an injunction. But, in deference to the recent case, he did grant an injunction, but only until 17.00 hours today (23rd June 1975), on the understanding that by that time this court would be able to reconsider the position.

Now counsel for the charterers has been very helpful. He has drawn our attention not only to *Lister & Co v Stubbs* but also to s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which repeats s 25(8) of the Judicature Act 1873. It says:

> A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient ...

In *Beddow v. Beddow* [(1878) 9 Ch. D. 89 at 93] Jessel MR gave a very wide interpretation to that section. He said: 'I have unlimited power to grant an injunction in any case where it would be right or just to do so ...'

There is only one qualification to be made. The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from *North London Railway Co v. Great Northern Railway Co* [(1883) 11 Q.B.D. 30]. But, subject to that qualification, the statute gives a wide general power to the courts. It is well summarised in Halsbury's Laws of England [21 Halsbury's Laws (3rd Edn) 348, para 729; see now 24 Halsbury's Laws (4th Edn) para 918]:

> ... now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right.

In my opinion that principle applies 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 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. It seems to me that this is a proper case for the exerise of this jurisdiction.

35 Both Roskill and Ormrod L.JJ. reserved their final views because only one side had been heard, the appeal being ex parte. However, the contract clearly called for a daily rate of hire payable half-monthly in advance and it was clearly in arrears; the default being unexcused, there was strong reason for granting the application.

36 It can be seen that Lord Denning M.R. refers to Lord Jessel M.R.'s interpretation of the words "just or convenient" found in s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 (U.K. 15 & 16 Geo. 5), c. 49, which repeats s. 25(8) of the Judicature Act of 1873, and purports to apply it. However, it should be noted that in the later case of *Aslatt v. Corporation of Southampton* (1880), 16 Ch. D. 143 at 148, Lord Jessel had this to say about those words:

> ... the words 'just or convenient' did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere.

37 In the third and final case in the trilogy, *Rasu Maritima S.A. v. Perusahaan*, supra, Lord Denning M.R. once again presided and once again the defendants were foreigners. On this occasion the defendants were represented by counsel in the Court of Appeal and the matter was fully argued. Lord Denning summarized the facts briefly as follows (p. 327):

> It arises out of events in the Far East. Its only connection with England is that there are goods lying in the West Gladstone dock at Liverpool which are worth US $12 million. The owner of the goods wants to remove them to Hamburg. But a creditor applies to stop them from being taken out of the jurisdiction of the court. The application is made under a new procedure which was introduced by this court a year or two ago known as 'the Mareva procedure'.

38 While concluding on the material before the Court that it was not "just or convenient" to grant the interlocutory judgment, Lord Denning M.R., in the course of his reasons, had a number of interesting things to say. In dealing with the present law, he said this at p. 332:

> So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

After quoting a number of authorities in support of the proposition, Lord Denning M.R. goes on to say (pp. 332-33):

> None of those statements was made, however, in relation to a defendant who was out of the jurisdiction but had money or goods in this country, save in *Burmester v Burmester* [1913] P 76] and there the point was not canvassed. I do not think they should be applied to cases where a defendant is out of the jurisdiction but has assets in this country.

39 He then returned once again to Lord Jessel M.R.'s statement in *Beddow v. Beddow* (1878), 9 Ch. D. 89, as to the wide discretion granted by the words "just or convenient" and concluded that Courts can lay down considerations to be borne in mind when exercising the discretion but from time to time as public policy changes these considerations may change. He quoted with approval the reasons of Kerr J. in the Court below which, he said, gave the practical reasons for justifying the procedure (pp. 333-34):

> The two cases of *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, and *Mareva Compania Naviera SA v International Bulk Carriers Ltd*, [1975] 2 Lloyd's Rep. 509, are part of the evolutionary process. This court was there presented with sets of facts which called aloud for the intervention of the court by injunction. Study those facts and you will see that it was both just and convenient that the courts should restrain the debtor from removing his funds from London. Unless an interlocutory injunction were granted ex parte, the debtor could and probably would, by a single telex or telegraphic message, deprive the shipowner of the money to which he was plainly entitled. So just and so convenient, indeed, is the procedure that it has been constantly invoked since in the commercial courts with the approval of all the judges and users of that court. Now, after full argument, I hold that those cases were rightly decided. And I would like to read here the words of Kerr J, the commercial judge, who has had more experience than any other of this jurisdiction in giving what he says are the practical reasons which justify this procedure:
>
> > A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date when he is served, all of which usually takes several weeks or even months. Secondly, it is only then that the plaintiff can apply for summary judgment under RSC Ord 14 with a view to levying execution on the defendant's assets here. Thirdly, however, on being apprised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him. It has always been my understanding that the purpose and scope of the exercise of this jurisdiction is to deal with cases of this nature. To exercise it on an ex parte basis in such cases presents

> little danger or inconvenience to the defendant. He is at liberty to apply to have the injunction discharged at any time on short notice.

40 It would be difficult to argue with this hypothesis and the practical and equitable result achieved by the granting of such an interlocutory injunction. The serious difficulties arise when there is an attempt to transport the principle on a blanket basis to domestic situations. Lord Denning concluded his discussion of the principle in such cases by saying, "[s]o I would hold that an order restraining removal of assets can be made whenever the plaintiff can show that he has a 'good arguable case'" — the test applied for service on a defendant out of the jurisdiction. Interestingly, there were only two appellate Judges sitting on this appeal and Orr L.J. did not specifically agree with all the statements made by Lord Denning but rather concluded, on the facts, that Kerr J. had been right in refusing to make the interlocutory order requested.

41 Shortly after this case, the issue of Mareva injunctions was incidentally raised in the *Siskina v. Distos Compania Naviera S.A.; The Siskina*, [1979] A.C. 210, [1977] 3 All E.R. 803, [1978] 1 Lloyd's Rep. 1. There the House of Lords came to the conclusion that the appeal did not provide an appropriate vehicle for the consideration of the wider question of what restrictions, whether discretional or jurisdictional, there may be on the powers conferred on the High Court by s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 to "grant a mandamus or an injunction or appoint a receiver in all cases in which it appears to the court to be just or convenient so to do." Lord Hailsham (p. 827), for his part at that moment, was limiting the applicability of the Mareva injunction, if it were a valid remedy, to foreign based defendants with assets in England. The House of Lords, so far as I am aware, has yet to deal with Mareva injunctions and their applicability to domestic defendants.

42 In a later case, *Third Chandris Shipping Corp. v. Unimarine S.A.; The Pythis*, [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 2 Lloyd's Rep. 184 (C.A.), Lord Denning M.R. purported to set out "guidelines" for the granting of Mareva injunctions. Once again the case concerned a charter contract with a foreign defendant. Mustill J., who heard the application in the Court of first instance in the course of discussing Mareva injunctions, said (pp. 976-77 All E.R.):

> At present, applications are being made at the rate of about 20 per month. Almost all are granted. Applications to discharge the injunctions are very rare, whether because the order is not regarded as producing substantial injustice or because it is cheaper and less trouble to lift the injunction by providing bank guarantees rather than by proceedings in court is impossible to say. A very simple procedure has now been evolved. The plaintiff's affidavit to lead the application usually sets out the nature of the claim; and states that the defendant is abroad and asserts that, if the plaintiff is successful in the action, judgment will be unsatisfied if the injunction is refused. Sometimes, but not always, the plaintiff is able to identify specific balances among the accounts and gives reasons for his assertion that the judgment will go unsatisfied.
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> The matter was however complicated by a rather surprising development. At a late state of the argument counsel (who argued the matter very forcefully for the charterers) asserted that their bank account in question in fact contained no funds at the time the injunctions were granted but was in a position of overdraft. It seemed to me that this assertion raised a serious issue which went to the heart of the present dispute. I therefore invited further argument. The *MBPXL* case [[1975] Court of Appeal Transcript 411] is authority binding on this court that the plaintiff must demonstrate the existence of assets within the jurisdiction if Mareva relief is to be granted. If the only assets whose existence is asserted by the plaintiff consists of a credit balance and if in fact it is shown that no such balance exists, the requirements of the *MBPXL* case are not satisfied.

43 In my view, Mustill J. succinctly put the original purpose and point of Mareva injunctions when he states (p. 978) "[t]he whole point of Mareva jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction".

44 At the commencement of the outline of his guidelines in this case, Lord Denning issued an uncharacteristic caveat: "Much as I am in favour of the Mareva injunction it must not be stretched too far lest it be endangered." He then stated his guidelines summarized as follows (pp. 984-85):

> (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

(ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.

(iii) The plaintiff should give some grounds for believing that the defendants have assets here.

(iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied.

(v) The plaintiffs must give an undertaking as to damages.

Items (i), (ii) and (v) are standard guidelines in this province in considering whether to grant an interlocutory injunction in the ordinary case.

45 Lawton L.J., in the course of his reasons, was of the view that the mere fact that a defendant having assets within the jurisdiction, is a foreigner, cannot by itself justify the granting of a Mareva injunction. "There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction." (p. 987) Cumming-Bruce L.J., the third member of the Court, felt that "[t]here must be evidence of some facts leading to an inference that the assets within the jurisdiction may well be removed". (p. 988)

46 It was not long before Mareva injunctioms were extended in England to apply to defendants domiciled in England. In *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190, Sir Robert Megarry V-C. faced the problem. The plaintiff had transferred a leasehold property to the defendant on which transfer she claimed there was still £2000 owing. The parties engaged them selves in renovating the premises and there was a dispute between them as to the amount that was owing and the state of the accounts. Litigation ensued and while negotiations were proceeding the plaintiff was advised that the defendant was abroad or was about to go abroad. She discovered that the premises in issue had been sold. At the time of the application for a Mareva injunction the defendant's solicitors were having difficulty in securing instructions as their client was cruising in the Mediterranean and could not be reached.

47 The injunction sought was to restrain the defendant from removing out of the jurisdiction or dealing with the net proceeds of sale of the premises otherwise than by paying them into a separate bank deposit account. It was agreed that some £3300 standing to the credit of the defendant in a bank account in his name represented the balance of the proceeds of the sale of the premises. The plaintiff was fearful that the defendant would remove all his assets and live abroad. She swore that when the defendant was previously in financial difficulties he had gone to live in the United States for a considerable period although he was an English national with an English domicile.

48 Sir Robert Megarry considered the two lines of authority — the one illustrated by *Lister & Co. v. Stubbs*, supra, and the cases which followed it and the other Mareva cases based on what is "just or convenient". He came to the conclusion which he set out as follows at pp. 194-95:

> It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilised for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due: see *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1980] 1 All ER 480 at 486, [1980] 1 WLR 488 at 494 per Robert Goff J.

> If, then, the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction, I cannot see why it should be confined to 'foreigners', in any sense of that term.
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> In the result, I would hold (1) that it is no bar to the grant of a Mareva injunction that the defendant is not a foreigner, or is not foreign-based, in any sense of those terms, (2) that it is essential that there should be a real risk of the defendant's assets being removed from the jurisdiction in such a way as to stultify any judgment that the plaintiff may obtain, and (3) that, in determining whether there is such a risk, questions of the defendant's nationality, domicile, place of residence and many other matters may be material to a greater or a lesser degree.
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> In addition to establishing the existence of a sufficient risk of removal of the defendant's assets, the plaintiff must satisfy certain other requirements. I shall not attempt any comprehensive survey, particularly in view of the guidelines laid down by Lord Denning MR in *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972 at 984-985, [1979] QB 645 at 668-669. But I may refer to three of them. One is that it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.
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> Second, the plaintiff must establish his claim with sufficient particularity, and show a good arguable case, though he need not demonstrate that his case is strong enough to entitle him to judgment under RSC Ord 14: see the *Pertamina* case [1977] 3 All ER 518, [1978] QB 644. Third, the case must be one in which, on weighing the considerations for and against the grant of an injunction, the balance of convenience is in favour of granting it. In considering this in Mareva cases, I think that some weight must be given to the principle of *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886-90] All ER Rep 797....

And, finally he said (p. 195):

> I would regard the *Lister* principle as remaining the rule, and the *Mareva* doctrine as constituting a limited exception to it.

49 The last case to which I would refer in the English courts is *Prince Abdul Rahman Bin Turki Al Sudairy v. Abu- Taha*, [1980] 3 All E.R. 409 (C.A.). In rather broad language, Lord Denning M.R. extended the bite of the Mareva injunction. He said at p. 412 All E.R.:

> So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

50 Waller L.J., in agreeing with Lord Denning, after briefly reviewing the relevant facts, stated (p. 412 All E.R.):

> In my judgment, that raises a strong inference that assets may be removed from the jurisdiction... .

51 I have dealt extensively with the English authorities because the principle they expound has been imported into this province, possibly in some cases without sufficient regard to the limitations which the English authorities themselves have placed on its application.

52 The principle applicable to Mareva injunctions has now been given statutory force in England in s. 37(3) of the Supreme Court Act, 1981 (U.K.), c. 54 which states:

> The power of the High Court... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, *or otherwise dealing with, assets* located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction. (The italics are mine.)

Although there is no similar legislation at present in this province, in my view, under certain limited and special conditions, it is a legitimate exercise of the discretion given a Court under s. 19(1) of the Judicature Act, R.S.O. 1980, c. 223 to grant a Mareva injunction. This jurisdiction is not limited by the nature of the proceedings. However, like Sir Robert Megarry, I regard the *Lister* principle as remaining the rule "with the Mareva doctrine as constituting a limited exception".

53 Section 19(1) is the Ontario counterpart to s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the section upon which Lord Denning placed much reliance. The opening words of s. 19(1) are identical to those of s. 45(1) and state: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it appears to the court to be *just or convenient* that the order should be made. ..." (The italics are mine.) Those words, of course, must not be construed so broadly as to permit the Court to grant the injunction, as Jessel M.R. put it in *Aslatt v. Southampton*, supra, "simply because the Court thought it convenient."

54 I do not propose to canvass all the recent Ontario cases which have dealt with the granting of a Mareva injunction. Saunders J., in a helpful judgment in *Bank of Montreal v. James Main Holdings Ltd.; Re Main and Bank of Montreal* (1982), 26 C.P.C. 266, 23 R.P.R. 180, affirmed 28 C.P.C. 157 (Ont. Div. Ct.), released March 1, 1982, attempted to rationalize a number of the judgments here and in England and he pointed out that in almost all of the decided cases there was some unusual circumstance related to the risk of removal or disposition of the property or assets.

55 In the instant case the motions Court Judge referred to *OSF Indust. Ltd. v. Marc-Jay Invts. Inc.* (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446. In that case the Court, in effect, refused to follow *Nippon Yusen Kaisha v. Karageorgis*, supra, and held that "it was not for the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained". (p. 448 D.L.R.) Lerner J. held that there was in this province at that time no basis in law for the remedy of Mareva injunction. With deference, I am of the opinion that the learned Judge was in error in this conclusion and the case cannot be used to stand in the way of the granting of a Mareva injunction in a proper case.

56 As I mentioned earlier, items (i), (ii) and (v) of Lord Denning's guidelines are standard considerations for the Courts of this province when considering the usual application for an interlocutory injunction. However, when an application for a Mareva injunction is before the Court, the material under items (i) and (ii) of the guidelines must be such, as I have already said, as persuades the Court that the plaintiff has a strong prima facie case on the merits.

57 Guidelines (iii) and (iv) cover areas that are unique to the Mareva injunction. The material under item (iii), which deals with the assets of the defendant within the jurisdiction, should establish those assets with as much precision as possible so that, if a Mareva injunction is warranted, it is directed towards specific assets or bank accounts. It would be unusual and in a sense punitive to tie up all the assets and income of a defendant who is a citizen and resident within the jurisdiction. Damages, covered by an undertaking as to damages, might be far from compensating for the ramifications and destructive effect of such an order. In the instant case, this was the order sought and initially secured without any attempted identification of assets to which the order would be directed. It may well be that a plaintiff may have no knowledge of any of the defendant's assets or their location, but that was not stated to be the case in the instant application.

58 Turning finally to item (iv) of Lord Denning's guidelines — the risk of removal of these assets before judgment — once again the material must be persuasive to the Court. The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

59 Earlier, in another connection, I pointed out that our practice in interlocutory injunctions generally is somewhat different from what occurs in England. My understanding is that it is rare in England for a deponent to be cross-examined on his affidavit in such cases. Here, cross-examination is the rule rather than the exception. Although the ex parte order is made without the benefit of such cross-examination, on the hearing for the continuation of the order the Court usually has the cross-examination on the affidavits that have been filed, including any filed by the defendant. At that time the Ontario Court is in a better position

than it would be without such cross-examination to assess the respective merits of the parties both with regard to whether a strong prima facie case has been established on the claim and with regard to whether the "guidelines" have been satisfied.

60 The instant application illustrates what can take place between the ex parte hearing of the original application and the hearing on the application to continue. Mr. Justice Galligan cannot be faulted for granting the original ex parte injunction. On the material before him it appeared that, as a result of a professional medical relationship, the defendant had secured the trust of a woman inexperienced in financial matters who relied on him for financial advice. He then, in abuse of that trust, secured shares from her by fraud or theft. When she commenced asking for their return he made arrangements to leave Canada and indeed was in the process of leaving and removing all his assets from Canada. She secured the injunction the day before he was to leave Canada for good.

61 On those facts, this appeared to be a classic case for the remedy of a Mareva injunction. However, as a result of the material filed by the defendant and, in particular, the cross-examination of the plaintiff on her affidavit, the facts took on a different hue as I have already described. As I have stated before, the failure of the plaintiff to fully and accurately set out the facts on which her claim was based was sufficient to deny the application to continue the interlocutory injunction. The more "complete" facts, as they are now understood, if they had been fully and correctly stated originally would not have warranted the granting of a Mareva injunction.

62 The Courts must be careful to ensure that the "new" Mareva injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial. I would respectfully adopt what Grange J. said in *C.P. Airlines Ltd. v. Hind* (1981), 32 O.R. (2d) 591, 22 C.P.C. 179, 14 B.L.R. 233, 122 D.L.R. (3d) 498 at 503:

> The adoption of the *Mareva* principle can lead to some sorry abuse. I would hate to see a defendant's assets tied up merely because he was involved in litigation. I do not think the *American Cyanamid* injunction rule can possibly apply ...

63 Mr. Justice Anderson in the instant case said [p. 96 C.P.C.], "I can see no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause". I agree with this view and I have sought to point out the conditions that must be satisfied before a Mareva injunction can be granted. However, I do not have the pessimistic view taken by the Motions Court Judge that all the former criteria for the granting of interlocutory injunctions are now to be disregarded. I do not believe that to be so. The Mareva injunction is here and here to stay and properly so, but it is not the rule — it is the exception to the rule.

64 The application is dismissed with costs, including the costs of the appearance before Mr. Justice Anderson, in any event of the cause.

Application dismissed.

TAB 6

2014 ONSC 2917
Ontario Superior Court of Justice

Petro-Diamond Inc. v. Verdeo Inc.

2014 CarswellOnt 7390, 2014 ONSC 2917, 13 C.B.R. (6th) 211, 241 A.C.W.S. (3d) 687

Petro-Diamond Incorporated, BioUrja Trading, LLC and Kolmar Americas Inc., Plaintiffs v Verdeo Inc., Bioversel Trading Inc., Great Lakes Biodiesel Inc. (formerly Bioversel Sarnia Inc.), Einer Canada Inc. (formerly Bioversel Inc.), Arie Mazur and Sergey Ptushkin, Defendants

H.J. Wilton-Siegel J.

Heard: April 3, 2014
Judgment: May 23, 2014
Docket: CL-13-10261-00CL

Counsel: Lou Brzezinski, Catherine MacInnis for Moving Parties / Plaintiffs
David E. Lederman, Ryan Cookson for Responding Parties / Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.h Liabilities
III.1.h.vii Oppression
Business associations
V Legal proceedings involving business associations
V.1 Associations
V.1.a General principles
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.c Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Miscellaneous

Plaintiffs claimed defendants V Inc. breached its contracts with them — Plaintiffs commenced actions in United States in respect of contracts — V Inc. ceased operations and had no assets with which to satisfy claims against it — Plaintiffs asserted substantial funds were fraudulently conveyed by V Inc. and commenced action to trace and recover funds — Plaintiffs asserted that B Inc. loaned considerable amount of money to G Inc. that it used to fund construction of Plant — O Inc. invested $45 million in G Inc. for plant — O Inc. subscribed for shares and converted outstanding loan into additional shares of G Inc. — Plaintiffs asserted there was no evidence of consideration flowing from O Inc. to G Inc. and all issuances of shares to O Inc. were to be invalidated as fraudulent conveyances — Plaintiffs asserted V Inc. loaned considerable amount to B Inc. that constituted fraudulent conveyance — Plaintiffs brought motion for Mareva injunction in respect of defendants' assets — Motion dismissed — Plaintiffs failed to establish on strong prima facie basis existence of any fraudulent conveyance from B Inc. to G Inc. — B Inc. made loans to G Inc., but full amount of loans was repaid — There was no basis for disregarding repayments recorded on B Inc.'s general ledger — Plaintiffs did not establish strong prima facie case of transfers of monies from V Inc. to B Inc. that were not substantially repaid — Plaintiffs were unable to establish strong prima facie case that source of funding of plant was fraudulent transfer from B Inc. — It was at least probable on evidence that O Inc. provided such funding — It was not possible

to establish that any of subscription proceeds for shares issued by G Inc. that diluted interest were derived from monies that were subject of fraudulent transfer from V Inc. — Share issuances did not constitute fraudulent conveyance.

Business associations --- Legal proceedings involving business associations — Associations — General principles

Plaintiffs claimed defendants V Inc. breached its contracts with them — Plaintiffs commenced actions in United States in respect of contracts — V Inc. ceased operations and had no assets with which to satisfy claims against it — Plaintiffs asserted substantial funds were fraudulently conveyed by V Inc. and commenced action to trace and recover funds — Plaintiffs asserted that B Inc. loaned considerable amount of money to G Inc. that it used to fund construction of Plant — O Inc. invested $45 million in G Inc. for plant — O Inc. subscribed for shares and converted outstanding loan into additional shares of G Inc. — Plaintiffs asserted there was no evidence of consideration flowing from O Inc. to G Inc. and all issuances of shares to O Inc. were to be invalidated as fraudulent conveyances — Plaintiffs asserted V Inc. loaned considerable amount to B Inc. that constituted fraudulent conveyance — Plaintiffs asserted disposition of all of assets of V Inc. and B Inc. constituted oppressive activity — Plaintiffs brought motion for interim relief under oppression provisions of Business Corporations Act — Motion dismissed — There was no claim that could be asserted under s. 248 of Act in respect of V Inc. or in respect of any transfers of monies from V Inc. to B Inc. — By virtue of share ownership of V Inc., corporation was not affiliate of V Inc. or G Inc. — V Inc. was not corporation governed by Act — Plaintiffs failed to establish strong prima facie case of fraudulent transfers from B Inc. to G Inc. — Plaintiffs were unable to establish disposition of B Inc's assets at undervalue for purposes of oppression claim.

Business associations --- Specific matters of corporate organization — Directors and officers — Liabilities — Oppression

Plaintiffs claimed defendants V Inc. breached its contracts with them — Plaintiffs commenced actions in United States in respect of contracts — V Inc. ceased operations and had no assets with which to satisfy claims against it — Plaintiffs asserted substantial funds were fraudulently conveyed by V Inc. and commenced action to trace and recover funds — Plaintiffs asserted that B Inc. loaned considerable amount of money to G Inc. that it used to fund construction of Plant — O Inc. invested $45 million in G Inc. for plant — O Inc. subscribed for shares and converted outstanding loan into additional shares of G Inc. — Plaintiffs asserted there was no evidence of consideration flowing from O Inc. to G Inc. and all issuances of shares to O Inc. were to be invalidated as fraudulent conveyances — Plaintiffs asserted V Inc. loaned considerable amount to B Inc. that constituted fraudulent conveyance — Plaintiffs asserted disposition of all of assets of V Inc. and B Inc. constituted oppressive activity — Plaintiffs brought motion for interim relief under oppression provisions of Business Corporations Act — Motion dismissed — There was no claim that could be asserted under s. 248 of Act in respect of V Inc. or in respect of any transfers of monies from V Inc. to B Inc. — By virtue of share ownership of V Inc., corporation was not affiliate of V Inc. or G Inc. — V Inc. was not corporation governed by Act — Plaintiffs failed to establish strong prima facie case of fraudulent transfers from B Inc. to G Inc. — Plaintiffs were unable to establish disposition of B Inc's assets at undervalue for purposes of oppression claim.

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Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — referred to

Cybernetic Exchange Inc. v. J.C.N. Equities Ltd. (2003), 2003 CarswellOnt 4762, 15 R.P.R. (4th) 74 (Ont. S.C.J.) — followed

Petro-Diamond Inc. v. Verdeo Inc. (2014), 2014 CarswellOnt 7389, 2014 ONSC 1725 (Ont. S.C.J.) — referred to

Sibley & Associates LP v. Ross (2011), 2011 CarswellOnt 4671, 2011 ONSC 2951, 106 O.R. (3d) 494, 334 D.L.R. (4th) 645 (Ont. S.C.J.) — followed

Third Chandris Shipping Co. v. Unimarine SA (1979), [1979] Q.B. 645, [1979] 2 Lloyd's Rep. 184, [1979] 2 All E.R. 972 (Eng. C.A.) — referred to

Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33

s. 4 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 95 — considered

s. 96 — considered

Business Corporations Act, R.S.O. 1990, c. B.16

Generally — referred to

s. 1(1) "affiliate" — considered

s. 1(1) "body corporate" — considered

s. 1(4) — considered

s. 1(5) — considered

s. 248 — considered

s. 248(2)(a) — considered

s. 248(2)(b) — considered

s. 248(3) — considered

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Generally — referred to

s. 2 — considered

s. 3 — considered

s. 4 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57 — considered

MOTION by plaintiffs for interim relief for oppression, and for interim injunction.

***H.J. Wilton-Siegel J.*:**

1 The plaintiffs seek a *Mareva* injunction in respect of the assets wherever situate of the defendants, including in particular a biodiesel plant located at 1 St. Clair Drive, Welland, Ontario that is owned by the defendant Great Lakes Biodiesel Inc. (the "Plant") and any assets in Ontario owned by the defendant Arie Mazur ("Mazur"). In the alternative, the plaintiffs seek either interim relief under the oppression provisions of the *Business Corporations Act* or leave to issue a certificate of pending litigation as against the Plant.

2 The plaintiffs claim that the defendant Verdeo breached its contracts with them. Two of the three plaintiffs have already obtained judgments against Verdeo in the United States, while the other plaintiff is still in the process of litigating its claim. Verdeo ceased operations in February 2011 and has no assets with which to satisfy the claims against it. The plaintiffs allege that substantial funds were fraudulently conveyed by Verdeo to the defendants and have commenced this action in Ontario in an attempt to trace and recover those funds.

3 In the result, the plaintiffs' motions for a *Mareva* injunction against the assets of Great Lakes Biodiesel Inc., and for interim relief under s. 248(3) of the *Business Corporations Act*, are dismissed on the grounds that the plaintiffs have not established a strong *prima facie* case of a fraudulent conveyance to that corporation that funded the construction of the Plant or a fraudulent conveyance in respect of the issue of shares by that corporation. The plaintiffs' motion for leave to issue a certificate of pending litigation against the Plant is also dismissed.

Background

The Parties

4 Verdeo Inc. ("Verdeo") is a corporation incorporated under the laws of Delaware on September 9, 2007. It carried on business as an international broker and trader in the fuel business until it apparently ceased operations in February 2011. It currently has no assets.

5 The original directors of Verdeo were Mazur and Matt Jansel, each of whom resigned on July 3, 2008 after all of the outstanding shares of Verdeo were conveyed to Sergey Ptushkin ("Ptushkin") for $1.00, allegedly in satisfaction of a debt due to Ptushkin. Thereafter, Ptushkin was apparently the sole director of Verdeo. However, the record indicates that Mazur continued to control Verdeo through a management agreement between Verdeo and Bioversel Trading Inc. dated October 20, 2009 (the "Verdeo Management Agreement").

6 Bioversel Trading Inc. ("BTI") is a corporation incorporated under the laws of Ontario on July 31, 2007. BTI apparently terminated active business operations in 2012 and currently is said to have no assets. According to its corporate filings of September 24, 2013, Mazur was the sole director and officer of BTI from June 30, 2009. It is understood that Mazur resigned as a director on April 19, 2012.

7 Einer Canada Inc. ("Einer") is a corporation incorporated under the laws of Ontario on May 28, 2007 under the name of Bioversel Canada Inc. Its name was changed to Einer Canada Inc. on June 7, 2013, effective April 2, 2012. As of September 24, 2013, Sergey Akulov ("Akulov") and Alexis Tsielepsis were the directors and Akulov was the sole officer. Mazur was a director of Einer from the date of its incorporation until his resignation on April 19, 2012.

8 Great Lakes Biodiesel Inc. ("GLB") is a corporation incorporated under the laws of Ontario on May 28, 2007. It was originally incorporated under the name Bioversel Sarnia Inc. and adopted its present name on January 9, 2013. According to GLB's corporate filings as of September 24, 2013, the directors were Barry Kramble, Wilson Parasiuk and Alexander Timofeev. Mazur was a director of GLB from the date of its incorporation until his resignation on April 19, 2012.

9 Orense Investments Limited ("Orense") is a Cypriot corporation that is not a party to this action or to any of the U.S. actions (as defined below). Orense currently owns all of the outstanding shares of GLB directly and indirectly through its ownership of Einer, as described further below.

The Proceedings in the United States

10 Each of the plaintiffs has commenced an action in the United States (collectively, the "U.S. actions") in respect of contracts between each of them and Verdeo for the sale of biodiesel fuel or biodiesel fuel credits which Verdeo failed to deliver.

11 The action of BioUrja Trading, LLC ("BioUrja") was commenced in Texas against Verdeo, BTI, Mazur and Ptushkin, among others. It related to Verdeo's failure to perform a contract entered into with BioUrja in May 2010 and a subsequent settlement agreement respecting its non-performance dated January 18, 2011. Judgment was issued on December 9, 2013 in favour of BioUrja against Verdeo and BTI in the amount of U.S. $2,956,768.49, as well as against Mazur and Ptushkin in the amounts of $11,000 and $40,000, respectively (the "BioUrja Judgment"). The judgments against BTI, Mazur and Ptushkin were based on findings of fraudulent transfers.

12 The action of Petro-Diamond Incorporated ("Petro-Diamond") against Verdeo was commenced in California on June 13, 2011. It related to Verdeo's failure to perform contracts entered into with Petro-Diamond in September 2009 and modified in December 2010. In 2012, Einer, BTI and Mazur were added as defendants. In 2012, summary judgment was granted against Verdeo in the amount of $2,550,000. The trial against the remaining defendants, based on fraud and fraudulent conveyances, among other claims, proceeded.

13 Subsequent to the hearing of this motion, the Court was provided with a judgment of the California court dated April 14, 2014 (the "Petro-Diamond Judgment"). In the Petro-Diamond Judgment, the court granted judgment in the amount of $2,550,000 against each of Verdeo, Einer, BTI and Mazur based on findings of fraudulent transfers and "the conclusion that each of said defendants is the *alter ego* of the other and, in particular, of Verdeo Inc., the original principal debtor." The court did not specify the particular transfers that it considered to constitute fraudulent transfers, although it did refer to the evidence before it relating to, among other things, a loan to Orense, a $12.5 million transfer from Einer/BTI and a forgiveness of $12.5 million of debt by Verdeo in favour of BTI, all of which appear to relate to the Orense Transaction (as defined below) although that cannot be considered to have been established for present purposes and is not relied upon herein.

14 The action of Kolmar Americas Inc. ("Kolmar") was commenced in the State of New York in 2008 against Verdeo. It related to Verdeo's failure to perform contracts entered into with Kolmar in 2009. By order dated December 19, 2013, BTI, Einer, Mazur and Ptushkin have been added as defendants in respect of claims based on piercing the corporate veil and fraudulent conveyances. This action has yet to proceed to trial.

The Action

15 The purpose of the action in Ontario is to trace the funds of Verdeo, BTI and Einer that the plaintiffs allege have been fraudulently conveyed away by these defendants since the commencement of the U.S. actions. The plaintiffs assert that the net effect of these alleged fraudulent transactions was that GLB received a considerable amount of monies that it has used to fund the construction of the Plant.

16 In the statement of claim, which was issued on September 20, 2013, the plaintiffs seek a declaration setting aside three categories of transfers on the grounds that such transfers are voidable as fraudulent conveyances:

1. all intercompany transfers of cash, funds and assets between Verdeo and BTI in 2010 and 2011 described therein;

2. alleged loans of U.S. $1,189,425 from Verdeo to Mazur in 2010; and

3. the "Orense Transaction", which the plaintiffs allege totalled between U.S. $12.5 million and U.S. $14 million.

In the alternative, the plaintiffs allege that approximately U.S. $20 million or U.S. $22 million was transferred from Verdeo to BTI and was used to construct the Plant giving rise to a constructive trust in their favour.

17 The statement of claim was amended on February 26, 2014. As amended, the statement of claim also seeks a declaration setting aside as fraudulent conveyances all inter-company transfers from Einer and/or BTI to GLB that were used to develop and/or construct the Plant. The plaintiffs allege that the funds BTI received from Verdeo were used for this purpose or "were transferred to proxies or related corporations and individuals". In addition, the plaintiffs seek an order setting aside all issuances of shares by GLB since January 1, 2011. They allege that the issuances of shares to Orense and the other shareholders of GLB, with the exception of Einer, constituted a sham and were effected to transfer ownership of GLB, and therefore of the Plant, from Einer to Orense to escape any claim against the assets of Einer. In addition, the plaintiffs seek recognition and enforcement of the BioUrja Judgment against each of Verdeo, BTI, Mazur and Ptushkin.

Procedural History

18 The plaintiffs commenced this motion for a *Mareva* injunction on an *ex parte* basis, seeking an order preventing the defendants from disposing of any of their assets. By order dated September 27, 2013, C. Campbell J. ordered short service on the defendants.

19 On September 30, 2013, counsel for the defendants BTI, GLB, Einer and Mazur (collectively, the "Represented Defendants") provided an undertaking on behalf of the Represented Defendants not to transfer or dispose of the Plant. The undertaking was embodied in an order of C. Campbell J. dated September 30, 2013. The Plant is the only asset of the defendants

in Ontario of which the plaintiffs are aware and, accordingly, transfers of monies directly or indirectly to or from GLB are the focus of this motion.

20 By order dated October 10, 2013 (the "Morawetz Order"), Morawetz J. adjourned the plaintiffs' motion for a *Mareva* injunction to December 20, 2013 on the condition that the Represented Defendants undertake in the interim not to dispose of or further encumber the Plant or the equipment and machinery located at the Plant. The Morawetz Order set a timetable for the exchange of affidavits in respect of the motion and for cross-examinations. Morawetz J. also ordered that the plaintiffs post security for costs in the amount of $91,000.

21 The Morawetz Order was extended on consent to January 30, 2014 by order of Mesbur J. dated November 25, 2013. On January 30, 2014, the plaintiffs brought a motion for a further adjournment in order to obtain answers to refusals given in the cross-examinations. The plaintiffs' motion for an adjournment was denied for the reasons set out in an endorsement of the Court dated March 17, 2014 (the "Endorsement").

22 By order of the Court, the Morawetz Order was extended post January 30, 2014 pending a determination of a motion of the Represented Defendants for a lifting of the undertaking in respect of the Plant. By order of the Court dated March 19, 2014 [2014 CarswellOnt 7389 (Ont. S.C.J.)], the undertaking was continued subject to an exception to permit a mortgage on the Plant and related equipment to secure a *bona fide* new financing to GLB for use by GLB in the ordinary course of its business.

23 In addition, a motion of the Represented Defendants for a stay of this action was scheduled for April 24, 2014. On that date, the parties agreed to an order of this Court staying the action on certain terms pending the recognition and enforcement proceedings contemplated for the BioUrja Judgment and the Petro-Diamond Judgment.

Applicable Law

The Requirements for a Mareva injunction

24 The five requirements for a *Mareva* injunction are well established in our case law:

> (a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;
>
> (b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;
>
> (c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;
>
> (d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and
>
> (e) the plaintiff must give an undertaking as to damages.

See *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.), at pp. 528, 532-33, and *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645 (Eng. C.A.), at pp. 668-69.

25 Of particular significance on this motion, it is also a fundamental requirement that the plaintiff demonstrate a strong *prima facie* case on the merits: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), at p. 27. The test for demonstration of a strong *prima facie* case is understood to be: "if the court had to decide the matter on the merits on the basis of the material before it, would the plaintiff succeed?": see Robert J. Sharpe, *Injunctions and Specific Performance* (loose-leaf November 2013-Rel.) (Toronto: Canada Law Book, 2013), ch. 2, at pp. 13-14.

The Fraudulent Conveyances Act

26 In this case, the plaintiffs allege fraudulent transfers under the section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). The relevant provisions of the FCA are as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.
>
> 3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.
>
> 4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

27 Notwithstanding the language of s. 2 of the FCA, fraudulent transactions subject to the FCA are voidable rather than void. This has two consequences. First, fraudulent transactions are apparently good as between the parties themselves, with the result that title to conveyed property validly passes to the debtor's transferee. In addition, third party rights that arise prior to an order under the FCA setting aside a conveyance will be valid as against creditors of the debtor: see M.A. Springman, George R. Stewart & J.J. Morrison, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (loose-leaf 2011-Rel. 7) (Toronto: Carswell, 2009), ch. 6, at pp. 1-6.

28 As discussed below, the plaintiffs ask the Court to draw inferences as to fraudulent intent based on the existence of "badges of fraud". They rely on the principles described by Spence J. in *Cybernetic Exchange Inc. v. J.C.N. Equities Ltd.* (2003), 15 R.P.R. (4th) 74 (Ont. S.C.J.), at para. 222, quoting C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1994), at pp. 613, 614-615:

> [T]he plaintiff may raise [an] inference of fraud sufficient to shift the evidentiary burden to the defendant if the plaintiff can establish that the transaction has characteristics which are typically associated with fraudulent intent. No doubt proof of one or several badges of fraud will not compel a finding for the plaintiff, but it does raise a prima facie case which it would be prudent for the defendant to attempt to rebut.

29 The present motion raises two issues not normally present in proceedings under s. 2 of the FCA.

30 First, the remedy under s. 2 of the FCA is an order voiding the transaction found to constitute a fraudulent conveyance. Therefore, to the extent that any conveyance, whether in the form of a loan or otherwise, that would otherwise be a fraudulent conveyance is reversed by the transferor and transferee or repaid by the transferee, there would appear to be no remedy available to a plaintiff. Thus, to the extent that any transfers by way of the alleged loans from Verdeo to BTI or from BTI to GLB have been repaid, there would be no basis for any order under s. 2 of the FCA.

31 Second, and more importantly for present purposes, the plaintiffs are relying on the FCA as opposed to any of the other statutes that might have been available in the circumstances. In particular, they are not asserting that such transactions constituted a "fraudulent preference" under s. 95 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") or a transfer at an undervalue under s. 96 of that statute. Nor do they rely on the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, s. 4 (the "APA"). Under s. 2 of the FCA, a transfer to a third party in satisfaction of a valid outstanding obligation or debt does not constitute a "fraudulent conveyance" even if the effect is to prefer the third party creditor over a plaintiff whose outstanding debt was not satisfied. A debtor is free to choose which creditor the debtor wishes to repay subject to operation of these provisions of the BIA or the APA in the event of bankruptcy or insolvency of the debtor.

The Business Corporations Act

32 The plaintiffs also allege that the alleged transfers give rise to an oppression claim under section 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"). The relevant provisions of the OBCA for present purposes are the following:

> 248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

33 In this proceeding, the definition of "affiliates" under the OBCA is also relevant. An "affiliate" is defined as an affiliated body corporate within the meaning of subsection 1(4) of the Act. The relevant provisions of the OBCA are as follows:

> (4) For the purposes of this Act, one body corporate shall be deemed to be affiliated with another body corporate if, but only if, one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person.
>
> (5) For the purposes of this Act, a body corporate shall be deemed to be controlled by another person or by two or more bodies corporate if, but only if,
>
> (a) voting securities of the first-mentioned body corporate carrying more than 50 per cent of the votes for the election of directors are held, other than by way of security only, by or for the benefit of such other person or by or for the benefit of such other bodies corporate; and
>
> (b) the votes carried by such securities are sufficient, if exercised, to elect a majority of the board of directors of the first-mentioned body corporate.

34 For the purposes of this motion, the following observations regarding the operation of s. 248 are relevant.

35 First, paragraphs 248(2)(a) and (b), upon which the plaintiffs rely, address acts or omissions, or the conduct of the business and affairs, of a corporation or any of its affiliates. For this purpose, a "corporation" is a body corporate to which the OBCA applies. Accordingly, BTI, Einer and GLB are corporations for such purpose but not Verdeo.

36 Second, under the definition of "affiliate" set out above, Einer, BTI and GLB are affiliates, as all are controlled by Orense. However, Verdeo is not an affiliate and was not throughout 2010 and 2011. While Mazur may have exercised control over Verdeo during that period through the Verdeo Management Agreement between BTI and Verdeo, such an arrangement does not constitute "control" under s. 1(5) of the OBCA and, accordingly, Verdeo was not an affiliate of BTI, Einer or GLB.

The Motion for the Mareva Injunction

37 In order to succeed on its motion for a *Mareva* injunction, the plaintiffs must establish, among other things, a strong *prima facie* case of fraudulent conveyances of monies from Verdeo to GLB, either directly or indirectly via transfers to Einer

or BTI and subsequent transfers from these corporations to GLB. They must also establish a real risk of dissipation of assets if the injunctive relief is not granted. I will deal with each issue in order.

The Plaintiffs' Allegations of Fraudulent Conveyances

The Positions of the Parties

38 The plaintiffs' allegations of fraudulent conveyances have become more focussed in the course of the proceedings in this action described above. For present purposes, the plaintiffs have narrowed their allegations of fraudulent conveyances under s. 2 of the FCA to two matters: (1) the transfer of approximately U.S. $20 million from BTI or Einer to GLB to fund the construction of the Plant; and (2) the issuance of common shares in GLB to Orense, thereby significantly diluting the interest of Einer in GLB. These allegations are addressed in greater detail below.

39 The Represented Defendants say that Orense, directly and through its ownership of the outstanding shares of Einer, is the sole owner of GLB, subject to some residual claims of Mazur and others in the event of a sale of GLB or of the Plant. They assert that Orense financed the entire cost of the construction of the Plant, and the acquisition of equipment for the Plant, by a combination of financing provided through Einer and BTI and financing provided directly to GLB. They also say that the only involvement of BTI took the form of loans totaling U.S. $4,024,794.05 that were made between January 1 and December 31, 2011 and were repaid in full by December 20, 2013. They say that the construction of the Plant was otherwise entirely funded by Orense by the subscription for shares in GLB referred to above.

The Principal Evidence of the Plaintiffs

40 The following summarizes the principal evidence upon which the plaintiffs assert that they have established a *prima facie* case of transfers of monies directly or indirectly to GLB that constitute fraudulent conveyances under s. 2 of the FCA warranting a *Mareva* injunction to prevent the disposition or dissipation of the assets of GLB. The plaintiffs assert, in the alternative, that this evidence supports an order for a certificate of pending litigation in respect of the Plant based on their constructive trust claim. In addition, the plaintiffs rely on the existence of circumstances they characterize as "badges of fraud", which are discussed further below.

41 The plaintiffs originally filed four affidavits on the motion. Only one of the affidavits sets out facts pertaining to the alleged fraudulent transfers. The affidavit of the President of Petro-Diamond states, among other things, that Verdeo transferred U.S. $22,084,048.33 to BTI in 2010 and attaches a copy of the 2010 general ledger of Verdeo in support of this allegation. The affidavit states that, after receipt of these funds, BTI invested or loaned $12 million to GLB in early 2011. The same affidavit also asserts facts respecting the Orense Transaction described in the statement of claim and addressed in greater detail below. In addition, the affiant referred to Mazur's evidence in a deposition in the U.S. actions to the effect that Einer or BTI provided the funds for the construction of the Plant, although he also states that such funds were received by Einer or BTI from Orense. Lastly, the affiant says that Verdeo transferred U.S. $2,050,000 to BTI in the first quarter of 2011 prior to ceasing operations and that this payment represented substantially all of Verdeo's revenues in 2011.

42 The plaintiffs also say that BTI loaned or otherwise invested approximately U.S. $20 million to or in GLB in 2010 and 2011, based on an excerpt of a deposition of Prakash Patel ("Patel") which is described below.

43 The plaintiffs also filed certain reply materials, including an affidavit of Viral Mehta sworn March 28, 2014 which addressed certain matters pertaining to Patel's testimony on his cross-examination in the U.S. actions. This affidavit also attached copies of the Einer general ledger accounts and the BTI general ledger accounts for 2010, which had been produced by the Represented Defendants in the U.S. actions.

The Principal Evidence of the Represented Defendants

44 In response to the motion for a *Mareva* injunction and their own cross-motion seeking a stay of the action, the Represented Defendants filed five affidavits. Of these affidavits, one pertained to Mazur's sale of a residence in Toronto, two were affidavits

of counsel in the California and Texas litigation, respectively, advising of the status of these matters, and a further affidavit was provided by corporate counsel to Einer addressing the New York litigation. The last affidavit of Barry Kramble, sworn November 1, 2013, the chief executive officer of GLB at the time, generally describes GLB's activities and status. This affidavit is described below. Subsequently, the Represented Defendants filed responding materials that included the affidavit of Patel dated March 26, 2014 described below.

45 The Represented Defendants rely principally on the testimony of Barry Kramble, the former chief executive officer and current vice-president, business development, of GLB. Mr. Kramble testified that Orense had funded GLB to the extent of approximately $45 million for the construction of the Plant. He also testified with respect to BTI's $4 million loan to GLB, described above. There is no mention of any of the other defendants or of any transfers of monies from or to any of the other defendants in this affidavit.

The Patel Testimony

46 As mentioned, the plaintiffs rely heavily on the testimony of Patel given on October 9, 2012 in the U.S. actions. He was the chief financial officer of Einer during 2010, 2011 and 2012. He resigned on March 13, 2013. Mr. Patel testified that approximately U.S. $20 million was invested by BTI in GLB by way of a loan to GLB that was incurred by GLB as BTI paid GLB's expenses of construction of the Plant and acquisition of equipment for the Plant. Mr. Patel said this investment was funded out of a combination of funds received from the shareholder, understood to be Orense, and BTI's active business income, which is understood to mean assets of BTI used and/or generated in its business activities, i.e. its working capital. Mr. Patel indicated that he thought approximately U.S. $8 million was funded by Orense and the balance, approximately U.S. $12 million, was therefore loaned by BTI from its working capital assets. The plaintiffs say there is no evidence this loan was set up as a payable to BTI. The plaintiffs also say that there is no evidence that this loan was repaid by GLB. They say this money was instead simply transferred to GLB and has disappeared from the financial statements of both BTI and GLB.

47 In a subsequent affidavit sworn March 26, 2014 in this proceeding that was produced by the Represented Defendants, Patel attached a copy of the Einer general ledger report for 2011, which shows no activity. Patel stated that all of Einer's transactions in 2011 would have been reported on the BTI general ledger. The affidavit also attached a copy of the BTI general ledger for 2011 and a copy of the GLB general ledger for the same year. Patel noted that account #2140 of BTI reflected a BTI loan to GLB in 2011 in the amount of $2,818,765.95, which was within $10,000 of the amount shown in the corresponding GLB general ledger account. Based on his review of the records, Patel concluded that his statement in the 2012 examination regarding the amount of the loans from BTI/Einer to GLB was incorrect. It should also be inferred from his statement that Patel considers the records of BTI and GLB to be reliable in this respect.

Preliminary Issue — The Relationship of Orense to the Represented Defendants

48 An important issue in this proceeding is the relationship between the Represented Defendants and Orense. The following summarizes the evidence before the Court and my conclusions regarding the relationship of Orense to the Represented Defendants.

49 First, the shareholder register of GLB shows Einer to be the sole shareholder of GLB until April 19, 2012, holding 96,000 common shares. On that date, 9,495,000 common shares were issued to Orense and an additional 9,000 common shares were issued to Einer. In addition, on December 31, 2012, an additional 13,818,620 common shares were issued to Orense. Accordingly, since April 19, 2012, Orense has been the holder, directly and indirectly through Einer, of all of the outstanding common shares of GLB.

50 In support of these share issuances, the Represented Defendants have submitted three documents executed between Orense and GLB. Two of these documents pertain to the share issuance of 9,495,000 shares. They indicate that the aggregate subscription price for these shares was $27,000,000. The third document relates to the share issuance of 13,818,620 common shares. It indicates that the subscription price was $13,818,620, which was satisfied by the conversion of an outstanding loan from Orense to GLB.

51 The financial statements that were produced by the Represented Defendants reflect the issuance of all of the shares attributed to Einer and the 9,495,000 shares attributed to Orense. However, the financial statements of GLB cannot be fully reconciled with the share records of that corporation. In the case of the shares issued to Orense, the stated capital in the financial statements appears to be higher than the $27 million contemplated by the two subscription agreements. In addition, the loan-to-equity conversion resulting in the issuance of 13,818,620 additional common shares to Orense is not reflected on the GLB financial statements.

52 Second, the Einer 2011 income tax return shows the ownership of Einer at December 31, 2011 to be Mazur — 42%; Akulov — 34%; Orense — 11%. There is no evidence of the ownership of the balance of these shares. It is clear, however, that Mazur, Akulov and the other unnamed shareholders subsequently sold their shares in Einer to Orense, as it is apparently undisputed that Orense owns all of the outstanding shares of Einer at the present time. It also appears that Mazur sold his shares to Orense in or about April 2012.

53 It should be noted that, insofar as BTI made any loans to GLB during 2011, such loans would have been made at a time when Orense was only a minority shareholder of Einer. The Represented Defendants say that Orense funded such loans. There is an unanswered question as to the understanding between the parties regarding the obligation of the other shareholders who do not appear to have put up their respective *pro rata* shares of such loans. This is addressed further below.

54 Third, it is not disputed that Einer owns all of the shares of BTI. Among other evidence, this is reflected in BTI's tax returns. Accordingly, Orense has also indirectly owned and controlled BTI since April 2012.

55 Fourth, the plaintiffs argue that Orense was "closely related" to all the defendants during 2010 and 2011 when the alleged transfers occurred. They point to a number of factors including: (1) the alleged loan from Verdeo to Orense of $12.5 million in 2010, representing a part of one version of the Orense Transaction; (2) a marketing agreement among Orense, Verdeo and BTI dated December 15, 2009; (3) Orense's shareholding in Einer, as a co-shareholder with Mazur; and (4) the alleged capital injection of funds in BTI by Orense in satisfaction of the loan in (1) above.

56 The onus rests with the plaintiffs to establish, on a balance of probabilities, that Orense was related to one or more of the Represented Defendants during 2010 and 2011 in a manner that is significant for present purposes. They have not satisfied this onus. Each of the relationships described above is a commercial or a financial relationship. There is nothing in the evidence regarding these relationships that could ground a finding that Orense was not at arm's length from the Represented Defendants. In particular, there is nothing in the record to suggest either common ownership of Verdeo by Orense and Mazur, control of Orense by Mazur, or use of Orense as a "clearing house" by the Represented Defendants, as the plaintiffs allege. Further, despite the finding below regarding the Orense Transaction — which address a fraudulent conveyance involving Verdeo, BTI and Mazur — there is no evidence before the Court that Orense and Mazur acted in concert to defeat the creditors of Verdeo.

57 I therefore conclude that, for purposes of this motion, I must proceed on the basis that Orense was not related to any of the Represented Defendants during 2010 and 2011 other than as a party with whom the Represented Defendants had arm's length commercial relationships.

Preliminary Observations

58 The principal issue for the Court on this motion is, as stated above, whether there is a strong *prima facie* case of fraudulent conveyances for the purposes of s. 2 of the FCA from Verdeo to either Einer or BTI and from one of those corporations to GLB. The following four considerations are of considerable significance in the determinations reached below.

59 First, the standard on this motion is a strong *prima facie* case. In this case, the onus rests with the plaintiffs to identify actual transfers of monies that constitute fraudulent conveyances. The Court cannot find a strong *prima facie* case if the evidence establishes that it is a least as probable that any given transaction was a valid transaction rather than a fraudulent transfer. As well, the Court cannot find transaction documentation to be fabricated in the absence of some supporting evidence.

60 Second, as a related matter, in the absence of documentation or evidence of credible third parties establishing that particular transfers and other transactions have been fabricated, the plaintiffs ask the Court to draw the inference of fabrication based on a finding that Mazur is not a credible party combined with his control of each of Verdeo, Einer and BTI during the period 2009 to April 2012. They argue that this evidence is sufficient to ground a conclusion that the evidence relied upon by the Represented Defendants is fabricated or otherwise misleading.

61 However, the Court cannot make findings of credibility on this motion based solely on the written record before it. I do not consider this to be a matter of law but rather a conclusion that is specific to the facts of this case. While the plaintiffs may be correct in their assertions, I do not think that the Court can make such a finding given that there is documentary evidence as well as testimony of Kramble and of Patel that is supportive of at least some aspects of Mazur's testimony. Any such determination of credibility would require a trial in the circumstances of this case. Accordingly, the Court cannot find that the transfers between Verdeo and Einer or BTI constituted fraudulent transfers solely because Mazur controlled each corporation during the relevant period.

62 Third, there is a further consideration in respect of the plaintiffs' assertion that the transfers from Einer or BTI to GLB, in particular, are tainted by Mazur's involvement as a director of GLB. Apart from the difficulty of a finding based on Mazur's credibility as discussed above, there is no evidence that Mazur controlled GLB. There is also evidence that by April 2012 at the latest, and possibly earlier on a formal or informal basis, Orense controlled GLB and Einer/BTI. As discussed above, the Court must proceed on the basis that Orense is an independent third party, i.e., that it is not related to, or controlled by, Mazur.

Analysis and Conclusions Regarding Allegations of Fraudulent Conveyances

63 As mentioned, the plaintiffs focus their allegations of fraudulent conveyances under s. 2 of the FCA on two matters: (1) the transfer of approximately U.S. $20 million from BTI or Einer to GLB to fund the construction of the Plant and (2) the issuance of common shares in GLB to Orense, thereby significantly diluting the interest of Einer in GLB. I will address each allegation in turn.

64 The principal issue for the Court is the extent to which the plaintiffs have established a claim that BTI transferred approximately U.S. $20 million to GLB under circumstances that constitute a "conveyance" described under section 2 of the FCA. To succeed on this claim, the plaintiffs must demonstrate fraudulent transfers at two separate levels: (1) between Verdeo and either Einer or BTI and (2) between Einer or BTI and GLB. I will address the evidence for the alleged fraudulent transfers in respect of each of these levels in turn.

Verdeo Transfers to Einer

65 For completeness, the plaintiffs do not allege that Verdeo made any transfers directly to Einer. Moreover, the evidence of Patel is that Einer did not have its own bank account during 2010 and 2011. Accordingly, in this endorsement, the issue of fraudulent conveyances from Verdeo is restricted to transactions involving BTI, including the Orense Transaction.

Verdeo Transfers to BTI

The Evidence

66 The plaintiffs say that Verdeo loaned considerable amounts to BTI that constitute a fraudulent conveyance for purposes of the FCA.

67 There is evidence in BTI's accounts of considerable transfers to and from Verdeo. Tab 8 of the Plaintiffs' Compendium III reflects loans from Verdeo totaling approximately $25.955 million in the course of 2010 recorded in account #2148 on the BT1 general ledger. It also shows repayment from BTI totaling $30.706 million during the same period. During 2010, the outstanding loan amount in this account reached approximately $21.667 million before being reduced. At December 31, 2010, the loan amount in this account was actually in a debit balance of approximately $3 million after a number of year-end adjustments. The BTI general ledger for account #2148 in 2011, which is set out at Tab 13 of the Plaintiffs' Compendium III, reflects total

loans of approximately $5.186 million and payments by BTI totaling $2.129 million. At the end of 2011, the outstanding loan due to Verdeo in this account was only $27,778.98.

68 The loan balances shown on the BTI general ledger cannot be reconciled exactly with the limited Verdeo accounting records provided to the Court. There are, however, Verdeo records that reflect loan balances to BTI that roughly approximate the 2010 and 2011 year-end balances in account #2148 in the BTI general ledger described above.

69 At Tab 25 of the Plaintiffs' Compendium II, there is a different trial balance of Verdeo for the same date (December 31, 2010) that reflects a change in the relevant account from a liability to Einer to a liability to BTI in the amount of $2,874,926.29. This approximates the receivable shown on BTI's general ledger of approximately $3 million at that date. I note the difference may be explained by the exchange rate between the U.S. and Canadian dollars. Similarly, the trial balance for Verdeo at December 31, 2011 at the same Tab 25 shows a receivable from BTI of $23,055.24, which may correspond to the liability shown on BTI's general ledger of $27,778.98 adjusted to reflect the conversion of U.S. dollars into Canadian dollars.

70 In addition, at Tab 20 of the Plaintiffs' Compendium I, there are two sheets that appear to show loans to BTI although there is no specific reference to Verdeo on these sheets. The first sheet reflects total loans of $19,590,950 during 2010 while the second reflects total loans of $1,950,000 during 2011.

71 At Tab 25 of the Plaintiffs' Compendium II, there is a report titled "Transactions by Account Report" for 2010 that includes an intercompany account of Verdeo with BTI (account # 2135). That account includes most of the loans reflected on the sheet described above for 2010 but cannot be fully reconciled with that sheet. The balance in that account at December 31, 2010 is, however, $2,874,926.29, being the amount shown on the second trial balance of Verdeo at that date described above.

72 If it is assumed that the differences between amounts on these sheets and on the BTI general ledger under account # 2148 represent conversion of U.S. funds into Canadian dollars, a large number of the transactions on these sheets can also be correlated with transactions reflected in the BTI account as either a "loan from Verdeo" or a "transfer from Verdeo". In the case of the 2010 sheets, while there are a number of smaller transactions not reflected in the BTI account, all but approximately $340,000 of the total of $19,590,950 can be so correlated. In the case of the 2011 sheet, all of the transactions correlate although there is a large discrepancy between the amount shown for the first transaction on the BTI general ledger and the corresponding amount shown on the Verdeo sheet.

73 I would note, however, that at Tab 20 of the Plaintiffs' Compendium I there is a statement also purporting to be a trial balance of Verdeo at December 31, 2010. It includes a loan due from Einer totaling approximately $22 million but does not show any loan payable or receivable with respect to BTI. There are, therefore, two trial balances for Verdeo at December 31, 2010 in evidence. In addition, there is also an unaudited balance sheet of Verdeo as at December 31, 2011 at Tab 20 of the Plaintiffs' Compendium II which shows a year-end liability to BTI in the amount of $3,499,564.26. Neither of these discrepancies in the materials at Tab 20 of the Plaintiffs' Compendium II has been explained.

Conclusions

74 The plaintiffs argue that all of the separate loans and transactions recorded under BTI's account # 2148 should be treated as a transfer from Verdeo to BTI that constitutes a fraudulent conveyance subject to the Act. However, with the exception of the entry or entries associated with the Orense Transaction which is discussed below, there is evidence indicating that all of these loans and other transfers have been repaid, apart from $27,778.98 as of December 31, 2011. There is no evidence of any activity in respect of this loan account after that date. There would therefore be essentially no amount to be repaid by BTI to Verdeo even if the alleged transfers were invalidated under the Act.

75 I have considered whether there is any evidence that would support a conclusion that additional loans or transfers were made outside the Verdeo and BTI intercompany accounts described above that would also constitute transfers under the FCA. As described above, however, the evidence, while not definitive, does not reflect any significant transfers that were not captured by these accounts.

76 For present purposes, given that the onus falls on the plaintiffs, I conclude that the plaintiffs have not established a strong *prima facie* case of transfers of monies from Verdeo to BTI that have not been substantially repaid, with the exception of the amount referable to the Orense Transaction, which is addressed below.

The Orense Transaction

77 The plaintiffs assert, in particular, that a $12.5 million transaction involving Orense reflected in the books of Verdeo and BTI (herein, the "Orense Transaction") constitutes a transfer on its own to which the FCA applies. The plaintiffs seek an order declaring the Orense Transaction to be void as a fraudulent transfer under the FCA.

78 The statement of claim provides three possible alternative forms of the alleged Orense Transaction as follows:

> 1. a loan of U.S. $12.5 to $14 million from Verdeo to Orense in 2010. Although not expressed in the amended statement of claim, it is understood that the plaintiffs allege that Orense used this money to make an equity injection in Einer and/or BTI which was used to reduce BTI's loan obligation to Verdeo under the intercompany loan account #2148 described below;
>
> 2. an assignment from BTI to Verdeo of a note receivable in the amount of U.S. $12.5 to Cdn. $14 million from Orense in partial satisfaction of the Verdeo loan to BTI under the intercompany loan account #2148; and
>
> 3. the assumption by BTI of an obligation of $14 million of Verdeo owed to Orense in respect of a customs seizure in Italy of illegally imported biodiesel fuel, with a corresponding reduction of BTI's obligation to repay the outstanding loan made by Verdeo to BTI under the intercompany loan account #2148. It is alleged that this obligation arose because Orense had a corresponding reimbursement obligation to a customer to whom it had sold the biodiesel fuel.

79 The specific transfer alleged to constitute a fraudulent conveyance in each case is different. In the first version of the Orense Transaction, the plaintiffs challenge the validity of the implied payment from BTI to Verdeo of U.S. $12.5 to $14 million. In the second version, the plaintiffs say that the note receivable in the amount of U.S. $12.5 to Cdn. $14 million from Orense was not legitimate. Similarly, in the third version, the plaintiffs deny the existence of any obligation of Verdeo to Orense in the amount of $14 million that was assumed by BTI.

80 With one qualification, each of these versions or explanations of the Orense Transaction have in common an indirect funding of BTI in the amount of U.S. $12.5 million or Cdn. $14 million, which might have been treated as the equivalent in Canadian dollars of U.S. $12.5 million. In each case, the net effect would appear to be a reduction of BTI's obligation to Verdeo on a basis which left U.S. $12.5 million or Cdn. $14 million in BTI. The qualification pertains to the first version of the Orense Transaction. It is unclear whether the BTI journal entry is intended to reflect an actual payment from BTI to Verdeo. To the extent it does, the BTI loan would have been reduced accordingly and the argument of a fraudulent transfer could not be sustained. To the extent it does not, the result would be the same under all three versions of the Orense transaction.

Evidence

81 The Orense Transaction is reflected, in part, in the following entries in the records of Verdeo and BTI.

82 The Verdeo financial statements for December 31, 2010 at Tab 20 of the Plaintiffs' Compendium I include a page listing certain journal entries, including a debit to "accounts-receivable — Orense" and a credit to "Loan payable — Bioversel Inc.". This sheet appears to be a listing of certain year-end journal entries, as two of the other items on the list are also shown as December 31 journal entries in account #2148 of BTI. This year-end journal entry appears to correspond to the entries in the Verdeo general ledger accounts #2145 (Loan-Orense) and #2135 (Interco-Bioversel Trading) for 2010 at Tab 25 of the Plaintiffs' Compendium II. The financial statements for Verdeo at December 31, 2011 therefore show the amount of $12,500,000 as a debit, i.e. as a receivable of Verdeo. There is, however, no explanation in the record for this re-characterization of the Orense Transaction. This matter is discussed further below.

83 In addition, account #2148 in the BTI general ledger includes a journal entry on December 31, 2010 in the form of a debit or receipt of $12.5 million described in the following terms: "to record the cash received from Orense via Verdeo as Equity injection." This journal entry also appears to re-characterize the transaction, although, as discussed below, the purpose of this entry is not clear.

84 The Represented Defendants object to the introduction of the page of the BTI general ledger for 2010 showing this entry on December 31, 2010 in account #2148. The objection is based on the understanding that the plaintiffs would not be introducing any further evidence after April 24, 2014. I note, however, that this page is included in the entire BTI general ledger for 2010 which had previously been produced by the Represented Defendants pursuant to a court order in the Kolmar action in California. Fairness dictates that it be admissible in this proceeding. However, insofar as Viral Mehta states in his affidavit sworn March 28, 2014 that this document pertains to Einer, he is clearly incorrect as the general ledger pertains to BTI.

Analysis and Conclusions Regarding the Orense Transaction

85 The issue for the Court on this motion is whether the plaintiffs have established a strong *prima facie* case that the Orense Transaction was fabricated and that, accordingly, there was no transaction giving rise to a legitimate basis for reducing the loan payable by BTI to Verdeo by U.S. $12.5 million or Cdn. $14 million. In this regard, I note the following three considerations.

86 First, the plaintiffs cannot establish which of these three versions of the Orense Transaction, if any, occurred. In part, this is a result of the fact that Orense is not a party to this action and has not participated in any manner in this motion.

87 Second, however, Verdeo and BTI have adopted the three alternative explanations at various times since 2010, without any explanation. The fact that the plaintiffs cannot propose a definitive form of the Orense Transaction should therefore not be determinative on this issue given the confusion, perhaps the intentional confusion, engendered by the actions of the Represented Defendants.

88 Third, the failure of the Represented Defendants to provide a clearer description of the Orense Transaction is meaningful in the face of the conflicting versions that they have themselves provided. I think the Court can reasonably infer: (1) that the purpose of these alternative versions was to seek to characterize the Orense Transaction in a manner that was in the best interests of one or both of the principal participants rather than to reflect the reality of the transaction; and (2) in the absence of an explanation for these versions that is directed to any other party, the purpose of these alternative versions was to mislead the plaintiffs, as creditors of Verdeo, among others.

89 In the absence of a definitive explanation for the Orense Transaction, the plaintiffs argue that associated "badges of fraud" support the conclusion that the Orense Transaction constituted a fraudulent conveyance of U.S. $12.5 million or Cdn. $14 million from Verdeo to BTI. I agree. I am of the opinion that the plaintiffs have established a strong *prima facie* case that the Orense Transaction resulted in an unsupported reduction in BTI's loan obligation to Verdeo of U.S. $12.5 million or Cdn. $14 million based on the following considerations.

90 First, there is no evidence of any payment of monies from BTI to Verdeo. In these circumstances, under any of the three versions of the Orense Transaction, the BTI loan from Verdeo was reduced without evidence of any actual payment to Verdeo or to another party on behalf of Verdeo.

91 Second, throughout the relevant period and, in particular, at the time of the Orense Transaction, Mazur controlled each of Verdeo, BTI and Einer. He was in a position to provide an explanation of the Orense Transaction and has had more than adequate notice, in this proceeding and in the U.S. actions, of the significance which the plaintiffs attach to this transaction. He has chosen not to provide a clear explanation. The absence of a legitimate business or tax reason for the transaction is a significant "badge of fraud" in the present case.

92 Third, in this regard, the Verdeo general ledger accounts evidence a year-end re-characterization of the Orense Transaction without any explanation. For the reasons set out above, I conclude that it is probable that this entry was intended to mislead creditors of Verdeo.

93 Fourth, as a related matter, Mazur had notice of the mounting obligations of Verdeo, not only to the plaintiffs but also to other parties. The disposition of the monies represented by the Orense Transaction was made in the face of these circumstances. This knowledge of Mazur should be imputed to both Verdeo and BTI by virtue of his relationships with these corporations.

94 Fifth, in addition, there is an apparent motive for the Orense Transaction which, while speculative, cannot be discounted as it relates to the larger issue of the relationship among Mazur, his associates, and Orense in respect of GLB. There is no adequate explanation for Ptushkin's ownership of Verdeo. Moreover, Verdeo was controlled by Mazur through the Verdeo Management Agreement. Mazur, Alculor and Orense, among others, were shareholders of Einer which owned GLB, which was, in turn, the entity in which the Plant was to be constructed and operated. Mazur required monies to fund his *pro rata* share of the investment which, ultimately, he was unable to obtain. It is possible that the Orense Transaction was a means of funding a portion of that investment to satisfy the obligation of Mazur and Akulov to Orense.

95 Based on the foregoing, I therefore conclude that the plaintiffs have established a strong *prima facie* case of a transfer of U.S. $12.5 million or Cdn. $14 million from Verdeo to BTI that constituted a fraudulent conveyance under s. 2 of the FCA. The critical issue on this motion is, therefore, whether the plaintiffs can also establish the existence of a fraudulent conveyance from BTI to GLB. For clarity, however, I also have concluded above that the evidence does not establish that Orense and Mazur acted in concert to defeat the creditors of Verdeo. In particular, the evidence before the Court is not sufficient to establish that Orense' participation in the Orense Transaction, the precise nature of which remains unclear, was directed towrd hindering or defeating the creditors of Verdeo in concert with Mazur.

BTI Transfers to GLB

96 I propose to address the plaintiffs' allegations of fraudulent transfers from BTI to GLB first by reference to the specific evidence of transactions between these corporations and then by considering the more general claims of the plaintiffs.

The Loans from BTI to GLB Acknowledged by the Represented Defendants

97 The Represented Defendants acknowledge that BTI made loans to GLB totaling approximately $4 million. These loans are evidenced in the records of these corporations. Tab 7 of the Plaintiffs' Compendium III reflects loans totaling approximately $1.278 million at the end of 2010 recorded in account # 2140 on the BTI general ledger. This loan rises to approximately $3.550 million at the end of 2011, as reflected in Tab 12 of the Plaintiffs' Compendium III. Tab 17 of the Defendants' Compendium sets out the corresponding account, also being account #2140, in the GLB general ledger. These records reflect full repayment of these loans by December 20, 2013.

98 In this regard, I note that the outstanding amounts on December 31, 2010 are exactly the same in the BTI general ledger account and in the GLB general ledger account for this loan. After adjusting for the two journal entries on January 1, 2012 in account #2140 in the GLB general ledger, the outstanding amounts are also exactly the same on December 31, 2011. In addition, as Patel noted in his affidavit sworn March 26, 2014, the aggregate amount of the BTI loan to GLB in the BTI general ledger account for 2011, being $2,818,765.95, is within $10,000 of the corresponding amount in the GLB general ledger account.

Conclusions

99 The plaintiffs argue that all of the separate loans recorded under BTI's account #2140 should be treated as a fraudulent conveyance subject to the FCA. However, as set out above, the evidence establishes that, while BTI made the loans described above to GLB, the full amount of such loans was repaid. There would therefore be no amount to be repaid by GLB to BTI even if the alleged transfers were invalidated under the FCA.

100 To avoid this difficulty with their argument, the plaintiffs argue that the Court should disregard the repayments recorded on the BTI general ledger. I see no basis for doing so. There is no evidence that the general ledgers of BTI and GLB do not represent actual loans and actual repayments between the parties. The plaintiffs rely on the evidence of the BTI general ledger with respect to the payment of funds to GLB, thereby implicitly asserting their validity. They cannot deny the validity of the same records with respect to the repayment of the loan and assert that such entries are a fabrication without some supporting evidence.

101 Accordingly, I conclude that the evidence does not disclose a strong *prima facie* case of a fraudulent conveyance in respect of the loans made by BTI to GLB that are reflected in account #2140 of each of these corporations.

The Plaintiffs' Further Claims of Loans From BTI to GLB

102 In the absence of evidence of specific transfers that they have identified in the accounting records of BTI and GLB, the plaintiffs urge the Court to conclude that BTI transferred approximately $20 million to GLB in 2010 and 2011, based on certain evidence discussed below, and that such transfers constituted a fraudulent conveyance for the purposes of the FCA. In this regard, it is not sufficient for this purpose to find that BTI received either U.S. $12.5 million or Cdn. $14 million in the Orense Transaction from BTI. It is also necessary to establish the existence of one or more transfers of these monies from BTI to GLB. The critical question on this motion is, therefore, whether the evidence supports a finding, on a balance of probabilities, of any transfer or transfers between BTI and GLB in addition to the loans acknowledged by the Represented Defendants addressed above.

The Orense Investment in Great Lakes Biodiesel Inc.

103 Before addressing the plaintiffs' submissions in this regard, it is necessary to assess the evidence regarding the alleged investment of Orense in GLB.

104 The relevant evidence consists principally of the following four matters. First, Kramble testified on his cross-examination that Orense invested $45 million in GLB. This was not contradicted. Second, there is documentary evidence, described above, pertaining to the share issuances. This suggests that Orense subscribed for shares and converted an outstanding loan into additional shares of GLB. The evidence regarding the conversion of the outstanding loan to equity does not, however, indicate whether the loan was made directly to GLB by Orense or was made indirectly through the agency of BTI. Third, as discussed above, the GLB financial statements are partially supportive of the share issuances, despite the reconciliation problem described above. Fourth, Patel testified that BTI made loans to GLB that were partly funded by BTI's trading assets and partly by the shareholders of Einer. In his affidavit of March 26, 2014, he stated that he believed the total of BTI's loans to GLB out of its own assets was limited to the $4 million discussed above. In his earlier testimony in the U.S. actions, Patel testified that the BTI loans to GLB totaled approximately $20 million and that the shareholders of Einer funded the loans not funded out of BTI's own assets. By implication, then, Patel considered that the Einer shareholders provided approximately $16 million for this purpose.

105 This raises the related matter of the relative contributions of the Einer shareholders to the BTI loan to GLB that has been mentioned above. While Mazur and Akulov may have made some loans that are not in evidence, Orense was the only one of the Einer shareholders that appears to have had the financial capacity to provide funds in the amount contemplated by Patel. By his own admission, Mazur did not have the financial capacity to invest and therefore sold his shares in Einer to Orense. The parties have not drawn the Court's attention to any equity injections or other payments from Mazur or Akulov to Einer or BTI. The only payments identified by the plaintiffs are those alleged to have come from Orense. In any event, even if there were similar payments by Mazur and/or Akulov for investment through BTI or GLB, there is no reconciliation of the total of all contributions to GLB via BTI alleged by the plaintiffs nor of the respective contributions of the Einer shareholders in GLB.

106 The plaintiffs make two submissions regarding the conclusions that the Court should draw from this evidence.

107 First, the plaintiffs submit that there is no evidence of any consideration flowing from Orense to GLB, whether through Einer/BTI as its agent or directly, and that, accordingly, all the issuances of shares to Orense should be invalidated as fraudulent transfers for purposes of s. 2 of the FCA.

108 I do not accept this argument. The onus is on the plaintiffs to prove, on a balance of probabilities, that Orense did not make the investments in the Plant alleged by the Represented Defendants. I do not think I can reach this conclusion on the facts in evidence before the Court. Rather, I think it is at least as likely that Orense did make these investments for the following reasons.

109 There is no question that the Plant cost is in excess of $30 million. The evidence of Kramble is clear and not contradicted. The other evidence described above is also at least partially supportive of the position of the Represented Defendants. In particular, Patel's testimony implies that shareholders provided most of the funds that were loaned by BTI to GLB. There is no evidence of any potential investors other than Orense, Mazur and Akulov. While Mazur and Akulov may have made some loans prior to selling their shares, the plaintiffs have not identified any such loans in the record. Orense was, as noted, the only one of the Einer shareholders that appears to have had the financial capacity to provide funds in the amount required to construct the Plant. In addition, the GLB financial statements partially reflect the alleged Orense investment and do not assist the plaintiffs in any manner.

110 I accept that there remain at least two issues of some significance regarding the Orense investment. First, the share subscription agreements are silent regarding any involvement of BTI. Given that at least part of the Orense investment in GLB appears to have been made through BTI at least initially, there is an issue as to whether the parties have re-characterized this investment for reasons that are relevant to this action. Second, as the plaintiffs point out, there is no actual evidence of payment and a material discrepancy in the GLB financial statements that has not been explained. These issues may point to material falsification of the records pertaining to the Orense investment in GLB. Each of these possibilities is, however, purely speculative. The plaintiffs have not produced any evidence that supports either scenario.

111 Based on the evidence that is before the Court, the Court cannot conclude that the evidence demonstrates that Orense did not make its alleged investment in GLB and that the GLB records have been falsified. In the absence of any other explanation of the funding of the construction of the Plant that is supported by the evidence and given the fact that the evidence is at least partially supportive of the alleged Orense investment for such purpose, I conclude that it is at least as probable that Orense made the payments and loans contemplated by the share subscription agreements described above either directly to GLB or indirectly through BTI.

112 The plaintiffs' second submission is that Orense was simply a "clearing house" for Verdeo and Mazur. I have set out above the reasons for concluding that the Court must proceed on the basis that Orense is an independent party from Mazur and Verdeo. There is also no basis in the evidence reviewed in reaching that conclusion that would support the plaintiffs' alternative allegation that Orense was a clearing house for Verdeo and Mazur. There is also no evidence that Mazur controlled Orense. Accordingly, this argument is also rejected.

The Plaintiffs' Submissions

113 In this section, I propose to address three issues raised by the plaintiffs and/or prompted by the plaintiffs' submissions.

Submission Based on Badges of Fraud

114 First, the plaintiffs urge the Court to find, based on Patel's evidence, that $20 million, $12 million or $8 million was provided by BTI out of its own assets and that such transfers constituted a fraudulent conveyance based on a number of "badges of fraud". They refer to the following eight circumstances in particular.

115 First, the plaintiffs say the Court should rely on the findings of fraud against Mazur, BTI and Ptushkin in the BioUrja Judgment. I decline to do so in the absence of any indication in the record of the evidence before the Texas court and of the specific basis upon which the jury in that action found that there was a "fraudulent transfer" within the meaning of that term in the applicable statute.

116 Second, the plaintiffs say the transfers from BTI to GLB were transfers by BTI to a related person. The basis of this conclusion is an allegation that Mazur controlled Verdeo, BTI and GLB during 2010 and 2011. Mazur did control BTI and Verdeo. However, it is not clear that he also controlled GLB, in which he was only one of several directors.

117 Third, the plaintiffs say that the BTI investment in GLB was for no consideration. Insofar as this refers to the BTI loans to GLB that are recorded in the accounts of GLB and BTI, it has been addressed above. The plaintiffs also allege that a $5 million investment of BTI in the Plant has been removed from the assets of BTI without explanation. This is addressed further below. To the extent the plaintiffs are correct, it would constitute a "badge of fraud". However, for the reasons set out below, I conclude that the plaintiffs have not established this allegation on a balance of probabilities.

118 Fourth, the plaintiffs say that there was no valid transfer because the transferor remains in possession of the property for its own use after the transfer. As applied to Verdeo, this may well be accurate, as Mazur continued to control Verdeo through the Verdeo Management Agreement notwithstanding the sale of the shares of Verdeo to Ptushkin for $1.00. However, this consideration does not apply to any transfers from BTI to GLB.

119 Fifth, the plaintiffs say the transfers from BTI to GLB occurred in 2010 and 2011 after the U.S. actions had been commenced and that the GLB issuance of shares to Orense occurred after Mazur was named in that litigation. In this respect, there is little doubt that significant transfers from Verdeo to BTI occurred after Verdeo incurred significant liabilities to the plaintiffs as well as other third parties. However, Einer, BTI and Mazur were not added to the Petro-Diamond action until May 8, 2012, Einer and BTI were not added to the BioUrja action until January 30, 2013, and Einer, BTI, Mazur and Ptushkin were not added to the Kolmar action until December 13, 2013. The alleged fraudulent transfers from Einer/BTI to GLB that are the subject of this action occurred in 2010 and 2011 before Einer and BTI were, however, added to these actions.

120 Sixth, neither Verdeo nor BTI has any remaining assets. Both companies have ceased operations. However, it is unclear whether the absence of assets results from the payment of outstanding liabilities on a winding down of their operations or from the disposition of assets to related parties. As mentioned, the accounting information produced by the plaintiffs is not complete and does not adequately address these questions.

121 Seventh, the plaintiffs allege that none of the payments made by BTI to GLB appear to have had any sound business or tax reasons for them. I do not accept this submission for the following reasons. The evidence strongly suggests that Einer/BTI was the vehicle by which the shareholders in Einer intended to invest in GLB. In addition, Patel's uncontradicted testimony was that monies from the shareholder or shareholders flowed through BTI as an agent for these shareholders.

122 Eighth, the plaintiffs say the Represented Defendants have provided inaccurate documents. This is correct in respect of Verdeo. However, I do not think that the plaintiffs have established any inaccurate documents in respect of BTI or GLB. Rather, the documentation provided to the Court is incomplete. What is less clear is whether the Represented Defendants have access to more complete documentation, particularly in respect of Orense.

123 In this regard, however, as mentioned, Orense is not a party to this action. The plaintiffs suggest that Orense must be taken to have notice of this claim, with which I agree given that Orense is the sole shareholder of GLB. However, the plaintiffs also urge the Court to draw an adverse inference from the failure of Orense to provide evidence to establish the *bona fide* nature of the GLB share issuances to itself. I do not think this is appropriate. As a non-party, Orense has no obligation to participate in this proceeding, much less to assume the onus of disproving the plaintiffs' allegations. The onus of establishing a strong *prima facie* case of a fraudulent conveyance from BTI to GLB rests with the plaintiffs.

124 The foregoing demonstrates that there are several circumstances present that could be regarded as "badges of fraud" in respect of the alleged transfers of funds from BTI to GLB. However, there are three significant difficulties with the plaintiffs' submission that the Court should find a fraudulent transfer in the amount of $12 million or $8 million occurred between BTI and GLB based on the existence of these "badges of fraud".

125 First, I do not think that the "badges of fraud" can be used in the manner implied by the plaintiffs' submission. The plaintiffs cannot identify any particular transaction between BTI and GLB that constitutes a fraudulent conveyance for the purposes of s. 2 of the FCA. Instead, they argue that the Court should infer that one or more of such conveyances must have occurred by virtue of the presence of the "badges of fraud" discussed above. I do not think this is appropriate.

126 Demonstration of the existence of "badges of fraud" cannot ground a finding that a transfer has occurred in the absence of any evidence of any such transfer. The existence of "badges of fraud" can only ground an inference that an identified transfer should be characterized as a fraudulent conveyance for the purposes of s. 2 of the FCA.

127 Second, in the present circumstances, the particular "badges of fraud" are not persuasive. The issue of the $5 million asset allegedly on the books of BTI is addressed below and does not factor into the present consideration. A number of the alleged "badges of fraud" are purely speculative without any evidentiary support. The only other "badge of fraud" that has been established is therefore the timing of the alleged transfers relative to the assertion of claims in the U.S. actions against Einer, BTI and Mazur. It is the case that the alleged fraudulent conveyances from Einer/BTI to GLB occurred after the Kolmar action had been commenced. However, the little information available regarding the timing of the alleged transfers suggests that they occurred prior to the addition of BTI and Einer to the U.S. actions. In any event, the presence of a single "badge of fraud" is not enough to find that it is more likely than not that BTI fabricated the records of its loan to GLB.

128 Third, any such inference must be made against the background of the Court's determination regarding the Orense investment in GLB set out above. Even if the Court were able to rely on the "badges of fraud" upon which the plaintiffs rely, I would find, on a balance of probabilities, that the plaintiffs had failed to demonstrate the existence of any transfer that could constitute a fraudulent conveyance from BTI to GLB for the following reason. There is sufficient evidence supporting the alternative explanation for the funding of the Plant that, in my opinion, a court cannot find that there are unidentified transfers from BTI to GLB out of BTI's assets based solely on the "badges of fraud."

129 Accordingly, I conclude there is no basis in the alleged "badges of fraud" alone for a finding that any transfer of funds occurred between BTI and GLB beyond the loans aggregating $4 million described above.

Submission Based on Patel's Original Testimony

130 The plaintiffs also argue that, based on Patel's testimony, the Court should find that one or more fraudulent transfers occurred from BTI to GLB out of BTI's assets based on Patel's testimony. In making this argument, they submit that the Court should disregard his testimony in his affidavit of March 26, 2014 or, alternatively, that the testimony in that affidavit does not, in fact, change his original testimony.

131 As mentioned, in the U.S. actions, Patel testified that approximately $20 million was invested through BTI in 2010 and 2011. In his original testimony, Patel suggested approximately $12 million came from BTI's own funds derived from its trading activities, with the balance being funded by the shareholders. In his affidavit of March 26, 2014, Patel retracted this evidence and stated that, based on the records before him, only $4 million was loaned by BTI out of its own assets.

132 The plaintiffs urge the Court to find that Patel's original testimony was correct and to reject the evidence in his affidavit of March 26, 2014. They say the evidence demonstrates that, as of December 31, 2011, BTI had invested approximately $8 million in GLB. This amount includes the outstanding loan described above, which was $3.550 million at that date and an investment in the Plant in the amount of $5.136 million, which is shown in account # 1090 of BTI as of December 31, 2010 and reflected in BTI's 2010 and 2011 tax returns.

133 I confess to some difficulty in understanding the plaintiffs' submission in this regard. I do not accept, however, that Patel's evidence in his affidavit of March 26, 2014 should be rejected. There is no evidence before the Court that casts doubt on his credibility. In addition, and in any event, while the plaintiffs urge the Court to find that BTI loaned GLB approximately $12 million out of its own funds based on Patel's testimony, they are, in fact, only able to identify a total investment of $8 million, of which $3.550 million was repaid according to the records of BTI and GLB.

134 This submission does, however, raise the issue of whether the asset of BTI set out in its 2010 and 2011 tax returns reflects a fraudulent transfer.

135 The BTI accounting records show a BTI investment of approximately $5 million in the Plant at the end of 2010 and 2011. There are also apparently-related references in the BTI tax returns for these years to an asset described as "plant" having an undepreciated capital cost of $5,107,389. The plaintiffs say, with justification, that this treatment is inconsistent with the treatment of BTI's provision of loans to GLB in respect of the Plant and related equipment. Further, the apparent disappearance of this entry in the assets of BTI after 2011 without any sale, transfer or other disposition remains unexplained.

136 I have considered whether the circumstances pertaining to this entry in the BTI tax returns, together with the other "badges of fraud", are sufficient to demonstrate a strong *prima facie* case of a fraudulent conveyance in the amount of the entry in the tax returns. I conclude that it is not, however, for the following reasons.

137 Apart from the evidence of the two tax returns, there is no other evidence pertaining to this treatment of some portion of the BTI advances to GLB. In particular, there are no other financial statements of BTI nor are there any cash flow statements during any of the relevant years. In addition, there are possible explanations for BTI's removal of this asset from its books that are consistent with the position of the Represented Defendants that Orense funded all of the investment in the Plant. For example, it is possible that this asset has been rolled into the Orense loans that were made through BTI, that is, that it was accounted for as part of the Orense loans to GLB. Further, there is, as mentioned, evidence that is supportive of the allegation that Orense was the source of all monies that were invested in GLB.

138 Given the foregoing, the Court cannot conclude that it is more probable than not that BTI invested approximately $5 million in the Plant and then simply removed the asset from its books without any consideration.

Possible Application of BTI Monies As Part of the Orense Loans to GLB

139 The third, and most complicated, possibility is that BTI used the monies received pursuant to the Orense Transaction to make the Orense loans to GLB that flowed through BTI's bank account that were apparently treated as separate from BTI's assets.

140 There is certainly a possibility that this occurred as a result of the sale arrangements between Orense and the other shareholders of Einer including Mazur. As discussed above, during 2010 and 2011, it appears that each of Orense, Mazur and Akulov had an interest in Einer and therefore, in BTI and GLB, which were wholly-owned subsidiaries of Einer. There is no evidence of any agreement between these parties regarding the treatment of any funds provided by them for investment in GLB. In addition, as mentioned, while it appears that Mazur, Akulov and the other unnamed shareholders of Einer sold their shares in Einer to Orense in or about April 2012, the sale arrangements are not before the Court. If BTI had assets at the time of the sale of the Einer shares to Orense from the Orense Transaction, it is possible that the sale arrangements resulted in such monies being left in BTI and used by Orense for its loans to GLB with knowledge of their source. In such event, it would be arguable that the loans referable to such monies constituted a fraudulent conveyance.

141 However, in the absence of any documentation pertaining to such sale, this is pure speculation. It is equally possible that any such monies were paid out to Mazur and the other shareholders of Einer or were used to pay other liabilities of BTI when it was wound down. The evidence is not sufficient to establish the flow of funds out of BTI. It is therefore not sufficient to establish a strong *prima facie* case of a fraudulent conveyance from BTI to GLB.

Conclusions Regarding Allegations of Fraudulent Conveyances

142 Based on the foregoing, I conclude that the plaintiffs have failed to establish on a strong *prima facie* basis the existence of any fraudulent conveyance from BTI to GLB for the purposes of s. 2 of the FCA. Accordingly, the plaintiffs' motion for a *Mareva* injunction is denied.

143 The plaintiffs also seek a *Mareva* injunction in respect of the assets of the other corporate defendants. However, in view of the acknowledged lack of assets of each corporation, there is no risk of dissipation of assets by any of such defendants. In

other words, such an order would have no practical consequence. I do not think that a *Mareva* injunction would be appropriate in such circumstances. Accordingly, such relief is also denied.

144 The Court has advised the parties that, in view of the fact that the submissions on the plaintiffs' motions did not address the motion for injunctive relief against Mazur in any detail, the plaintiffs' motions in this regard remain under reserve. The parties are to contact the Commercial list office to schedule a 9:30 am appointment to address possible further submissions regarding this matter.

Allegation Regarding Fraudulent Transfers of Shares By Orense

145 The plaintiffs also argue that the issuances of shares to Orense constituted a fraudulent conveyance for purposes of s. 2 of the FCA. This submission has been specifically addressed above in connection with the analysis of the plaintiffs' submissions that there were fraudulent conveyances from BTI to GLB. It is rejected for the reasons set out therein.

146 In particular, I note the following. The plaintiffs are unable to establish a strong *prima facie* case that the source of the funding of the Plant and the related equipment was one or more fraudulent transfers from BTI. On the evidence, it is at least as probable that Orense provided such funding. There is uncontradicted specific evidence to this effect from Kramble. The share subscription documentation is supportive of this conclusion. The GLB financial statements are partially supportive. Patel's testimony is also consistent with this conclusion even though he is not specific regarding the extent to which any of the Einer shareholders contributed monies to fund the BTI loans to GLB. The fact that the first share issuance to Orense is dated four days after the date on which Petro-Diamond added Einer to the Petro-Diamond action in the the United States, while it could constitue a "badge of fraud", is not a sufficient basis to find that this share issuance was a fraudulent conveyance in the face of the foregoing evidence.

147 As mentioned, there is a possibility that a portion of that funding was the result of fraudulent transfers from Verdeo to BTI in connection with the Orense Transaction and that the funds received by BTI remained in BTI at the time that Orense acquired all of the shares of Einer not previously owned by it. However, for the reasons set out above, I conclude that the plaintiffs are unable to establish a strong *prima facie* case to this effect on the evidence before the Court. In particular, as mentioned above, the evidence is insufficient to find that Orense and Mazur acted in concert to defeat the creditors of Verdeo.

148 Accordingly, it is not possible to establish, on a balance of probabilities, that any of the subscription proceeds for the shares issued by GLB that diluted the interest of Einer were derived from monies that were the subject of a fraudulent transfer from Verdeo. In these circumstances, the Court cannot find that any of the share issuances constituted a fraudulent conveyance for the purposes of s.2 of the FCA.

149 I would add that, insofar as it may be suggested that the share issuances were originally to Einer which then transferred the shares to Orense, there is no evidence of any debts or liabilities of Einer to the plaintiffs that were hindered or defeated by any such transfer. Nor is there any evidence of a transaction that was structured in this manner.

The Requirement of Establishing a Real Risk of Dissipation of Assets

150 The plaintiffs say that the Court should infer a real risk of dissipation of assets, i.e. the Plant, based on the approach of Strathy J. (as he then was) in *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, 106 O.R. (3d) 494 (Ont. S.C.J.), at para. 63:

> [T]he Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

151 In this case, the plaintiffs say that the Court should find that the Represented Defendants would dissipate assets, if given the opportunity, based on the following factors: (1) concealment of the nature of the Orense Transaction; (2) the dilution of Einer's shareholding in GLB; (3) the refusal to produce audited financial statements, the amendments to the Verdeo tax returns and an allegation of two sets of books for Verdeo; (4) the timing of Mazur's resignation as a director of Einer and GLB in relation to Petro-Diamond's amendment of its complaint to assert claims against Mazur; (5) the defendants' delay of the U.S. actions to permit the disposition of the Verdeo assets and Mazur's sale of his house; and (6) alleged deceitful conduct, including changing their evidence in the course of these proceedings, the finding of fraudulent transfers in the BioUrja Judgment and the circumstances of certain Verdeo loans to Mazur.

152 Given the determinations above on the merits of the plaintiffs' allegations of fraudulent transfers from BTI to GLB, it is not necessary to address this issue and I therefore decline to do so.

Conclusion Regarding the Plaintiffs' Motion for a Mareva Injunction Based on the Allegations of Fraudulent Conveyances

153 Based on the foregoing, I conclude that the plaintiffs have failed to establish on a strong *prima facie* basis the existence of any fraudulent conveyance from BTI to GLB, or of any fraudulent transfers in the form of issuances of shares by GLB, for the purposes of s. 2 of the FCA. Accordingly, the plaintiffs' motion for a *Mareva* injunction is denied.

The Plaintiffs' Motion for Injunctive Relief Based on the Oppression Claim

154 In the alternative, the plaintiffs allege that the disposition of all of the assets of Verdeo and BTI constituted oppressive activity for purposes of s. 248 of the OBCA. They argue that such actions were contrary to the plaintiffs' reasonable expectations. They seek injunctive relief of the nature of a *Mareva* injunction by way of interim relief under s. 248(3) of the OBCA.

155 This claim is dismissed for two reasons.

156 First, the plaintiffs' oppression claim is asserted under ss. 248(2)(a) and/or (b). The claim relates to acts or omissions of a "corporation or its affiliates". As set out above, by virtue of the share ownership of Verdeo, that corporation is not, and was not, an affiliate of BTI, Einer or GLB. Nor is it a corporation governed by the OBCA. Accordingly, there is no claim that can be asserted under s. 248 of the OBCA in respect of Verdeo, in particular, in respect of any transfers of monies from Verdeo to BTI.

157 Second, while a claim could be asserted in respect of BTI and its affiliates, which include Einer and GLB, the plaintiffs are required to demonstrate a strong *prima facie* case of oppression, among other things, to obtain interim relief under s. 248. Specifically, to succeed in its oppression claim, the plaintiffs would have to establish that BTI disposed of its assets at an under value to GLB. Such a claim is, in effect, an alternative expression of the plaintiffs' claim of fraudulent transfers to GLB.

158 As the plaintiffs have failed to establish a strong *prima facie* case of fraudulent transfers from BTI to GLB, they are also unable to establish a disposition of BTI's assets at an undervalue for purposes of their oppression claim on the same standard.

The Plaintiffs' Motion for a Certificate of Pending Litigation

159 In the alternative, the plaintiffs also seek leave to issue a certificate of pending litigation in respect of the Plant. This claim is based on a constructive trust which the plaintiffs assert arises by virtue of having established that Verdeo funds that should have been available for its creditors were transferred by fraudulent conveyances from Verdeo to BTI and from BTI to GLB.

160 Based on the foregoing, the plaintiffs are unable to establish a strong *prima facie* case of a fraudulent conveyance, from BTI to GLB. I would also conclude that it is questionable whether the plaintiffs have established a *prima facie* case, although there can be no doubt that the plaintiffs have established a serious issue to be tried.

161 Regardless of the applicable standard, however, I conclude that the balance of convenience favours denial of the requested relief for the following reasons.

162 First, the plaintiffs' allegation is that Verdeo funds have been converted into the Plant. If established, a constructive trust in part or all of the Plant might be imposed in favour of Verdeo or its creditors. However, there is no evidence of any intention of GLB to sell the Plant. While the Court has previously granted an order permitting a mortgaging of the Plant to secure working capital financing, there is no evidence of any real possibility of additional mortgage financing to monetize the remaining value of the Plant or of any proposed sale of the Plant.

163 Second, the real issue is not a risk of monetization of the Plant but a wind-up and distribution of the assets of GLB. There is no evidence of any intention on the part of GLB or its shareholder to effect such a transaction. Insofar as the plaintiffs seek to prevent GLB mortgaging the remaining equity in the Plant in favour of Orense or other creditors, the plaintiffs will continue to have their rights as creditors if and when they obtain recognition of their respective claims in Ontario.

164 Third, on the other hand, there is evidence that any uncertainty regarding GLB's title to the Plant will adversely affect its business reputation and, thereby, its ability to compete in the international market.

165 Fourth, based on the determinations above, the plaintiffs cannot establish a high probability that they will recover judgment in the action against GLB.

Conclusion

166 Based on the foregoing, the plaintiffs' motions for a *Mareva* injunction, for interim relief under s. 248 of the OBCA and for a certificate of pending litigation in respect of the Plant are dismissed.

167 The Represented Defendants shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and the plaintiffs shall have 15 days from the date of receipt of the such submission to provide the Court with any responding submission they may choose to make. Submissions seeking costs shall include the costs outline required by r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

Motion dismissed.

TAB 7

2014 SCC 8, 2014 CSC 8
Supreme Court of Canada

Bruno Appliance and Furniture Inc. v. Hryniak

2014 CarswellOnt 642, 2014 CarswellOnt 643, 2014 SCC 8, 2014 CSC 8, [2014] 1 S.C.R. 126, [2014] S.C.J. No. 8, 128 O.R. (3d) 799 (note), 12 C.C.E.L. (4th) 63, 21 B.L.R. (5th) 311, 239 A.C.W.S. (3d) 1077, 27 C.L.R. (4th) 65, 314 O.A.C. 49, 366 D.L.R. (4th) 671, 37 R.P.R. (5th) 63, 453 N.R. 101, 47 C.P.C. (7th) 1

Bruno Appliance and Furniture, Inc., Applicant and Robert Hryniak, Respondent and Attorney General of Ontario, Ontario Trial Lawyers Association, Advocates' Society and Canadian Bar Association, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: March 26, 2013
Judgment: January 23, 2014
Docket: 34645

Proceedings: affirming *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.); affirming *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 CarswellOnt 2026, 2010 ONSC 1729 (Ont. S.C.J.); affirming *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 2010 ONSC 5636, 2010 CarswellOnt 7991 (Ont. Div. Ct.); affirming *Parker v. Casalese* (2010), 2010 CarswellOnt 4406, 268 O.A.C. 378 (Ont. S.C.J.); affirming *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 2010 CarswellOnt 8323 (Ont. S.C.J.); reversing in part *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP* (2010), 2010 ONSC 5490, 2010 CarswellOnt 8325 (Ont. S.C.J.)

Counsel: Javad Heydary, Jeffrey D. Landmann, David K. Alderson, Michelle Jackson, Jonathan A. Odumeru, for Appellant
Sarit E. Batner, Brandon Kain, Moya J. Graham, for Respondent
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Allan Rouben, Ronald P. Bohm, for Intervener, Ontario Trial Lawyers Association
David W. Scott, Q.C., Patricia D.S. Jackson, Crawford Smith, for Intervener, Advocates' Society
Paul R. Sweeny, David Sterns, for Intervener, Canadian Bar Association

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts; Contracts; Employment; Property; Public
Related Abridgment Classifications
Business associations
I Nature of business associations
I.3 Nature of corporation
I.3.b Distinct existence
I.3.b.i From owner
I.3.b.i.B Lifting the corporate veil
I.3.b.i.B.1 Fraud or improper conduct
Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue
Torts
VIII Fraud, deceit, and misrepresentation
VIII.1 Fraudulent misrepresentation [civil fraud, deceit]

VIII.1.a Elements
VIII.1.a.iv Inducement

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff wired US$1 million to lawyer who assigned funds to account associated with company T, along with other funds — Plaintiff's money was not invested by T — Plaintiff joined with plaintiffs from companion action alleging fraud against principal of T, H; principal of Panamanian company, C; and law firm; and both sets of plaintiffs brought motions for summary judgment which were heard together — Motion judge found that plaintiff had established claim against H and that there was no issue requiring trial — Court of appeal found that plaintiff's action could not be addressed through summary judgment due to voluminous record, conflicting testimony, credibility issues, conflicting theories of liability, and absence of reliable documentary evidence — Plaintiff appealed — Appeal dismissed — Motion judge was required to ask whether matter could be resolved in fair and just manner on summary judgment motion — Matter can be resolved in this way when process allows judge to make necessary findings of fact, to apply law to facts, and is proportionate, more expeditious and less expensive means to achieve just result — Based on recent amendments to Rules of Civil Procedure regarding summary judgment, if it appeared that there was genuine issue requiring trial, judge could then ask if need for trial could be avoided by using new powers of evaluating evidence and ordering presentation of oral evidence — Motion judge failed to find necessary element of fraud, which was error of law, and did not draw sufficient factual conclusions for him or appellate court to make such finding.

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From owner — Lifting the corporate veil — Fraud or improper conduct

Plaintiff met with principal of Panamanian company, C, and Toronto lawyer regarding investment with company T — Principal of T, H, was not present at meeting — Plaintiff wired US$1 million to lawyer who assigned funds to account associated with T, along with other funds — Plaintiff's money was not invested by T — Plaintiff joined with plaintiffs from companion action alleging fraud against H, C and law firm, and both sets of plaintiffs brought motions for summary judgment which were heard together — Motion judge found that plaintiff had established claim against H and that there was no issue requiring trial — Court of Appeal found that plaintiff's action could not be addressed through summary judgment due to voluminous record, conflicting testimony, credibility issues, conflicting theories of liability, and absence of reliable documentary evidence — Court of Appeal found that H was supposed to be in attendance at initial meeting, knew purpose of meeting and paid for lawyer's attendance at meeting — Plaintiff appealed — Appeal dismissed — H was not present at meeting and could only be liable for misrepresentations made by C or lawyer if their statements could be attributed to him — Court of Appeal considered, and ultimately rejected, that lawyer or C were acting as H's agent — Motion judge's findings were insufficient to establish that any false statements made at meeting could be attributed to H — While principal will generally be vicariously liable for torts of agent committed with scope of actual or apparent authority, motion judge did not find lawyer or C to be H's agent — While evidence clearly showed that H was aware of fraud and may have benefited from fraud, whether H perpetrated fraud by inducing plaintiff to contribute to non-existent investment scheme was genuine issue requiring trial.

Torts --- Fraud and misrepresentation — Fraudulent misrepresentation — Specific elements — Inducement

Plaintiff met with principal of Panamanian company, C, and Toronto lawyer regarding investment with company T — Principal of T, H, was not present at meeting — Plaintiff wired US$1 million to lawyer who assigned funds to account associated with T, along with other funds — Plaintiff's money was not invested by T — Plaintiff joined with plaintiffs from companion action alleging fraud against H, C and law firm, and both sets of plaintiffs brought motions for summary judgment which were heard together — Motion judge found that plaintiff had established claim against H and that there was no issue requiring trial — Court of Appeal found that plaintiff's action could not be addressed through summary judgment due to voluminous record, conflicting testimony, credibility issues, conflicting theories of liability, and absence of reliable documentary evidence — Court of Appeal found that H was supposed to be in attendance at initial meeting, knew purpose of meeting and paid for lawyer's attendance at meeting — Plaintiff appealed — Appeal dismissed — H was not present at meeting, and could only be liable for misrepresentations made by C or lawyer if their statements could be attributed to him — Court of Appeal considered, and ultimately rejected, that lawyer or C were acting as H's agent — Motion judge's findings were insufficient to establish that any false statements made at meeting could be attributed to H — While principal will generally be vicariously liable for torts of agent committed with scope of actual or apparent authority, motion judge did not find lawyer or C to be H's agent — While

evidence clearly showed that H was aware of fraud and may have benefited from fraud, whether H perpetrated fraud by inducing plaintiff to contribute to non-existent investment scheme was genuine issue requiring trial.

Procédure civile --- Jugement sommaire — Exigence pour démontrer l'absence de question justifiant un procès

Demanderesse a transféré 1 million $US à un avocat, qui a placé l'argent dans un compte associé à la compagnie T, parmi d'autres fonds — T n'a pas investi l'argent de la demanderesse — Demanderesse s'est jointe aux demandeurs dans le cadre d'un dossier connexe où une action pour fraude civile avait été intentée contre H (le dirigeant de T), C (le dirigeant d'une entreprise panaméenne), et le cabinet d'avocats et les deux parties demanderesses ont déposé des requêtes en jugement sommaire qui ont été instruites ensemble — Juge saisi de la requête a conclu que la demanderesse avait établi le bien-fondé de sa poursuite à l'encontre de H et qu'aucune question ne nécessitait la tenue d'un procès — Cour d'appel a estimé que l'action de la demanderesse ne devrait pas être tranchée par jugement sommaire compte tenu de son volumineux dossier, des témoignages contradictoires, des questions de crédibilité, des thèses opposées en matière de responsabilité et de l'absence d'une preuve documentaire fiable — Demanderesse a formé un pourvoi — Pourvoi rejeté — Juge saisi de la requête devait se demander si le litige pouvait être tranché d'une manière juste et équitable dans le cadre d'une requête en jugement sommaire — Il est possible de résoudre un litige ainsi lorsque la procédure permet au juge de tirer les conclusions de fait qui s'imposent et d'appliquer le droit aux faits, et lorsqu'elle constitue une manière proportionnelle, plus rapide et moins coûteuse d'atteindre un résultat juste — Compte tenu des récentes modifications aux Règles de procédure civile concernant les jugements sommaires, s'il existe une véritable question nécessitant la tenue d'un procès, le juge peut alors se demander s'il est possible d'éviter la tenue d'un procès en ayant recours à de nouveaux pouvoirs permettant d'évaluer la preuve et d'ordonner la présentation de témoignages oraux — Juge saisi de la requête n'a pas traité d'un élément nécessaire de la fraude, ce qui constituait une erreur de droit, et n'a pas tiré les conclusions de fait suffisantes lui permettant, et ne permettant pas à la Cour d'appel, d'en arriver à une telle conclusion.

Associations d'affaires --- Nature des associations d'affaires — Nature de la société — Existence propre — Par rapport à celui à qui elle appartient — Lever le voile corporatif — Fraude ou inconduite

Demanderesse a rencontré C, le dirigeant d'une entreprise panaméenne, et un avocat de Toronto au sujet d'un investissement avec la compagnie T — H, le dirigeant de T, n'était pas présent lors de la rencontre — Demanderesse a transféré 1 million $US à un avocat, qui a placé l'argent dans un compte associé à T, parmi d'autres fonds — T n'a pas investi l'argent de la demanderesse — Demanderesse s'est jointe aux demandeurs dans le cadre d'un dossier connexe où une action pour fraude civile avait été intentée contre H, C et le cabinet d'avocats, et les deux parties demanderesses ont déposé des requêtes en jugement sommaire qui ont été instruites ensemble — Juge saisi de la requête a conclu que la demanderesse avait établi le bien-fondé de sa poursuite à l'encontre de H et qu'aucune question ne nécessitait la tenue d'un procès — Cour d'appel a estimé que l'action de la demanderesse ne devrait pas être tranchée par jugement sommaire compte tenu de son volumineux dossier, des témoignages contradictoires, des questions de crédibilité, des thèses opposées en matière de responsabilité et de l'absence d'une preuve documentaire fiable — Cour d'appel a présumé que H était présent lors de la rencontre initiale, était au courant du but de la rencontre et a couvert les frais encourus par la présence de l'avocat — Demanderesse a formé un pourvoi — Pourvoi rejeté — H n'était pas présent à la rencontre, et il ne pouvait être tenu responsable de fausses déclarations faites par C ou l'avocat que si ces déclarations pouvaient lui être attribuées — Cour d'appel a envisagé, puis a rejeté en fin de compte, la possibilité que l'avocat ou C aient agi comme mandataire de H — Conclusions du juge saisi de la requête ne suffisaient pas à prouver que les déclarations faites lors de la rencontre pouvaient être attribuées à H — Dirigeant est généralement responsable du fait d'autrui pour les délits commis par son mandataire dans le cadre de son pouvoir réel ou apparent, mais le juge saisi de la requête n'a pas conclu que l'avocat ou C étaient les mandataires de H — Alors que la preuve démontrait clairement que H était au courant de la fraude, et qu'il en avait peut-être bénéficié, la question de savoir si H avait commis la fraude en incitant la demanderesse à verser des fonds à un projet d'investissement inexistant constituait une véritable question nécessitant la tenue d'un procès.

Délits civils --- Fraude et déclaration inexacte — Assertion frauduleuse et inexacte — Éléments spécifiques — Incitation

Demanderesse a rencontré le dirigeant d'une entreprise panaméenne, C, et un avocat de Toronto au sujet d'un investissement avec la compagnie T — H, le dirigeant de T, n'était pas présent lors de la rencontre — Demanderesse a transféré 1 million $US à un avocat, qui a placé l'argent dans un compte associé à T, parmi d'autres fonds — T n'a pas investi l'argent de la demanderesse — Demanderesse s'est jointe aux demandeurs dans le cadre d'un dossier connexe où une action pour fraude civile avait été intentée contre H, C et le cabinet d'avocats, et les deux parties demanderesses ont déposé des requêtes en jugement sommaire qui ont été instruites ensemble — Juge saisi de la requête a conclu que la demanderesse avait établi le bien-fondé de sa poursuite à l'encontre de H et qu'aucune question ne nécessitait la tenue d'un procès — Cour d'appel a estimé que l'action de la demanderesse

ne devrait pas être tranchée par jugement sommaire compte tenu de son volumineux dossier, des témoignages contradictoires, des questions de crédibilité, des thèses opposées en matière de responsabilité et de l'absence d'une preuve documentaire fiable — Cour d'appel a présumé que H était présent lors de la rencontre initiale, était au courant du but de la rencontre et a couvert les frais encourus par la présence de l'avocat — Demanderesse a formé un pourvoi — Pourvoi rejeté — H n'était pas présent à la rencontre, et il ne pouvait être tenu responsable de fausses déclarations faites par C ou l'avocat que si ces déclarations pouvaient lui être attribuées — Cour d'appel a envisagé, puis a rejeté en fin de compte, la possibilité que l'avocat ou C aient agi comme mandataire de H — Conclusions du juge saisi de la requête ne suffisaient pas à prouver que les déclarations faites lors de la rencontre pouvaient être attribuées à H — Dirigeant est généralement responsable du fait d'autrui pour les délits commis par son mandataire dans le cadre de son pouvoir réel ou apparent, mais le juge saisi de la requête n'a pas conclu que l'avocat ou C étaient les mandataires de H — Alors que la preuve démontrait clairement que H était au courant de la fraude, et qu'il en avait peut-être bénéficié, la question de savoir si H avait commis la fraude en incitant la demanderesse à verser des fonds à un projet d'investissement inexistant constituait une véritable question nécessitant la tenue d'un procès.

The principal of the plaintiff, H, an American corporation, met with the principal of a Panamanian company, C, and executed investment documents in favour of C. The plaintiff wired US$1 million to a Toronto law firm, who assigned the funds to an account associated with T, a financial corporation of which H was the principal. The funds were bundled with other funds and paid to T in a bank draft. The plaintiff's money was not invested.

The plaintiff joined a civil fraud action against H, C, the law firm and the lawyer. The plaintiffs all brought a motion for summary judgment. The motion judge found that the plaintiff had established its claim and that there was no issue requiring a trial. H appealed, and the Court of Appeal held that the plaintiff's action could not be addressed through summary judgment due to its voluminous record, conflicting testimony, credibility issues, conflicting theories of liability, and the absence of reliable documentary evidence. The Court of Appeal found that there were two issues requiring trial: first, whether H induced the plaintiff to invest, and second, whether some of the funds were misappropriated by C instead of H. The Court of Appeal found that the motion judge failed to address the issue of whether H knowingly made representations that induced the plaintiff to invest, which was a necessary element of fraud, and concluded that there was no compelling evidence that the lawyer acted as H's agent when the relevant representations were made. The Court also found it could not decide, based on the record, whether the plaintiff's investment was misappropriated entirely by H, or by both H and C.

The plaintiff appealed.

Held: The appeal was dismissed.

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): There are four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood or representation on the part of the defendant (through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in loss.

In this case, there was a genuine issue requiring trial. While the tort requires a finding that H made a misrepresentation that induced the plaintiff to invest, the motion judge neither identified the need for any misrepresentation nor found that H made one. H was not present at the meeting between the lawyer, C and the plaintiff and can only be liable for any misrepresentations made at that meeting if the parties' statements could be attributed to him. The Court of Appeal considered, and rejected, the possibility that C or the lawyer were acting as H's agent. The motion judge's findings were insufficient to establish that any statements could be attributed to H. While the evidence clearly demonstrated that H was aware of the fraud and may have benefited from the fraud, whether he perpetrated the fraud by inducing the plaintiff to invest was a genuine issue that required a trial.

Le dirigeant de la demanderesse, H, une société américaine, a rencontré le dirigeant d'une entreprise panaméenne, C, et a signé un certain nombre de documents de placement en faveur de cette dernière. La demanderesse a transféré 1 million $US à un cabinet de Toronto, qui a placé l'argent dans un compte associé à T, une entreprise financière dont H était le dirigeant. Les fonds ont été regroupés avec d'autres fonds et versés à T par traite bancaire. L'argent de la demanderesse n'a pas été investi.

La demanderesse s'est jointe aux demandeurs d'une action pour fraude civile intentée contre H, C, le cabinet et un avocat. Les demandeurs ont tous déposé une requête en jugement sommaire. Le juge saisi de la requête a conclu que la demanderesse avait établi le bien-fondé de sa poursuite et qu'aucune question ne nécessitait la tenue d'un procès. H a interjeté appel, et la Cour d'appel a estimé que l'action de la demanderesse ne devrait pas être tranchée par jugement sommaire compte tenu de son volumineux dossier, des témoignages contradictoires, des questions de crédibilité, des thèses opposées en matière de responsabilité et de l'absence d'une preuve documentaire fiable. La Cour d'appel a conclu que deux questions nécessitaient la tenue d'un procès :

premièrement, celle de savoir si H avait incité la demanderesse à investir, et deuxièmement, celle de savoir si une partie des fonds avait été détournée par C plutôt que H. La Cour d'appel a conclu que le juge saisi de la requête n'avait pas traité de la question de savoir si H avait sciemment fait une fausse déclaration ayant incité la demanderesse à investir, un élément nécessaire de la fraude, et est arrivée à la conclusion qu'il n'existait aucune preuve convaincante selon laquelle l'avocat avait agi à titre de mandataire de H au moment où les déclarations pertinentes ont été faites. La Cour d'appel a conclu qu'elle ne pouvait pas décider, au vu du dossier, si le placement de la demanderesse avait été détourné entièrement par H, ou par H et C.

La demanderesse a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Cromwell, Wagner, JJ., souscrivant à son opinion) : Les quatre éléments du délit de fraude civile sont les suivants : 1) le défendeur a fait une fausse déclaration; 2) le défendeur savait, jusqu'à un certain point, que sa déclaration était fausse (sciemment ou par insouciance); 3) la fausse déclaration a incité le demandeur à agir; et 4) les actes du demandeur ont entraîné une perte.

En l'espèce, il y avait une véritable question nécessitant la tenue d'un procès. Alors que la fraude civile exige que H ait fait une fausse déclaration ayant incité la demanderesse à investir, le juge saisi de la requête n'a ni souligné la nécessité qu'il y ait eu fausse déclaration, ni conclu que H avait fait une telle déclaration. H n'était pas présent à la rencontre entre l'avocat, C et la demanderesse, et il ne pouvait être tenu responsable de fausses déclarations faites lors de cette rencontre que si des déclarations pouvaient lui être attribuées. La Cour d'appel a envisagé, puis a rejeté en fin de compte, la possibilité que l'avocat ou C aient agi comme mandataire de H. Les conclusions du juge saisi de la requête ne suffisaient pas à prouver que des déclarations pouvaient être attribuées à H. Alors que la preuve démontrait clairement que H était au courant de la fraude, et qu'il en avait peut-être effectivement bénéficié, la question de savoir si H avait commis la fraude en incitant la demanderesse à investir constituait une véritable question nécessitant la tenue d'un procès.

Table of Authorities

Cases considered by *Karakatsanis J.*:

Angers v. Mutual Reserve Fund Life Assn. (1904), 35 S.C.R. 330, 1904 CarswellQue 28 (S.C.C.) — considered

Parna v. G. & S. Properties Ltd. (1970), [1971] S.C.R. 306, 1970 CarswellOnt 208, 1970 CarswellOnt 208F, 15 D.L.R. (3d) 336 (S.C.C.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 37 R.P.R. (5th) 1, 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7 (S.C.C.) — followed

Peek v. Derry (1889), 14 H. of L. 337, [1889] UKHL 1, 38 W.R. 33, 1 Megones Companies Act Cas 292, L.R. 14 App. Cas. 337, [1886-1890] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 5 T.L.R. 625, 14 A.C. 337 (U.K. H.L.) — considered

Snell v. Farrell (1990), 110 N.R. 200, 1990 CarswellNB 218, 1990 CarswellNB 82, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, *(*sub nom. *Farrell c. Snell)* [1990] R.R.A. 660 (S.C.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — referred to

R. 20.04(2.1) [en. O. Reg. 438/08] — referred to

R. 20.04(2.2) [en. O. Reg. 438/08] — referred to

R. 20.05 — referred to

R. 20.05(2) — referred to

Authorities considered:

Osborne, Philip H., *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011)

APPEAL by plaintiff from judgment reported at *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286

O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), reversing motion judge's decision to grant summary judgment in favour of plaintiff.

POURVOI formé par la demanderesse à l'encontre d'un jugement publié à *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), ayant infirmé la décision du juge saisi de la requête de rendre un jugement sommaire en faveur de la demanderesse.

Karakatsanis J. **(McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring):**

1 Like its companion, *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) (*Mauldin*), this appeal concerns the interpretation and application of Ontario's new summary judgment rules. In this action, the Ontario Court of Appeal overturned the motion judge's decision to grant summary judgment in favour of the plaintiff and made various trial management orders under Rule 20.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

2 In light of the principles articulated in the *Mauldin* appeal and for the reasons that follow, I would dismiss the appeal.

I. Facts

3 Bruno Appliance and Furniture, Inc. is an American corporation, whose principal is Albert Bruno. In late 2001, Bruno met with Robert Cranston, the principal of a Panamanian company, Frontline Investments, Inc. As a result of these meetings, Bruno executed a number of investment documents in favour of Frontline.

4 In February 2002, Bruno met with Cranston and Gregory Peebles, a corporate-commercial lawyer at the Toronto offices of Cassels Brock and Blackwell. No notes were kept of this meeting, and the recollection of the participants varies. While Robert Hryniak did not attend this meeting, Tropos Financial Corp. (Tropos), a company of which Hryniak was the principal, received and paid a bill for Peebles' attendance.

5 In early March 2002, Bruno Appliance wired US$1 million to Cassels Brock, who assigned the funds to an account associated with Tropos. Bruno Appliance's funds were then bundled with other funds (totalling US$3.5 million) and paid to Tropos in a bank draft. At the end of April 2002, Tropos paid US$2.5 million to a company called Southern Equity Investors Inc., and in late June 2002 transferred approximately US$550,000 to an individual named Reinhard. By the end of September 2003, Tropos' balance with Cassels Brock had declined to US$19,000.

6 In short, Bruno Appliance's money was not invested and it never received a return on its investment.

II. Judicial History

A. Ontario Superior Court of Justice, 2010 ONSC 5490 (Ont. S.C.J.)

7 Bruno Appliance joined with the plaintiffs from the companion *Mauldin* appeal in a civil fraud action against Hryniak, Peebles and Cassels Brock. Both sets of plaintiffs brought motions for summary judgment, which were heard together.

8 The motion judge found that Bruno Appliance had established its claim against Hryniak and that there was no issue requiring a trial. He was satisfied that, in spite of Hryniak's absence from an early meeting between Peebles, Cranston and Bruno, Hryniak knew that the meeting was occurring and his company, Tropos, paid for Peebles' attendance. The motion judge further found that Hryniak was aware that US$1 million was placed in Tropos' account on Bruno Appliance's behalf, and that Hryniak gave instructions regarding those funds.

9 The motion judge found that none of Bruno Appliance's funds were invested. In part, they were used to fund disbursements to another individual, Reinhard, and the remainder was slowly drained.

10 The motion judge held that the tort of civil fraud was made out and there was no genuine issue requiring a trial.

11 As in the companion *Mauldin* appeal, the motion judge dismissed the motion for summary judgment against Peebles, as he found that the claim involved factual issues that could not be resolved on the record. Consequently, the motion for summary judgment against Cassels Brock was dismissed, as it was premised on the theory that the firm was vicariously liable for Peebles' acts and omissions.

B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.)

12 Hryniak's appeal of this motion was heard together with the companion *Mauldin* appeal, as well as three other matters, which are not before this Court. The Court of Appeal found that Bruno Appliance's action should not be addressed through summary judgment due to its voluminous record, conflicting testimony, credibility issues, conflicting theories of liability advanced against multiple defendants, and the absence of reliable documentary evidence.

13 Despite this conclusion, as in *Mauldin*, the Court of Appeal was prepared to review whether the motion judge was nonetheless entitled to grant judgment but, in this case, it concluded that the evidence against Hryniak was not nearly as overwhelming. Two genuine issues required a trial: first whether Hryniak induced Bruno Appliance to invest, and second whether some of the funds were misappropriated by Cranston, instead of Hryniak.

14 The Court of Appeal found that the motion judge failed to address the issue of whether Hryniak knowingly made any misrepresentation that induced Bruno Appliance to invest, a necessary element of fraud. The Court of Appeal concluded that there was no compelling evidence that Peebles acted as Hryniak's agent when the relevant representations were made. With respect to the second issue, the Court of Appeal found that it could not decide, based on the record, whether Bruno Appliance's investment was misappropriated entirely by Hryniak or by both Hryniak and Cranston in some proportion.

15 As a result, the Court of Appeal ordered that the Bruno Appliance action proceed to trial, subject to certain trial management orders under Rule 20.05(2).

III. Analysis

16 The scope and interpretation of the amended Rule 20 are addressed in the companion *Mauldin* appeal. Therefore, the issue that remains to be determined in this appeal is whether the Court of Appeal erred in its determination that Bruno Appliance should not receive summary judgment against Hryniak.

A. The Tort of Civil Fraud

17 The parties disagree as to the elements of the tort of civil fraud, in particular whether proof is required that Hryniak induced Bruno Appliance to part with its funds.

18 The classic statement of the elements of civil fraud stems from an 1889 decision of the House of Lords, *Peek v. Derry* (1889), L.R. 14 App. Cas. 337 (U.K. H.L.), where Lord Herschell conducted a thorough review of the history of the tort of deceit and put forward the following three propositions, at p. 374:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.... Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

19 This Court adopted Lord Herschell's formulation in *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), adding that the false statement must "actually [induce the plaintiff] to act upon it" (p. 316, quoting *Anson on Contract*). Requiring the plaintiff to prove inducement is consistent with this Court's later recognition in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), at pp. 319-20, that tort law requires proof that "but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".

20 Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330 (S.C.C.) "fraud without damage gives ... no cause of action" (p. 340).

21 From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

B. Did the Motion Judge Err in Granting Summary Judgment?

22 Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

23 For the reasons that follow, I am of the view that there is a genuine issue requiring a trial.

24 As noted by the Court of Appeal, and following the analysis above, civil fraud requires a finding that Hryniak made a misrepresentation which induced Bruno Appliance to invest. The motion judge neither identified the need for a misrepresentation, nor found that Hryniak made one.

25 The motion judge found that Tropos did not invest Bruno Appliance's funds and that a misrepresentation had therefore been made to the investors. The point at which a misrepresentation occurred was a meeting between Peebles, Cranston and Bruno Appliance's principal in February 2002. He found: that Hryniak was supposed to be in attendance at this meeting, that Hryniak knew of the purpose of the meeting and that Hryniak's company paid for Peebles' attendance.

26 However, Hryniak was not present, and he can only be liable for any misrepresentation made by Peebles or Cranston if their statements can be attributed to him. For example, the Court of Appeal considered, and ultimately rejected, the possibility that Peebles or Cranston was acting as Hryniak's agent.

27 In my view, the motion judge's findings are insufficient to establish that any false statements made at the meeting can be attributed to Hryniak. There was no evidence that Peebles or Cranston were acting on instructions from Hryniak when they met with Bruno. While a principal will generally be vicariously liable "for the torts of her agent committed within the scope of her actual or apparent authority" (P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 369), the motion judge did not find Peebles or Cranston to be Hryniak's agent, and there is no indication that the evidence established that Peebles or Cranston was authorized to make representations on behalf of Hryniak and did not do so on their own account. Similarly, there was insufficient evidence to establish that either Peebles or Cranston was acting as Hryniak's unwitting dupe and, as the motion judge concluded, that issue required a trial.

28 While the motion judge found that Hryniak was aware of the falseness of the representations [1] and exercised "full dominion and control" over Bruno Appliance's funds (at para. 169), as noted by the Court of Appeal, this finding would support liability in conversion, but is not sufficient to establish fraud.

29 While I agree with the motion judge that the evidence clearly demonstrates that Hryniak was *aware* of the fraud, and may in fact have *benefited* from the fraud, whether Hryniak *perpetrated* the fraud by inducing Bruno Appliance to contribute US$1 million to a non-existent investment scheme is a genuine issue requiring a trial.

30 The Court of Appeal also found the extent of Hryniak's misappropriation of Bruno Appliance's funds to be a second issue requiring a trial. The Court of Appeal found that Hryniak had appropriated US$450,000, but that the fate of the remaining US $550,000 required a trial. Given the principles of joint and several liability, I am satisfied that this issue would not normally preclude a finding that there is no genuine issue requiring a trial against Hryniak.

31 The motion judge failed to find a necessary element of civil fraud, an error of law, and did not draw sufficient factual conclusions for either him, or an appellate court, to make such a finding. Since the action was proceeding to trial against the other defendants in any event, the order of the Court of Appeal that all the remaining actions be heard together is the most proportionate, timely and cost effective approach. In light of this conclusion, it is unnecessary for me to determine whether it was against the interest of justice for the motion judge to make use of his expanded fact-finding powers.

IV. Conclusion

32 Accordingly, I would dismiss the appeal, with costs to the respondent. I would not interfere with the case management orders made by the Court of Appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 This follows from his finding in a footnote to para. 178 of his reasons that he accepted Peebles' evidence that he regularly reviewed trust activity with Hryniak (A.R., vol. V, at pp. 154-59).

TAB 8

1973 CarswellOnt 236
Supreme Court of Canada

Canadian Aero Service Ltd. v. O'Malley

1973 CarswellOnt 236F, 1973 CarswellOnt 236, [1973] S.C.J. No. 97, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371

Canadian Aero Service Limited, (Plaintiff) Appellant and Thomas M. O'Malley, J.M. (George) Zarzycki, James E. Wells, Terra Surveys Limited, (Defendants) Respondents

Martland, Judson, Ritchie, Spence and Laskin JJ.

Judgment: May 11, 1972
Judgment: May 12, 1972
Judgment: May 15, 1972
Judgment: May 16, 1972
Judgment: May 24, 1972
Judgment: May 25, 1972
Judgment: June 29, 1973

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *C.L. Dubin, Q.C., R.W. McKimm* and *R.A. Blair*, for the plaintiff, appellant.
Hon. C.H. Locke, Q.C., and *Gordon Blair*, for the defendant, respondent, Wells.
John P. Nelligan, Q.C., and *Denis Power*, for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.

Subject: Intellectual Property; Property; Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.iv Taking of corporate opportunity
Labour and employment law
II Employment law
II.2 Elements of employment relationship
II.2.b Duties of employee to employer
II.2.b.iii Use of confidential information
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.f Termination of employment by employee
II.6.f.i Resignation
II.6.f.i.B Miscellaneous
Headnote
Corporations --- Directors and officers — Fiduciary duties — Taking of corporate opportunity
Directors and officers — Fiduciary duties — Taking of corporate opportunity.
Use of company's confidential information by former directors, senior officers and their solicitor -- Senior officers owe same duty to corporate employer as director -- Duty continuing after termination of employment -- Liability not dependent upon

ability of corporation to take advantage of opportunity -- Fiduciary duty upon director or senior officer one of loyalty, good faith, avoidance of conflict of duty and self-interest -- No general rule for liability since multiplicity of factors must be considered -- Facts surrounding solicitor such that no conclusion of law by which to fix liability.

The judgment of the Court was delivered by *Laskin J.*:

1 This appeal arises out of a claim by the plaintiff-appellant (hereinafter referred to as Canaero) that the defendants had improperly taken the fruits of a corporate opportunity in which Canaero had a prior and continuing interest. The allegation against the defendants O'Malley and Zarzycki is that while directors or officers of Canaero they had devoted effort and planning in respect of the particular corporate opportunity as representatives of Canaero, but had subsequently wrongfully taken the benefit thereof in breach of a fiduciary duty to Canaero. The defendant Wells, who had been a director of Canaero but never an officer, was brought into the action as an associate of the other individual defendants in an alleged scheme to deprive Canaero of the corporate opportunity which it had been developing through O'Malley and Zarzycki; and the defendant Terra Surveys Limited was joined as the vehicle through which the individual defendants in fact obtained the benefit for which Canaero had been negotiating.

2 Canaero failed before Grant J. whose judgment on October 8, 1969, was affirmed by the Ontario Court of Appeal, speaking through MacKay J.A., on June 18, 1971. The trial judge fixed the damages at $125,000 in the event of a successful appeal, and this determination was implicitly endorsed by the Ontario Court of Appeal. The appeal to this Court is taken in the light of concurrent findings of fact on all points touching the course of events, but the Ontario Court of Appeal did not agree with Grant J. that the relationship of O'Malley and Zarzycki to Canaero, by reason of their positions as senior managerial officers, was of a fiduciary character, like that existing between directors and a company; rather, it was of the view that the relationship was simply that of employees and employer, involving no corresponding fiduciary obligations and, apart from valid contractual restriction, no limitation upon post-employment competition save as to appropriation of trade secrets and enticement of customers, of which there was no proof in this case.

3 Canaero was incorporated in 1948 under the *Companies Act* of Canada as a wholly-owned subsidiary of Aero Service Corporation, a United States company whose main business, like that of Canaero and other subsidiaries, was topographical mapping and geophysical exploration. In 1961, the parent Aero and its subsidiaries came under the control of another United States corporation, Litton Industries Inc. O'Malley joined Aero Service Corporation in 1936 and, apart from army service, remained with it until 1950 when he became general manager and president of Canaero whose head office was in Ottawa. He returned to the parent Aero company in 1957, but rejoined Canaero in 1964 as president and chief executive officer, and remained as such until he resigned on August 19, 1966. Acknowledgement and acceptance of the resignation followed on August 26, 1966.

4 Zarzycki, who attained a widely-respected reputation in geodesy, joined Canaero in 1953, soon becoming chief engineer. He was named executive vice-president in 1964 and made a director in March 1965. He resigned these posts on August 22, 1966, and received the acknowledgment and acceptance of his resignation in a letter of August 29, 1966.

5 Wells, a solicitor in Ottawa, knowledgeable about external aid programmes and the opportunities open in that connection to aeroplane companies, became a director of Canaero on March 15, 1950, at the same time as O'Malley. He was never an officer and was, on the evidence, an inactive director. When Survair Limited was incorporated in 1960 at Canaero's instance to provide it with flying services (at first, exclusively, but not so after February 1, 1966), Wells became a shareholder by reason of his association with Canaero. He submitted his resignation as a director of Canaero at the request of Litton Industries Inc. when the latter took control, the resignation to be effective at its pleasure. No such pleasure was indicated, and Wells submitted a resignation on his own on February 5, 1965. There is an uncontested finding that he ceased to be a director after that date.

6 The defendant Terra Surveys Limited was incorporated on August 16, 1966, following a luncheon meeting of O'Malley, Zarzycki and Wells on August 6, 1966, at which the suggestion to form a company of their own was made by Wells to O'Malley and Zarzycki. To Wells' knowledge, the latter were discontented at Canaero by reason of the limitations upon their authority and the scope of independent action imposed by the Litton company, and they also feared loss of position if Canaero should fail

to get contracts. Nominal directors and officers of the new company were appointed, but O'Malley and Zarzycki became major shareholders when common stock was issued on September 12, 1966. One share was issued to Wells at this time but he made a further investment in the new company on November 6, 1966. There is no doubt that Terra Surveys Limited was conceived as a company through which O'Malley and Zarzycki could pursue the same objects that animated Canaero. O'Malley became president of Terra Surveys Limited and Zarzycki became executive vice-president shortly after its incorporation.

7 The legal issues in this appeal concern what I shall call the Guyana project, the topographical mapping and aerial photographing of parts of Guyana (known as British Guiana until its independence on May 25, 1965) to be financed through an external aid grant or loan from the Government of Canada under its programme of aid to developing countries. Terra Surveys Limited, in association with Survair Limited and another company, succeeded in obtaining the contract for the Guyana project which Canaero had been pursuing through O'Malley and Zarzycki, among others, for a number of years. There is a coincidence of dates and events surrounding the maturing and realization of that project, and the departure of O'Malley and Zarzycki from Canaero, their involvement with Wells in the incorporation of Terra Surveys Limited and its success, almost immediately thereafter, in obtaining the contract for the project. The significance of this coincidence is related, first, to the nature of the duty owed to Canaero by O'Malley and Zarzycki by reason of their positions with that company and, second, to the continuation of the duty, if any, upon a severance of relationship.

8 The coincidence aforementioned emerges from a review of the activities of Canaero in respect of the Guyana project. The business in which Canaero and other like companies were engaged involved technical, administrative and even diplomatic capabilities because, in the main, their dealings were with governments, both of countries seeking foreign aid for development and of countries, like United States and Canada, which had programmes for such aid. Companies like Canaero risked initiative and expenditure in preparatory work for projects without any assurance of return in the form of contracts; they saw their business as not only bidding on projects ripe for realization, but as also embracing suggestion and development of projects for which they would later seek approval and contracts to carry them out. In this latter aspect, the development of a project involved negotiation with officials of the country for whose benefit it was intended and the establishment of a receptive accord with a country offering aid for such matters. Of course, a suggested project was more likely to be viewed favourably if its technical and administrative aspects were well worked out in the course of its presentation for governmental approval.

9 Canaero's interest in promoting a project in Guyana for the development of its natural resources, and in particular electrical energy, began in 1961. It had done work in nearby Surinam (or Dutch Guiana) where conditions were similar. It envisaged extensive aerial photography and mapping of the country which, apart from the populated coastal area, was covered by dense jungle. Promotional work to persuade the local authorities that Canaero was best equipped to carry out the topographical mapping was done by O'Malley and by another associate of the parent Aero. A local agent, one Gavin B. Kennard, was engaged by Canaero. In May 1962, Zarzycki spent three days in Guyana in the interests of Canaero, obtaining information, examining existing geographical surveys and meeting government officials. He submitted a report on his visit to Canaero and to the parent Aero company.

10 Between 1962 and 1964 Canaero did magnetometer and electromagnetometer surveys in Guyana on behalf of the United Nations, and it envisaged either the United Nations or the United States as the funding agency to support the topographical mapping project that it was evolving as a result of its contacts in Guyana and Zarzycki's visit and report. Political conditions in Guyana after Zarzycki's visit in May 1962 did not conduce to furtherance of the project and activity thereon was suspended.

11 It was resumed in 1965 when it appeared that funds for it might be made available under Canada's external aid programme. The United States had adopted a policy in this area of awarding contracts to United States firms. The record in this case includes a letter of October 22, 1968, after the events which gave rise to this litigation, in which the Canadian Secretary of State for External Affairs wrote that Canada's external aid policy was to require contractors to be incorporated in Canada, managed and operated from Canada and to employ Canadian personnel; and although preference in awarding external aid contracts was given to Canadian controlled firms, this was not an absolute requirement of eligibility to obtain such contracts. Canaero would hence have been eligible at that time for an award of a contract and, inferentially, in 1966 as well.

12 Zarzycki returned to Guyana on July 14, 1965, and remained there until July 18, 1965. By July 26, 1965, he completed a proposal for topographical mapping of the country, a proposal that the Government thereof might use in seeking Canadian financial aid. Copies went to a Guyana cabinet minister, to the Canadian High Commissioner there and to the External Aid Office in Ottawa. Zarzycki in his evidence described the proposal as more sales-slanted than technical. The technical aspects were none the less covered; for example, the report recommended the use of an aerodist, a recently invented airborne electronic distance-measuring device. Zarzycki had previously urged that Canaero purchase one as a needed piece of equipment which other subsidiaries of Litton Industries Inc. could also use. Canaero placed an order for an aerodist, at a cost of $75,000, on or about July 15, 1966.

13 A few days earlier, on July 10, 1966, to be exact, an internal communication to the acting director-general of the Canadian External Aid Office, one Peter Towe, informed him that the Governments of Guyana and Canada had agreed in principle on a loan to Guyana for a topographical survey and mapping. The Prime Minister of Guyana had come to Ottawa early in July, 1966, for discussion on that among other matters. O'Malley had felt that if the assistance from Canada was by way of a loan Guyana would have the major say in naming the contractor, and this would make Canaero's chances better than if the assistance was by way of grant because then the selection would be determined by Canada. Although a loan was authorized, its terms were very liberal, and it was decided that Canada would select the contractor with the concurrence of Guyana, after examining proposals from a number of designated companies which would be invited to bid. An official of the Department of Mines and Technical Surveys visited Guyana and prepared specifications for the project which was approved by the Cabinet on August 10, 1966. Towe was informed by departmental letter of August 18, 1966, of a recommendation that Canaero, Lockwood Survey Corporation, Spartan Air Services Limited and Survair Limited be invited to submit proposals for the project. There was a pencilled note on the side of the letter, apparently added later, of the following words: "general photogramy Terra Ltd.".

14 The Canadian External Aid Office by letter of August 23, 1966, invited five companies to bid on the Guyana project. Survair Limited was dropped from the originally recommended group of four companies, and Terra Surveys Limited and General Photogrammetric Services Limited were added. A briefing on the specifications for the project was held by the Department of Mines and Technical Surveys on August 29, 1966. Zarzycki and another represented Terra Surveys Limited at this briefing.

15 O'Malley and Zarzycki pursued the Guyana project on behalf of Canaero up to July 25, 1966, but did nothing thereon for Canaero thereafter. On July 9, 1966, they had met with the Prime Minister of Guyana during his visit to Ottawa, and on July 13, 1966, they had met with Towe (who had previously been informed of the inter-governmental agreement in principle on the Guyana project) and learned from him that the project was on foot. O'Malley had written to Kennard, Canaero's Guyana agent, on July 15, 1966, that he felt the job was a certainty for Canaero. By letter of the same date to Towe, O'Malley wrote that Zarzycki had spent about 20 days in Georgetown, Guyana, on two successive visits to inventory the data available and determine the use to which the control survey and mapping would be put, and that he had subsequently prepared a proposal for a geodetic network and topographical mapping which was submitted to the Honourable Robert Jordan (the appropriate Guyanese cabinet minister) on July 27, 1965. On July 22, 1966, O'Malley wrote to an officer of the parent company that the Prime Minister of Guyana had advised him that "the Canadian Government would honour the project". Finally, on July 25, 1966, O'Malley wrote to Kennard to ask if he could learn what position Guyana was taking on the selection of a contractor, that is whether it proposed to make the selection with Canada's concurrence or whether it would leave the selection to Canada subject to its concurrence.

16 Thereafter the record of events, subject to one exception, concerns the involvement of O'Malley and Zarzycki with Wells in the incorporation of Terra Surveys Limited, their resignations from their positions with Canaero and their successful intervention through Terra Surveys Limited into the Guyana project. As of the date of O'Malley's letter of resignation, August 19, 1966, Terra Surveys Limited had a post office box and a favourable bank reference. Zarzycki had then not yet formally resigned as had O'Malley but had made the decision to do so. O'Malley informed the Canadian External Aid Office on August 22, 1966, of the new company which he, Zarzycki and Wells had formed.

17 The exception in the record of events just recited concerns a visit of Zarzycki, his "regular trip to the External Aid Office" (to use his own words), to the man in charge of the Caribbean area. This was on or about August 13, 1966, after his return from holidays and after the luncheon meeting with O'Malley and Wells that led to the incorporation of Terra. The purpose of

the visit related to two project possibilities in the Caribbean area for Canaero, that in Guyana and one in Ecuador. Zarzycki then received confirmation of what he had earlier learned from Towe, namely, that the Guyana project had been approved in principle.

18 Despite having lost O'Malley and Zarzycki and also a senior employee Turner (who joined the Terra venture and attended the briefing session on August 29, 1966, on its behalf with Zarzycki), Canaero associated itself with Spartan Air Services Limited in the latter's proposal on the Guyana project which was submitted under date of September 12, 1966. Prior to this submission, representatives of these two companies visited Guyana to assure officials there that Canaero was involved in the preparation of the Spartan proposal and was supporting it.

19 Terra Surveys Limited submitted its proposal on September 12, 1966, through Zarzycki, having sent a letter on that date to the External Aid Office setting out its qualifications. A report on the various proposals submitted was issued on September 16, 1966, by the Canadian government officer who had visited Guyana and had prepared the specifications for the project. He recommended that Terra Surveys Limited be the contractor, and included in his report the following observations upon its capabilities:

> This project is one of the most demanding that has been undertaken in the Canadian technical assistance program. The parts of the operation most seriously affected by the difficult conditions are the establishment of survey control and the procurement of the aerial photography, and the success of the project will depend greatly on the ability of the company selected to complete these two phases satisfactorily. The subsequent operations are somewhat less complex and are dependent on the successful completion of the initial phases. Furthermore, should the project lag in these phases, further resources are readily available in other companies in Canada.
>
> In my discussions with senior survey officials in Guyana, I was informed that an accurate framework of survey control was required to form the base for the topographical mapping now urgently required and in addition to permit the orderly completion of the national coverage in the future. Our experience is that the Aerodist system can provide the precision and density of control required more economically than any other method developed to date. Operational experience with this equipment by Canadian commercial companies has been extremely limited and has only been gained on projects where they acted in a support role to Surveys and Mapping Branch engineers. This has been kept in mind in the examination of the proposals in evaluating the plans of approach presented for this phase....
>
> The proposals for the control surveys and topographical mapping project in Guyana submitted to the Director General on September 12, 1966 by Lockwood Survey Corporation, Spartan Air Services Limited and Terra Surveys Limited have been carefully reviewed.
>
> Representatives of General Photogrammetric Services Limited and Canadian Aero Services Limited submitted no proposals. However, Spartan Air Services Limited has indicated that they intend to make use of equipment and services of Canadian Aero Service Limited while Terra Surveys Limited has stated that they intend to subcontract compilation and draughting work to General Photogrammetric Services Limited....
>
> Terra Surveys Limited has submitted a detailed proposal outlining their assessment of the major points to be considered in undertaking the proposed project in Guyana and their solution. It concludes with their proposed plan of operations and associated time schedule and is accompanied by a summary of what the Government of Guyana may expect to receive as well as the support it will be expected to provide....
>
> Although Terra, like other Canadian companies, has had no practical experience in planning and executing a similar type of Aerodist project, the proposal indicates that its authors have studied the subject very thoroughly and in preparing their plan of operation have also taken conditions peculiar to Guyana into account....
>
> Dr. J.M. Zarzycki is named as the project manager. He is known internationally as an outstanding photogrammetric engineer and has developed and successfully used an aerial triangulation procedure utilizing superwide angle photography, the Wild B. 8 and auxiliary data. Like most photogrammetric operations it requires good work by technicians but its success or

> failure hinges on the professional judgment and supervision of the engineer. Dr. Zarzycki has demonstrated this ability most clearly in past years.
>
> Mr. M.H. Turner is to assist Dr. Zarzycki. He gained extensive experience in different field operations in Africa and has shown his ability to establish excellent working relationships with the senior survey officials as well as carrying out very difficult survey tasks. The Aerodist project will call for a high degree of theoretical knowledge in geodesy as well as practical management ability. This can be provided by Messrs. Turner and Zarzycki....
>
> The proposal submitted by Terra Surveys Limited covered the operation in much greater detail than might normally be expected. However, the suggestions put forward indicate that all aspects of the operation have been most carefully reviewed and the plan of operation well thought out. The sections of the Terra proposal dealing with Aerodist indicate a more complete understanding of the problems in the field and subsequent operations than the other two proposals.
>
> The treatment of many aspects of the project varies very little in the three proposals. However, appreciable differences do appear in the key phases of aerial photography and Aerodist control as explained in the preceding paragraphs. My assessment is that Terra Surveys Limited, in combination with Survair Limited and General Photogrammetric Services Limited, is best fitted to undertake this very difficult operation.

In the result, Terra Surveys Limited negotiated a contract with the External Aid Office, and on November 26, 1966, entered into an agreement with the Government of Guyana to carry out the project for the sum of $2,300,000. This was the amount indicated in the proposal of July 26, 1965, prepared by Zarzycki on behalf of Canaero.

20 There is no evidence that either Zarzycki or any other representative of Terra visited Guyana between August 23, 1966, the date when the invitations to submit proposals went out, and September 12, 1966, the date of the Terra proposal. The reference in the report of September 16, 1966, to the fact that the Terra proposal "covered the operation in much greater detail than might normally be expected" is a tribute to Zarzycki that owed much to his long involvement in the Guyana project on behalf of Canaero. From the time of his contact with certain Guyana officials in Canada in July 1966, Zarzycki had no relationship with them or any others until he went to Guyana to sign the contract which had been awarded to Terra.

21 There are four issues that arise for consideration on the facts so far recited. There is, first, the determination of the relationship of O'Malley and Zarzycki to Canaero. Second, there is the duty or duties, if any, owed by them to Canaero by reason of the ascertained relationship. Third, there is the question whether there has been any breach of duty, if any is owing, by reason of the conduct of O'Malley and Zarzycki in acting through Terra to secure the contract for the Guyana project; and, fourth, there is the question of liability for breach of duty if established.

22 Like Grant J., the trial judge, I do not think it matters whether O'Malley and Zarzycki were properly appointed as directors of Canaero or whether they did or did not act as directors. What is not in doubt is that they acted respectively as president and executive vice-president of Canaero for about two years prior to their resignations. To paraphrase the findings of the trial judge in this respect, they acted in those positions and their remuneration and responsibilities verified their status as senior officers of Canaero. They were "top management" and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer by its directors. I adopt what is said on this point by Gower, *Principles of Modern Company Law*, 3rd ed., 1969, at p. 518 as follows:

> ...these duties, except in so far as they depend on statutory provisions expressly limited to directors, are not so restricted but apply equally to any officials of the company who are authorized to act on its behalf, and in particular to those acting in a managerial capacity.

23 The distinction taken between agents and servants of an employer is apt here, and I am unable to appreciate the basis upon which the Ontario Court of Appeal concluded that O'Malley and Zarzycki were mere employees, that is servants of Canaero rather than agents. Although they were subject to supervision of the officers of the controlling company, their positions as senior

officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants.

24 It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

25 An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

26 It is this fiduciary duty which is invoked by the appellant in this case and which is resisted by the respondents on the grounds that the duty as formulated is not nor should be part of our law and that, in any event, the facts of the present case do not fall within its scope.

27 This Court considered the issue of fiduciary duty of directors in *Zwicker v. Stanbury* [1], where it found apt for the purposes of that case certain general statements of law by Viscount Sankey and by Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver* [2], at pp. 381 and 389. These statements, reflecting basic principle which is not challenged in the present case, are represented in the following passages:

28 *Per* Viscount Sankey:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust*. The earlier cases are concerned with trusts of specific property: *Keech v. Sandford* ((1726), Sel. Cas. Ch. 61) per Lord King, L.C. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

29 *Per* Lord Russell of Killowen:

> In the result, I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them. The equitable rule laid down in *Keech v. Sandford* [*supra*] and *Ex p. James* ((1803), 8 Ves. 337), and similar authorities applies ... in full force. It was contended that these cases were distinguishable by reason of the fact that it was impossible for Regal to get the shares owing to lack of funds, and that the directors in taking the shares were really acting as members of the public. I cannot accept this argument. It was impossible for the *cestui que trust* in *Keech v. Sandford* to obtain the lease, nevertheless the trustee was accountable. The suggestion that the directors were applying simply as members of the public is a travesty of the facts. They could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain.

30 I need not pause to consider whether on the facts in *Regal* (*Hastings*) *Ltd. v. Gulliver* the equitable principle was overzealously applied; see, for example, Gower, *op. cit.*, at pp. 535-537. What I would observe is that the principle, or, indeed,

principles, as stated, grew out of older cases concerned with fiduciaries other than directors or managing officers of a modern corporation, and I do not therefore regard them as providing a rigid measure whose literal terms must be met in assessing succeeding cases. In my opinion, neither the conflict test, referred to by Viscount Sankey, nor the test of accountability for profits acquired by reason only of being directors and in the course of execution of the office, reflected in the passage quoted from Lord Russell of Killowen, should be considered as the exclusive touchstones of liability. In this, as in other branches of the law, new fact situations may require a reformulation of existing principle to maintain its vigour in the new setting.

31 The reaping of a profit by a person at a company's expense while a director thereof is, of course, an adequate ground upon which to hold the director accountable. Yet there may be situations where a profit must be disgorged, although not gained at the expense of the company, on the ground that a director must not be allowed to use his position as such to make a profit even if it was not open to the company, as for example, by reason of legal disability, to participate in the transaction. An analogous situation, albeit not involving a director, existed for all practical purposes in the case of *Phipps v. Boardman* [3] , which also supports the view that liability to account does not depend on proof of an actual conflict of duty and self-interest. Another, quite recent, illustration of a liability to account where the company itself had failed to obtain a business contract and hence could not be regarded as having been deprived of a business opportunity is *Industrial Development Consultants Ltd. v. Cooley* [4] , a judgment of a Court of first instance. There, the managing director, who was allowed to resign his position on a false assertion of ill health, subsequently got the contract for himself. That case is thus also illustrative of the situation where a director's resignation is prompted by a decision to obtain for himself the business contract denied to his company and where he does obtain it without disclosing his intention.

32 What these decisions indicate is an updating of the equitable principle whose roots lie in the general standards that I have already mentioned, namely, loyalty, good faith and avoidance of a conflict of duty and self-interest. Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day-to-day accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings. It is a necessary supplement, in the public interest, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgment of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behavior.

33 A particular application of the equitable principle against a director is found in an early Australian case, appealed unsuccessfully to the Privy Council, where there was a refusal to permit a director to carry out a scheme for acquiring a mining claim of the company, through unopposed enforcement of a forfeiture, on his undertaking to give all shareholders save a pledgee bank the benefit of his purchase according to their shareholdings: see *Smith v. Harrison* [5] . The High Court of Australia applied the equitable principle on a conflict of duty and self-interest basis in a case where a director, who was empowered to sell a branch of his company's business with which he was particularly associated (which would result in loss of his position), arranged with the purchaser to enter its employ, doing so with the approval of the chairman of the board of the seller company, he having consulted with his fellow directors: see *Furs Ltd. v. Tomkies* [6] . As was there pointed out, there was failure to make full disclosure to the shareholders of the financial arrangements made by the director, and it was no answer to the breach of fiduciary duty that no loss was caused to the company or that any profit made was of a kind which the company could not have obtained.

34 In the same vein is the New Zealand case of *G.E. Smith Ltd. v. Smith* [7] , which founded itself not only on *Regal* (*Hastings*) *Ltd. v. Gulliver, supra*, but as well on the proposition stated by Lord Cranworth in *Aberdeen Railway Co. v. Blakie Bros.* [8] that a possible conflict of personal interest and duty will establish a basis for relief. The case concerned acquisition by a company director in his own right of an import licence (which had been refused to the company) for goods in which the company dealt, this being done at a time when liquidation of the company was contemplated by him and the other principal shareholder but before an agreement was concluded by which the defendant sold his interest in the company to that other shareholder.

35 Cases in the United States show that early enunciations of principle, resting on particular fact situations, have been broadened to cover succeeding cases, but one cannot pretend that there is any one consistent line of approach among the

different state jurisdictions: see James C. Slaughter, "The Corporate Opportunity Doctrine", 18 Southwestern L.J. 96 (1964). What emerges from a review of the American case law is an imprecise ethical standard "which prohibits an executive — here defined to include either a director or an officer — from appropriating to himself a business opportunity which in fairness should belong to the corporation": see Note, "Corporate Opportunity", 74 Harv. L. Rev. 765 (1961).

36 A useful examination of the approach to corporate opportunity in American decisions is that found in *Burg v. Horn* [9], a majority decision of the Second Circuit Court of Appeals applying New York law in a diversity suit. What was involved in that case was not the usurpation of an opportunity which the particular company was pursuing, but the more far-reaching question whether a director was obliged to offer to the company, before taking them for himself, opportunities in its line of business of which he rather than the company became aware and which he pursued. The facts, briefly, were that directors of a company, operating low rental housing, who were known to their co-director plaintiff to have unrelated interests and also interests, acquired earlier, in other like companies, acquired a number of low rental properties which they did not offer to the company of which they and the plaintiff were co-directors. These properties had not been sought by the company nor did the defendants learn of them through the company. In denying liability, the majority expressed New York law to require a determination in each case, by considering the relationship between director and company, whether a duty to offer the company all opportunities within its line of business was fairly to be implied. The dissenting judge saw the case as one where, in the absence of a contrary understanding between the parties, the defendants were under a fiduciary obligation to offer the properties to the company before buying them for themselves.

37 That the rigorous standard of behavior enforced against directors and executives may survive their tenure of such offices was indicated as early as *Ex p. James* [10] where Lord Eldon, speaking of the fiduciary in that case who was a solicitor purchasing at a sale, said (at p. 390 E.R.):

> With respect to the question now put whether I will permit Jones to give up the office of solicitor and to bid, I cannot give that permission. If the principle is right that the solicitor cannot buy, it would lead to all the mischief of acting up to the point of the sale, getting all the information that may be useful to him, then discharging himself from the character of solicitor and buying the property. ...On the other hand I do not deny that those interested in the question may give the permission.

The same principle, although applied in a master-servant case in respect of the use to his own advantage of confidential information acquired by the respondent while employed by the appellant, was recognized by this Court in *Pre-Cam Exploration & Development Ltd. v. McTavish* [11].

38 The trial judge appeared to treat this question differently in quoting a passage from *Raines v. Toney* [12], a judgment of the Supreme Court of Arkansas, at p.809. The passage is in the following words:

> It is, however, a common occurrence for corporate fiduciaries to resign and form a competing enterprise. Unless restricted by contract, this may be done with complete immunity because freedom of employment and encouragement of competition generally dictate that such persons can leave their corporation at any time and go into a competing business. They cannot while still corporate fiduciaries set up a competitive enterprise ... or resign and take with them the key personnel of their corporations for the purposes of operating their own competitive enterprises ... but they can, while still employed, notify their corporation's customers of their intention to resign and subsequently go into business for themselves, and accept business from them and offer it to them ... but they can use in their own enterprise the experience and knowledge they gained while working for their corporation ... They can solicit the customers of their former corporation for business unless the customer list is itself confidential.

39 Prior to quoting from *Raines v. Toney*, Grant J. had referred to and rejected a submission of the appellant that "as long as the defendants came upon the profit making possibility inherent in the Guyana contract in the course of and by reason of occupying their positions as directors and senior officers of Canaero ... the strict equitable rule must be applied against them". *Albert A. Volk Inc. v. Fleschner Bros. Inc.* [13] had been cited in support of the submission. The trial judge's position on this point was put by him as follows:

> I do not interpret the decision above quoted as indicating that the mere fact of learning of the contract or even doing extensive work and preparation in attempts to secure the same for the plaintiff while they were still in their offices for it, of itself prevents them, after severing relations with their employer, from seeking to acquire it for themselves. It is not the coming upon or learning of the proposed contract while directors that establishes liability, but rather obtaining the same because of such fiduciary position and in the course of their duties as such. I would think that when directors or senior officers leave the employ of the company they must not use confidential information which they have acquired in such employment for the purpose of assisting them in getting such a contract for themselves. Such information so acquired by them would remain an asset of their principal even after they had left their employment.

40 In so far as the trial judge, founding himself upon what Lord Russell of Killowen said in *Regal* (*Hastings*) *Ltd. v. Gulliver*, would limit the liability of directors or senior officers to the case where they obtained a contract "in the course of their duties as such", I regard his position as too narrowly conceived. *Raines v. Toney* does not support the trial judge's view, as is evident from the assertion of the Supreme Court of Arkansas that the fiduciary duty of a director or officer does not terminate upon resignation and that it cannot be renounced at will by the termination of employment: see also *Mile-O-Mo Fishing Club Inc. v. Noble* [14] . The passage quoted by Grant J. from *Raines v. Toney* was directed to a different point, namely, that of a right to compete with one's former employer unless restricted by contract.

41 The view taken by the trial judge, and affirmed by the Court of Appeal (which quoted the same passage from the reasons of Lord Russell of Killowen in *Regal* (*Hastings*) *Ltd. v. Gulliver*), tended to obscure the difference between the survival of fiduciary duty after resignation and the right to use non-confidential information acquired in the course of employment and as a result of experience. I do not see that either the question of the confidentiality of the information acquired by O'Malley and Zarzycki in the course of their work for Canaero on the Guyana project or the question of copyright is relevant to the enforcement against them of a fiduciary duty. The fact that breach of confidence or violation of copyright may itself afford a ground of relief does not make either one a necessary ingredient of a successful claim for breach of fiduciary duty.

42 Submissions and argument were addressed to this Court on the question whether or how far Zarzycki copied Canaero's documents in preparing the Terra proposal. The appellant's position is that Zarzycki was not entitled to use for Terra what he compiled for Canaero; and the respondents contended that, although Zarzycki was not entitled to use for Terra the 1965 report or proposal as such that he prepared for Canaero, he was entitled to use the information therein which came to him in the normal course and by reason of his own capacity. It was the respondents' further submission that Zarzycki did not respond in 1966 on behalf of Terra on the basis of his 1965 report as an officer of and for Canaero; and they went so far as to say that it did not matter that O'Malley and Zarzycki worked on the same contract for Terra as they had for Canaero, especially when the project was not exactly the same.

43 In my opinion, the fiduciary duty upon O'Malley and Zarzycki, if it survived their departure from Canaero, would be reduced to an absurdity if it could be evaded merely because the Guyana project had been varied in some details when it became the subject of invited proposals, or merely because Zarzycki met the variations by appropriate changes in what he prepared for Canaero in 1965 and what he proposed for Terra in 1966. I do not regard it as necessary to look for substantial resemblances. Their presence would be a factor to be considered on the issue of breach of fiduciary duty but they are not a *sine qua non*. The cardinal fact is that the one project, the same project which Zarzycki had pursued for Canaero, was the subject of his Terra proposal. It was that business opportunity, in line with its general pursuits, which Canaero sought through O'Malley and Zarzycki. There is no suggestion that there had been such a change of objective as to make the project for which proposals were invited from Canaero, Terra and others a different one from that which Canaero had been developing with a view to obtaining the contract for itself.

44 Again, whether or not Terra was incorporated for the purpose of intercepting the contract for the Guyana project is not central to the issue of breach of fiduciary duty. Honesty of purpose is no more a defence in that respect than it would be in respect of personal interception of the contract by O'Malley and Zarzycki. This is fundamental in the enforcement of fiduciary duty where the fiduciaries are acting against the interests of their principal. Then it is urged that Canaero could not in any event have obtained the contract, and that O'Malley and Zarzycki left Canaero as an ultimate response to their dissatisfaction with that

company and with the restrictions that they were under in managing it. There was, however, no certain knowledge at the time O'Malley and Zarzycki resigned that the Guyana project was beyond Canaero's grasp. Canaero had not abandoned its hope of capturing it, even if Wells was of opinion, expressed during his luncheon with O'Malley and Zarzycki on August 6, 1966, that it would not get a foreign aid contract from the Canadian Government. Although it was contended that O'Malley and Zarzycki did not know of the imminence of the approval of the Guyana project, their ready run for it, when it was approved at about the time of their resignations and at a time when they knew of Canaero's continuing interest, are factors to be considered in deciding whether they were still under a fiduciary duty not to seek to procure for themselves or for their newly-formed company the business opportunity which they had nurtured for Canaero.

45 Counsel for O'Malley and Zarzycki relied upon the judgment of this Court in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper* [15], as representing an affirmation of what was said in *Regal* (*Hastings*) *Ltd. v. Gulliver* respecting the circumscription of liability to circumstances where the directors or senior officers had obtained the challenged benefit by reason only of the fact that they held those positions and in the course of execution of those offices. In urging this, he did not deny that leaving to capitalize on their positions would not necessarily immunize them, but he submitted that in the present case there was no special knowledge or information obtained from Canaero during their service with that company upon which O'Malley and Zarzycki had relied in reaching for the Guyana project on behalf of Terra.

46 There is a considerable gulf between the *Peso* case and the present one on the facts as found in each and on the issues that they respectively raise. In *Peso*, there was a finding of good faith in the rejection by its directors of an offer of mining claims because of its strained finances. The subsequent acquisition of those claims by the managing director and his associates, albeit without seeking shareholder approval, was held to be proper because the company's interest in them ceased. There is some analogy to *Burg v. Horn* because there was evidence that Peso had received many offers of mining properties and, as in *Burg v. Horn*, the acquisition of the particular claims out of which the litigation arose could not be said to be essential to the success of the company. Whether evidence was overlooked in *Peso* which would have led to the result reached in *Regal* (*Hastings*) *Ltd. v. Gulliver* (see the examination by Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered", (1971), 49 Can. Bar. Rev. 80, at p. 101) has no bearing on the proper disposition of the present case. What is before this Court is not a situation where various opportunities were offered to a company which was open to all of them, but rather a case where it had devoted itself to originating and bringing to fruition a particular business deal which was ultimately captured by former senior officers who had been in charge of the matter for the company. Since Canaero had been invited to make a proposal on the Guyana project, there is no basis for contending that it could not, in any event, have obtained the contract or that there was any unwillingness to deal with it.

47 It is a mistake, in my opinion, to seek to encase the principle stated and applied in *Peso*, by adoption from *Regal* (*Hastings*) *Ltd. v. Gulliver*, in the straight-jacket of special knowledge acquired while acting as directors or senior officers, let alone limiting it to benefits acquired by reason of and during the holding of those offices. As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it. So it is in the present case. Accepting the facts found by the trial judge, I find no obstructing considerations to the conclusion that O'Malley and Zarzycki continued, after their resignations, to be under a fiduciary duty to respect Canaero's priority, as against them and their instrument Terra, in seeking to capture the contract for the Guyana project. They entered the lists in the heat of the maturation of the project, known to them to be under active Government consideration when they resigned from Canaero and when they proposed to bid on behalf of Terra.

48 In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty

where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

49 Wells stands on a different footing from O'Malley and Zarzycki. The case put against Wells in the submissions to this Court is not that he personally owed a fiduciary duty to Canaero in respect of the Guyana project from the time it took shape but rather that he was a party to a conspiracy with O'Malley and Zarzycki to convert Canaero's business opportunity in respect of the Guyana project to personal benefit in breach of fiduciary obligation. Although Wells was associated with his co-defendants beyond the role of their solicitor, and was a director and substantial shareholder of Survair Limited, which was among the original intended invitees to submit proposals for the Guyana project but was dropped when the formal invitations were issued, there is no reason to interfere with the concurrent findings of fact upon which the action against Wells was dismissed and the dismissal affirmed on appeal. Unlike the case with O'Malley and Zarzycki, the findings of fact do not admit of a conclusion of law by which to fix Wells with liability.

50 There remains the question of the appropriate relief against O'Malley and Zarzycki, and against Terra through which they acted in breach of fiduciary duty. In fixing the damages at $125,000, the trial judge based himself on a claim for damages related only to the loss of the contract for the Guyana project, this being the extent of Canaero's claim as he understood it. No claim for a different amount or for relief on a different basis, as, for example, to hold Terra as constructive trustee for Canaero in respect of the execution of the Guyana contract, was made in this Court. Counsel for the respondents, although conceding that there was evidence of Terra's likely profit from the Guyana contract, emphasized the trial judge's finding that Canaero could not have obtained the contract itself in view of its association with Spartan Air Services Limited in the submission of a proposal. It was his submission that there was no evidence that that proposal would have been accepted if Terra's had been rejected and, in any event, there was no evidence of Canaero's likely share of the profit.

51 Liability of O'Malley and Zarzycki for breach of fiduciary duty does not depend upon proof by Canaero that, but for their intervention, it would have obtained the Guyana contract; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. It is entitled to compel the faithless fiduciaries to answer for their default according to their gain. Whether the damages awarded here be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, I would not interfere with the quantum. The appeal is, accordingly, allowed against all defendants save Wells, and judgment should be entered against them for $125,000. The appellant should have its costs against them throughout. I would dismiss the appeal as against Wells with costs.

Appeal allowed against all defendants save Wells.

Solicitors of record:
Solicitors for the plaintiff, appellant: *Soloway, Wright, Houston, McKimm, Killeen & Greenberg*, Ottawa.
Solicitors for the defendant, respondent, Wells: *Herridge, Tolmie, Gray, Coyne & Blair*, Ottawa.
Solicitors for the defendants, respondents, O'Malley, Zarzycki and Terra Surveys Ltd.: *Nelligan/Power*, Ottawa.

Footnotes

1 [1953] 2 S.C.R. 438.

2 [1942] 1 All E.R. 378.

3 [1967] 2 A.C. 46.

4 [1972] 2 All E.R. 162.

5 (1872), 27 L.T.R. 188.

6 (1936), 54 C.L.R. 583.

7 [1952] N.Z.L.R. 470.

8 (1854), 1 Macq. 461.

9 (1967), 380 F. 2d 897.

10 (1803), 8 Ves. 337, 32 E.R. 385.

11 [1966] S.C.R. 551.

12 (1958), 313 S.W. 2d 802.

13 (1945), 60 N.Y.S. 2d 244.

14 (1965), 210 N.E. 2d 12.

15 [1966] S.C.R. 673.

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TAB 9

2020 ONSC 4188
Ontario Superior Court of Justice

Associated Foreign Exchange Inc. et al. v. MBM Trading

2020 CarswellOnt 9936, 2020 ONSC 4188, 321 A.C.W.S. (3d) 152

Associated Foreign Exchange Inc. and Associated Foreign Exchange, ULC, c.o.b. as AFEX Canada (Plaintiffs) and 9189-0921 Quebec Inc. c.o.b. as MBM Trading and Mendel Streicher also known as Mendy Streicher and Manny Streicher and Emmeco Inc. (Defendants)

C. Gilmore J.

Heard: June 18, 2020
Judgment: July 8, 2020
Docket: CV-20-00640753-00CL

Counsel: Gavin J. Tighe, Scott K. Gfeller, for Plaintiffs
Ken Prehogan, Nadia Chiesa, for MBM Trading and Mr. Streicher
Alycia Young, for Defendant, EMMECO Inc.

Subject: Civil Practice and Procedure; Contracts; Torts
Related Abridgment Classifications
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets
Headnote
Remedies --- Injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets
Plaintiffs provided global payment and foreign exchange services — Defendant S executed Pre-Authorized Debit Forms authorizing plaintiffs to initiate direct debit withdrawals from defendant MBM's designated accounts at banks and then transfer funds from those accounts to plaintiffs' account to settle foreign exchange transactions — Between February 13 and February 18, 2020, S instructed plaintiffs to complete six wire transfers on behalf of MBM totalling USD $845,030.36 — All six transactions were funded by plaintiffs in accordance with settlement limit for account — Plaintiffs received notice from banks that there were insufficient funds in MBM's accounts to settle transactions — Plaintiffs closed foreign exchange option contracts with MBM and made demand for repayment — Plaintiffs claimed that S, defendant E Inc. and others had significant joint indebtedness to various creditors and that S and spouse were actively encumbering, and thereby depleting, equity in various properties — Plaintiffs' obtained ex parte Mareva injunction in Quebec against defendants and others — Injunction order was varied on consent to permit defendants to pay $50,000 to counsel and $4,230 per month for ordinary living expenses — Plaintiffs brought motion for continuation of Mareva injunction — Motion granted — Mediation clause in account agreement could not forever oust court's jurisdiction, especially in relation to urgent interlocutory relief — Once Mareva-related issues were dealt with, formal mediation would be next step — There was prima facie case for fraud based on fact that S proceeded with transactions despite knowledge that bank would likely suspend overdraft and credit facilities and S's failure to advice plaintiffs that account was frozen — Funds from plaintiffs went to S personally or to partner, but upon finding out that bank credit facility was frozen, S made no effort to return those funds to plaintiffs despite possibility that funds were still accessible — S admitted to dissipating assets and receiving financial assistance from family and friends in order to pay down bank debt — It was appropriate to continue Mareva injunction.
Table of Authorities
Cases considered by *C. Gilmore J.*:

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — considered
Noreast Electronics Co. Ltd. v. Danis (2018), 2018 ONSC 879, 2018 CarswellOnt 1684 (Ont. S.C.J.) — referred to
OPFFA v. Paul Atkinson et al (2019), 2019 ONSC 3877, 2019 CarswellOnt 10616 (Ont. S.C.J.) — referred to
R. v. Sansregret (1985), [1985] 1 S.C.R. 570, (sub nom. *Sansregret v. R.)* 17 D.L.R. (4th) 577, (sub nom. *Sansregret v. R.)* 58 N.R. 123, (sub nom. *Sansregret v. R.)* [1985] 3 W.W.R. 701, (sub nom. *Sansregret v. R.)* 35 Man. R. (2d) 1, (sub nom. *Sansregret v. R.)* 45 C.R. (3d) 193, (sub nom. *Sansregret v. R.)* 18 C.C.C. (3d) 223, 1985 CarswellMan 176, 1985 CarswellMan 380 (S.C.C.) — considered
RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, 1994 SCC 117 (S.C.C.) — referred to
SFC Litigation Trust (Trustee of) v. Chan (2017), 2017 ONSC 1815, 2017 CarswellOnt 4336, 46 C.B.R. (6th) 253, 137 O.R. (3d) 382 (Ont. Div. Ct.) — considered

MOTION by plaintiffs for continuation of Mareva injunction.

***C. Gilmore J.*:**

OVERVIEW

1 The moving party Plaintiffs ("AFEX") seek a continuation of the *ex-parte Mareva* injunction Order they obtained on May 27, 2020 against the Defendants. The May 27, 2020 Order was varied on consent on June 8, 2020 (on notice) to permit the MBM Defendants to pay $50,000 to their counsel and $4,230 per month for ordinary living expenses. The matter was further adjourned to June 18, 2020 to permit the MBM Defendants to retain counsel, file materials and for all parties to conduct cross-examinations.

2 The Defendant Emmeco Inc. was represented at this motion but did not file materials or participate.

3 AFEX's claim relates to recovery of an outstanding negative balance of USD $845,030.36 resulting from six USD wire transactions in February 2020 requested and initiated by MBM for payment to various recipients designated by MBM including the co-defendant Emmeco Inc. ("Emmeco"), as well as MBM and Streicher personally. The wire transactions were to be funded through pre-authorized debit withdrawals from MBM's account, however, the transactions were rejected by MBM's financial institutions.

4 The MBM Defendants have acknowledged that they are indebted to the Plaintiffs and tried to work out a resolution before the Plaintiffs proceeded with their *ex-parte* motion. The MBM Defendants submit that the Plaintiffs have failed to meet the high threshold for a *Mareva* injunction and it should be immediately discontinued.

BACKGROUND FACTS

5 AFEX provides global payment and foreign exchange services. Streicher, as President of MBM, has had an account with AFEX since 2014. Streicher executed Pre-Authorized Debit Forms ("PADs") authorizing AFEX to initiate direct debit withdrawals from MBM's designated accounts at Caisse Populaire Desjardins Outremont ("Desjardins") and CIBC and then transfer funds from those accounts to the AFEX account to settle foreign exchange transactions.

6 Since 2015 MBM has conducted over 1300 transactions in the AFEX Account totalling approximately USD $160,000,000. USD $118,000,000 of these transactions were currency exchanges between MBM's own financial institutions and USD $500,000 were transfers to Streicher's personal bank account in New York.

7 Given the business history between AFEX and MBM, MBM was authorized to make transfers without a clearance hold with a settlement limit of USD $1,000,000. Normally, funds would be subject to a 10-day clearance period.

8 MBM had a revolving line of credit of up to $2M with CIBC. Between 2017 and 2020 MBM often exceeded its credit limit. In 2019 MBM relied heavily on the line of credit due to a downturn in business.

9 Between February 13 and February 18, 2020, Streicher instructed AFEX to complete six USD wire transfers on behalf of MBM totalling USD $845,030.36. Those transactions over the five-day period are set out below:

Date, Transaction and Beneficiary

February 13, 2020 - USD $55,000 debited from MBM's CIBC account and converted by AFEX to CAN $72,875 and paid to MBM's bank account at Desjardins.

February 14, 2020 - USD $75,000 debited from MBM's CIBC account and USD $29,000 paid to Streicher's personal bank account at the Northeast Community Bank in Monsey, New York and USD $12,000 converted by AFEX to CAD $15,870 and paid to MBM's bank account at Desjardins (the remaining USD $34,000 was used to net the negative balance from the bounced transactions and has been accounted for in the overall amount claimed).

February 14, 2020 - USD $240,000 debited from MBM's CIBC account and paid to a designated beneficiary Emmeco.

February 18, 2020 - USD $18,882.18 debited from MBM's CIBC account and converted by AFEX to CAN $25,000 and paid to MBM's bank account at Desjardins.

February 18, 2020 - USD $390,000 debited from MBM's Desjardins account and paid to Emmeco.

February 18, 2020 - USD $100,000 debited from MBM's Desjardins account and paid to Emmeco.

10 All of the transactions were funded by AFEX in accordance with the settlement limit for the AFEX account. On February 20 and 24, 2020, AFEX received notification from CIBC that the first four transactions had "bounced." On February 25, 2020 AFEX received notification from Desjardins regarding "insufficient funds" for the last two transactions. Desjardins and CIBC reversed the debit withdrawals leaving AFEX no ability to recall the transactions.

11 On March 1, 2020 AFEX closed foreign exchange option contracts with MBM to mitigate against future possible losses. This resulted in a combined loss to AFEX of a further USD $150,055.78.

12 AFEX takes the position that there is evidence to support that CIBC froze MBM's account on February 13, 2020 due to its failure to provide requested financial information and its ongoing overdraft position, and that Streicher knew they were frozen when he processed the CIBC transactions. While Streicher agrees the CIBC account was frozen, he was not aware of it until after the transactions on February 18, 2020 had been processed. His evidence was that his on line account showed funds available on his credit facility and he would not have proceeded with the transactions had he known the account was frozen. AFEX alleges that Streicher engaged in a form of kiting scheme with AFEX, CIBC and Desjardins and fraudulently took advantage of the AFEX settlement limit.

13 Demand letters for repayment were sent to MBM in February and March 2020. Streicher has not repaid AFEX despite acknowledging his indebtedness to it. In particular AFEX requested return of USD $29,000 that was transferred to Streicher's personal bank account in New York. Streicher's position is that CIBC is the first place lender with security over both his business and personal assets and he must repay them first.

14 Emmeco received USD $730,000 via three separate transfers that was allegedly misappropriated from AFEX. The President of Emmeco is David Stark ("Stark") who is the Vice-President and a shareholder in the Defendant 9301-6178 Quebec Inc. ("9301"). Streicher is the President of 9301 and a shareholder.

15 Streicher's spouse, Mindy Wasserman ("Wasserman"), Stark, Emmeco and Stark's spouse Esther Farkas ("Farkas") are co-borrowers on two loans that are collaterally registered against title to various properties owned by them.

16 Based on AFEX's investigations, its position is that Streicher, Stark, MBM and Emmeco have significant joint indebtedness to various creditors and that Streicher and Wasserman are actively encumbering, and thereby depleting the equity in various properties owned by them or by corporations they control.

17 On May 29, 2020 agents for the Plaintiffs' counsel obtained an *ex parte Mareva* injunction in Quebec against the MBM Defendants to the extent of assets held by them, as well as against Mindy Wasserman and 9353-9500 Quebec Inc. (the "Quebec *Mareva*"). The Quebec *Mareva* was served on the various financial institutions and registered on title to the real property set out in Schedule A to the Ontario and Quebec *Mareva.*

The Declinatory Exception and Account Agreement Issues

18 During the course of argument on the motion to extend the Quebec *Mareva*, the Defendants argued that Quebec should decline jurisdiction because the parties had chosen by agreement to submit disputes to the Courts of Ontario and specifically in Toronto. On June 15, 2020, Justice Pinsonnault released his judgment and extended the *Mareva.* He dismissed the Defendants' argument with respect to the Declinatory Exception.

19 The MBM Defendants in the Ontario case have raised the issue of jurisdiction and specifically the fact that AFEX cannot locate a signed Account Agreement between MBM and AFEX. Streicher does not deny signing an Account Agreement, his evidence was that he did not remember signing one and that neither party has any documentation to support that he did.

20 Paragraph 26.4 of AFEX Business Account Application and Agreement sets out that the parties attorn to the jurisdiction of the Courts of Ontario and that any action is to be brought in Toronto, Ontario. The Plaintiffs submit that the MBM Defendants cannot argue in Quebec that Ontario is the correct forum because the parties had agreed to this, and when in Ontario deny that they are bound by the Account Agreement. The Plaintiffs argue that the Defendants should be estopped from altering course before this Court, having failed on the opposite argument in Quebec.

21 The MBM Defendants argue that there was never any agreement to attorn to Ontario in the Quebec case. They argue that only Quebec has jurisdiction because all the assets are in Quebec and the individual Defendants live in Quebec. There is no basis to proceed in Ontario given the location of the assets and the parties and the lack of a signed Account Agreement.

22 I agree with the Plaintiffs on this point. Certainly there was no "agreement" between counsel or otherwise to attorn to Quebec jurisdiction. The agreement referred to was obviously the Account Agreement. It is this court's view that it is absurd for Mr. Streicher to argue that he was moving hundreds of thousands of dollars via AFEX currency exchange services and paying commission without any idea of his obligations to AFEX. It is indeed unfortunate that AFEX cannot find a signed copy of the Account Agreement. That does not mean that all parties acted in accordance with what they believed was the agreement that governed their commercial relationship.

23 The MBM Defendants also argue that if the Account Agreement is found to be valid and is relied upon by the Plaintiffs, section 24.4 of the Account Agreement would apply. That section requires parties to attend mediation before any court proceeding can be commenced. The Plaintiffs have not offered to attend any form of mediation to date.

24 I share the Plaintiffs' view on this point as well. A mediation clause in an Agreement cannot forever oust the court's jurisdiction, especially in relation to urgent interlocutory relief. It is clear, however, that once the *Mareva* related issues are dealt with, a formal mediation would be the next step.

The Alleged Fraud re the CIBC Credit Facility and the Transactions

25 It is not contested that MBM had a credit facility with CIBC up to $2M which was substantially over its limit at various times between 2017 and 2020. Streicher admitted during his cross-examination that 2019 was a difficult year for his business and that by October 2019, MBM was overdrawn on the CIBC facility by $400,000 and had not provided required monthly sales reports to CIBC as required since August 2019.

26 Streicher produced further evidence that between May 15, 2017 and February 7, 2020, he was contacted by CIBC on eight separate occasions and requested to cover the overdraft.

27 In October 2019 CIBC demanded MBM's Financial Statements which were not delivered until February 14, 2020.

28 Streicher's communication with CIBC during the critical period of February 13 to February 18, 2020 is in issue given the Plaintiffs' allegations that Streicher knew, but ignored, the fact CIBC had frozen his account. He knew when he placed the impugned orders that there would be no hold put on the funds and that at the relevant time he was $600,000 over his credit limit. In proceeding with the transactions, the Plaintiffs allege that Streicher engaged in a fraudulent "kiting" scheme transferring funds from accounts he knew were frozen or had no money (Desjardins) to non arms length parties.

29 Streicher maintains he did not know the account had been frozen until after the impugned transactions had occurred. He was often close to the line or overdrawn on his credit facility. The record is replete with emails from CIBC asking him to bring his credit facility back to the $2M threshold. Streicher submits these were all normal MBM transactions and that when he checked his account on line, he had room for the transactions on his credit line.

30 In issue on this motion is Streicher's knowledge of the timing of the freezing of his account with respect to the Plaintiffs having a *prima facie* case. Streicher denies that he knew as early as February 13, 2020 that the CIBC account was frozen. On February 13, 2020 Streicher sent an email to Marco Folini at CIBC indicating that the overdrawn amounts would be covered shortly. Mr. Folini replied that same day confirming the overdraft would be covered and requesting October 2019 Financial Statements and December reporting. The required financial reports were not delivered until February 14, 2020.

31 Streicher's evidence is that he was contacted by CIBC Commercial Banking Team Lead, Alexandra Boulos, on Monday February 17, 2020 at 11:42 a.m. He was asked to call Marco Folini on an urgent basis. Streicher replied he would call him later but did not actually speak with him until the afternoon of Tuesday February 18, 2020. Streicher's evidence was that on February 17th his CIBC credit facility showed "available funds" of approximately $300,000 [1]. On this basis he continued with the impugned transactions despite the fact that he knew CIBC was trying to reach him on an urgent basis.

32 On Tuesday February 18, 2020 at 10:12 a.m. he received an email from Mr. Folini advising as follows:

> Manny as was mentioned to you verbally yesterday, your accounts remain frozen and only available for deposits. As mentioned we need the December reporting which is late and also we need to clarify and rectify the covenant breaches and determine action plan on a forward basis. Please refrain from writing cheques or making transfers.

33 Streicher's evidence is that he cannot recall when he read the 10:12 a.m. email from Folini on February 18th and does not recall the conversation referred to in Mr. Folini's email which allegedly took place on February 17th. He was aware of his responsibility to ensure that when he did transactions with AFEX, there were sufficient funds in his account. [2]

34 Streicher's evidence was that he instructed AFEX to process transactions on his CIBC account on February 18, 2020 before he read the email from Mr. Folini. Streicher further deposed that AFEX made an error in debiting his Desjardins account on February 18, 2020. Those were not his instructions because he knew the Desjardins account did not have sufficient funds to cover the transactions.

35 I agree with the Plaintiffs that the additional productions resulting from Streicher's undertakings on examination demonstrate that when CIBC finally received MBM's 2019 financial statements on February 14, 2020 showing a net loss of $961,010, its position was quite different than its previous tolerance of MBM's overdrafts. After receiving the financial statements on February 14, 2020, CIBC wrote to Streicher on February 21, 2020 setting out a number of defaults under the credit facility. These included depositing funds at another banking institution (Desjardins), failing to respect reporting requirements and using capital for personal real estate investments.

36 Streicher had several meetings with AFEX representatives following the impugned transactions. AFEX wanted Streicher to work out a payment plan with them. He advised he could not because his account was frozen and in any event he had to reach a settlement with CIBC before he could make any financial commitment to AFEX.

37 Streicher's evidence is that he has been able to reduce his trading debt to CIBC by $1,079M by refinancing and doing sales and collections. Mr. Streicher also has other debts with trade creditors and unsecured lenders. His evidence was that "family and friends are willing to help me out in my situation." [3]

38 The Plaintiffs have concerns about Streicher's position that he is refinancing to pay CIBC and paying down his secured creditor through work and friends. There is no evidence of how this is happening and what funds are moving between family and friends. Despite Streicher's protestations that he intends to pay AFEX first, the Plaintiffs are concerned that Streicher will put his assets out of reach and use the money from AFEX to pay other creditors (or family) ahead of AFEX. There were no financial statements received from MBM that indicate it is actually earning anything at this time.

39 Based on all of the above, I find that there is a *prima facie* case of fraud for the following reasons:

a. At no time in the past had Streicher's CIBC account been overdrawn as often and as much as it was in January and February 2020. It is clear that there was a link between the production of MBM's 2019 financial statements on February 14, 2020 and CIBC's actions thereafter. I infer that Streicher must have had some knowledge that CIBC would change its position about MBM's overdraft and credit facility at the relevant time but Streicher recklessly proceeded with the impugned transactions. As set out in *R. v. Sansregret*, recklessness involves "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur". The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it. See *R. v. Sansregret*, *1985 CanLII 79*, [1985] 1 S.C.R. 570 (S.C.C.) *at para. 22.*

b. It defies logic that Streicher would not recall reading the critical email on February 18, 2020 which said that his accounts remained frozen and that he did not recall speaking to Mr. Folini on February 17, 2020. I am permitted to and do draw an adverse inference with respect to Streicher's conduct in that he did not contact AFEX immediately nor did he attempt to return funds sent to his Desjardins account, his personal account or his business partner at Emmeco.

c. Streicher's insistence that he had clearance of about $300,000 in his credit facility on February 17, 2018 is put in serious doubt when one adds the six impugned transactions which would have put his overdraft in excess of $3M. It is unlikely that CIBC would have allowed such an overdraft in the face of MBM's financial position at the time and I infer that Streicher knew this.

What Weight Should be Given to Ms. Abbott's Affidavits of May 22nd and June 12th, 2020

40 The MBM Defendants seek to strike Ms. Abbott's affidavits on the grounds that they are based on hearsay and should be given little or no weight. Ms. Abbott's affidavit was the foundational affidavit in the original *Mareva* motion. Ms. Abbott is the Global General Counsel for AFEX and has knowledge of their business practices.

41 The MBM Defendants submit there is no purpose to these affidavits because Ms. Abbott was not present for the conversations on which she reports. The Plaintiffs could have attempted to obtain affidavits from Mr. Manashirov or Ms. Yoon but did not. Further, Ms. Abbott did not join AFEX until 2015 and therefore cannot comment on compliance procedures at the time when MBM opened its account in 2014. Ms. Abbott is also not in a position to give evidence about the PAD forms as she had no direct knowledge of the arrangement between AFEX and MBM re pre-authorized debits.

42 I agree with the Plaintiffs on this issue that it is somewhat of a red herring. First, Ms. Abbot does not depose that she has personal knowledge of what happened during the MBM account opening stage although it would not be unusual for a General Counsel to provide evidence of standard account opening procedures.

43 Ms. Abbott's evidence on the PAD form is based on the fact that MBM account funded hundreds of transactions with AFEX over the years using a pre-authorized debit arrangement. Similar to the argument about the lack of existence of a signed account form, it is not logical that a pre-authorized debit arrangement for transactions of this size was not based on some form of agreement even if the agreement can only be confirmed by the parties' conduct.

44 In terms of Ms. Abbott's evidence about conversations between AFEX employees and Mr. Streicher, she was simply trying to put forward the information that AFEX had about Streicher's position. Doing otherwise would not fulfill its obligation to provide full disclosure for the *ex-parte* motion. In any event, much of her recounting of Streicher's position was not contested and was not material to the main issues.

45 In summary, I find that Ms. Abbott attempted to provide the best evidence she could in relation to the Plaintiffs' burdens of proof on both the *ex-parte* and the comeback motion.

Has the Test to Continue the Mareva been met?

46 The court's authority to grant a motion to extend an *ex parte* injunction is a hearing *de novo* and the presiding judge may consider the original record, transcripts and all material filed on the comeback motion.

47 For a *Mareva* injunction, the moving party must, in general, satisfy the court that (a) it has a strong *prima facie* case; (b) it will suffer irreparable harm if the injunctive relief is not granted; (c) the balance of convenience favours the granting of the injunction; (d) the responding party has assets in the province of Ontario; and (e) there is a serious risk that the responding party will remove property or dissipate assets before the granting of a potential judgment. See *OPFFA v. Paul Atkinson et al*, 2019 ONSC 3877 (Ont. S.C.J.) (CanLII) at para. 6.

48 The moving party is also obligated to make full and frank disclosure of all material matters within his or her knowledge, and must give particulars of the claim against the defendant(s), stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant.

49 For the reasons set out above, I find that not much has changed since the original *Mareva* Order was granted. In fact, there is more evidence to support that Streicher on behalf of MBM must have known or was wilfully blind to the fact that CIBC would no longer tolerate his overdraft practices as MBM was not profitable enough to do so. The funds from AFEX went to Streicher personally or to his partner, but upon finding out that his CIBC credit facility was frozen he made no effort to return those funds to AFEX despite the possibility that the funds were still accessible to him.

50 Much was made by the MBM Defendants about the fact that there is no evidence that Streicher or MBM have assets in Ontario. They reiterate that they do not have the burden of proof and that the Plaintiffs are therefore precluded from arguing that the Defendants have failed to provide any evidence that they do *not* have assets in Ontario.

51 Both parties rely on *SFC Litigation Trust (Trustee of) v. Chan*, 2017 ONSC 1815 (Ont. Div. Ct.) [hereinafter Borrelli] with respect to the requirement that a party have assets in Ontario before a *Mareva* may be granted. The MBM Defendants argue that the *Borrelli* decision cannot be relied upon for the proposition that the criteria in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.) can now be interpreted only as guidelines. Only the Court of Appeal can make such a significant change to the test.

52 The Plaintiffs argue that the law has evolved since *Chitel* given the global economy. Doing otherwise would mean that a party would be required to commence a proceeding in each jurisdiction in which it had assets or that a party's credit would be limited to jurisdictions in which they had assets. Neither proposition makes sense.

53 I agree with the Plaintiffs and see no reason not to follow Borrelli (which has not been overturned) with respect to its holding in relation to the requirement to have assets in Ontario as follows:

> Section 101(1) of the *Courts of Justice Act* provides the court with jurisdiction to grant an interlocutory junction or mandatory order "where it appears to a judge of the court to be just or convenient to do so". A *Mareva* injunction is an

equitable remedy and as such I agree with the respondent's submission that this remedy evolves as facts and circumstances merit (paras 28 and 29 — *CosimoBorrelli*).

54 In summary, while the MBM Defendants are not required to prove that they do not have assets in Ontario, the fact that there is no evidence of any assets in Ontario does not preclude the court from exercising its discretion to grant the *Mareva* where circumstances merit.

55 With respect to the dissipation of assets, not much needs to be said on this point. Streicher admitted that he is dissipating assets and receiving financial assistance from family and friends in order to pay down his CIBC debt. The question which remains outstanding is what happened to the funds from AFEX? Streicher has not provided any evidence on this point or offered to pay the outstanding amount into court. As such, I infer he does not want AFEX to know what happened to their funds. This is troubling and supports the Plaintiffs' position that Streicher is making the decision on his own as to which creditors to pay first, without any information being given to AFEX.

56 Finally, the fact that Streicher is repaying CIBC at a rapid rate causes understandable concern to AFEX as it does not have Streicher's personal guarantee and has no assurance that in fact Streicher used the money from AFEX to pay CIBC. Streicher did not provide any concrete evidence as to exactly how he has paid down his CIBC debt so quickly (other than a vague reference to "sales and collections") or what other creditors he may have who are receiving priority over AFEX. The other logical concern on the part of AFEX is that once CIBC is paid out, Streicher will shut down MBM.

57 As for irreparable harm, the case law is clear that such harm must extend to the possibility that the Plaintiffs may not be able to realize on a future judgment (see *Noreast Electronics Co. Ltd. v. Danis*, 2018 ONSC 879 (Ont. S.C.J.) at para 37). Streicher's evidence on cross-examination is that he has "enough assets to take care of everyone" and that AFEX will be "taken care of." If that were the case, the MBM Defendants could have paid the amount owing to AFEX into court, thereby vacating the necessity of a *Mareva*. The MBM Defendants have taken no such action. In this case there is a real concern that Streicher may dissipate the AFEX funds to pay off creditors in the order he deems fit. There was also some evidence that Streicher may have been dissipating assets by encumbering the equity in properties in which he has an interest. Streicher denied this and insisted that he was simply renewing mortgages as they came due.

58 Finally, this court must balance which of the two parties will suffer the greatest harm if the *Mareva* Order is not extended (see *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994 CarswellQue 120 (S.C.C.)], 1994 CanLII117 at para 67). It does not appear to this court that Streicher or the MBM Defendants have been particularly inconvenienced by the *Mareva* given Streicher's insistence that he has financial support from family and friends and that everyone to whom he owes money will be paid. If there are further issues, the *Mareva* can be amended to permit personal and legal expenses as needed.

ORDERS

59 Given all of the above, I make the following Orders:

a. The *Mareva* Order shall continue until further Court Order or the parties consent to a termination or variation.

b. Paragraph 4 of the Order of Justice Koehnen dated June 8, 2020 shall continue.

c. Within seven days of the date of this endorsement, the MBM Defendants shall provide a sworn statement describing the nature, value and location of their assets worldwide, whether in their own name or not and whether solely or jointly owned.

d. The MBM Defendants shall submit to examinations under oath, by video conference, within 20 days of the sworn statement in paragraph c) above.

e. The sum of $121,334.82 shall be released to the MBM Defendants' counsel forthwith subject to the Defendants disclosing the source of those funds.

f. This Order is effective when signed without the requirement of it being entered.

COSTS

60 The Plaintiffs have had success on this motion, however, if there is no agreement on costs, the parties may provide written submissions of no more than 3 pages (double spaced) in length exclusive of any Offers to Settle or Bill of Costs. case law referred to in the submissions must be hyperlinked.

61 Submissions are due on a seven-day turnaround starting with the Plaintiffs, seven days from the date of this Endorsement. If no costs submissions are received within 35 days of the date of this Endorsement, the issue of costs shall be deemed to be settled.

Motion granted.

Footnotes

1 Transcript of the Cross-Examination of Mendel Streicher, June 15, 2020, Q136.

2 *Ibid* at Q32.

3 *Ibid* at Q255.

TAB 10

2017 ONSC 1815
Ontario Superior Court of Justice (Divisional Court)

SFC Litigation Trust (Trustee of) v. Chan

2017 CarswellOnt 4336, 2017 ONSC 1815, [2017] O.J. No. 1540,
137 O.R. (3d) 382, 278 A.C.W.S. (3d) 162, 46 C.B.R. (6th) 253

Cosimo Borrelli, in his capacity as trustee of the SFC LITIGATION TRUST (Plaintiff / Respondent) and Allen Tak Yuen Chan (Defendant / Appellant)

L.C. Leitch, H. Sachs, L.A. Pattillo JJ.

Heard: October 12, 2016
Judgment: March 28, 2017
Docket: Toronto 59/16

Counsel: Robert Staley, Derek J. Bell, Jason Berall, for Plaintiff / Respondent
Robert Rueter, Malik Martin, for Defendant / Appellant

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.ii Assets within jurisdiction
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.c Miscellaneous
Headnote
Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Assets within jurisdiction
Forestry company S Co. had office in Ontario, head office in Hong Kong, and assets predominantly located in China — S Co. sought Companies' Creditors Arrangement Act protection — Under plan, most of S Co.'s assets were transferred to new company E Ltd. — Litigation trust was assigned S Co.'s litigation rights and trustee was appointed — Situs of trust was Hong Kong — Trustee brought action alleging defendant, former CEO of S Co., defrauded S Co. — Worldwide Mareva injunction was granted — Defendant brought motion to vary or set aside injunction — Motion judge found that although there was no evidence trustee had assets in jurisdiction, it need not post security for its undertaking or for costs of action — Motion judge held that trustee's undertaking as to damages, along with undertaking from E Ltd., was sufficient undertaking and that such undertaking was sufficient to provide security for costs — Defendant appealed — Appeal dismissed — Court's in personam jurisdiction over defendant justifying issuance of Mareva injunction is not dependant, related to or "tied to" requirement that defendant has some assets in jurisdiction — Considering Ontario court's in personam jurisdiction, purpose of Mareva injunction, and evolutionary development of this equitable remedy, motion judge committed no error in law in finding it just and convenient to issue Mareva injunction.
Remedies --- Injunctions — Rules governing injunctions — Mareva injunctions — Miscellaneous
Forestry company S Co. had office in Ontario, head office in Hong Kong, and assets predominantly located in China — S Co. sought Companies' Creditors Arrangement Act protection — Under plan, most of S Co.'s assets were transferred to new company E Ltd. — Litigation trust was assigned S Co.'s litigation rights and trustee was appointed — Situs of trust was Hong Kong — Trustee brought action alleging defendant, former CEO of S Co., defrauded S Co. — Worldwide Mareva injunction

was granted — Defendant brought motion to vary or discharge injunction — Motion judge held that trustee's undertaking as to damages, along with undertaking from E Ltd., was sufficient and such undertaking was sufficient to provide security for costs — Defendant appealed, and sought to introduce as new evidence public notice of sale of majority of E Ltd.'s assets — Appeal dismissed — Evidence of sale of assets was admitted — However, sufficiency of undertaking as to damages was question of fact and was in discretion of motion judge — Motion judge's finding that E Ltd.'s undertaking as to damages was sufficient to secure defendant's cost in action reflected discretionary exercise of judgment — Defendant established no palpable and overriding error of fact and no error in principle by motion judge justifying reversal of those decisions — As part of its undertaking, E Ltd. was obliged to notify defendant if it experienced material change in its financial position affecting its undertaking — If defendant believed E Ltd. had not complied with motions judge's order, that issue could be brought before motion judge.

Forestry company S Co. had an office in Ontario, its head office was in Hong Kong, and its assets were predominantly located in China. The defendant was the CEO of S Co. and was resident in Hong Kong.

S Co. sought Companies' Creditors Arrangement Act protection and under a plan of compromise, most of S Co.'s assets were transferred to E Ltd., a Chinese company. A litigation trust was assigned S Co.'s litigation rights and a trustee was appointed. The situs of the trust was in Hong Kong, where the trustee was located.

The trustee brought an action alleging the defendant defrauded S Co, and a worldwide Mareva injunction was granted. The defendant brought a motion to vary or set aside the injunction.

The motion judge found that although there was no evidence the trustee had assets in Ontario, it need not post security for its undertaking or for costs of the action. It was also held that the trustee's undertaking as to damages, along with an undertaking from E Ltd., was a sufficient undertaking and that such undertaking was sufficient to provide security for costs.

The defendant appealed, and sought to introduce new evidence on appeal related to a sale of assets by E Ltd.

Held: The appeal was allowed.

Per Leitch J. (Sachs J. concurring): The appeal should be dismissed.

In a 1982 case (Chitel), the Ontario Court of Appeal dealt with the availability of a Mareva injunction in Ontario. Throughout their reasons in Chitel, the Court of Appeal described the factors to be considered in relation to the issuance of a Mareva injunction as "guidelines".

A court's in personam jurisdiction over a defendant justifying the issuance of a Mareva injunction is not dependant, related to or "tied to" a requirement that a defendant has some assets in the jurisdiction. A Mareva injunction is an equitable remedy and this remedy evolves as facts and circumstances merit. When an equitable remedy is sought the court ought to consider the guidelines set out in Chitel, but ultimately the court must consider what is just or convenient.

The defendant worked in Ontario, was sued in Ontario and attorned to this jurisdiction. He chose to be a Director and Officer of S Co. As CEO, the defendant chose to list S Co. in the Toronto capital markets. The in personam jurisdiction of the court was clear. It was significant that the motion judge found a strong prima facie case that the defendant committed fraud and that there was evidence that he dissipated assets.

The circumstances reflected an overriding consideration qualifying the trustee to obtain a Mareva injunction.

Courts have accepted undertakings from non-residents with foreign assets and the defendant pointed to no legal or statutory authority which indicated that doing so constitutes an error in principle.

The evidence regarding the sale of E Ltd.'s assets was accepted. However, the sufficiency of the undertaking as to damages was a question of fact and was in the discretion of the motion judge. The motion judge's finding that E Ltd.'s undertaking as to damages was sufficient to secure defendant's costs in the action reflected a discretionary exercise of judgment. The defendant established no palpable and overriding error of fact and no error in principle by the motion judge justifying a reversal of those decisions.

As part of its undertaking, E Ltd. was obliged to notify the defendant if it experienced a material change in its financial position affecting its undertaking. If the defendant felt E Ltd. had not complied with the motion judge's order, this could be brought before the motion judge for his consideration.

Per Patillo J. (dissenting): The appeal should be allowed. The Mareva injunction should be set aside and the matter referred back to motion judge for a determination of the damages suffered by the defendant, if any.

The motion judge erred in granting the Mareva injunction given that the trustee had no assets in the jurisdiction. Further, the motion judge erred in concluding that the undertaking of E Ltd. together with the undertaking of the trustee personally was sufficient security for the defendant's damages or costs.

The requirements for the issuance of a Mareva injunction as set out in Chitel represent the judicial principles upon which the court shall exercise its discretion to issue a Mareva injunction. In this case, the trustee had no assets in Ontario or in Canada. In such circumstances, the trustee was unable to meet the requirement in Chitel of having assets in the jurisdiction. Accordingly, the motion judge erred in exercising his discretion to grant the Mareva.

Chitel does not foreclose all situations where a Mareva can be granted. However, if the requirements for a Mareva as set out in Chitel are to change, it is the Court of Appeal and not this court that must change them.

The motion judge was aware that in order for the trustee's undertaking to be acceptable, there had to be evidence of assets in the jurisdiction to support the undertaking. To permit E Ltd.'s undertaking in the absence of any evidence of assets in the jurisdiction or any posted security was clearly wrong. Further, it created an injustice in that the undertakings of both the trustee and E Ltd. had no substance given the absence of either assets in the jurisdiction or posted security. In such circumstances, the undertakings are unenforceable by the court and therefore of no protection to the defendant.

For the same reasons, the motion judge's decision that the undertaking of E Ltd. was sufficient to cover the defendant's request for security for costs was also clearly wrong. As a result, the appeal should be allowed in respect of the issue of the adequacy of the undertakings.

Table of Authorities

Cases considered by *L.C. Leitch J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985 CarswellMan 379 (S.C.C.) — considered

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — followed

Dadourian Group Int. Inc. v. Simms (2006), [2006] 3 All E.R. 48, [2006] 1 W.L.R. 2499, [2006] 1 C.L.C. 744, [2006] EWCA Civ 399, [2006] 1 All E.R. (Comm) 709, [2006] 2 Lloyd's Rep. 354, [2006] C.P. Rep. 31 (Eng. & Wales C.A. (Civil)) — considered

Derby & Co. v. Weldon (1988), [1989] 1 All E.R. 469, [1990] Ch. 48, [1989] 2 W.L.R. 276 (Eng. C.A.) — considered

Mooney v. Orr (1994), 33 C.P.C. (3d) 31, [1995] 3 W.W.R. 116, 100 B.C.L.R. (2d) 335, 1994 CarswellBC 26 (B.C. S.C.) — considered

R. v. Consolidated Fastfrate Transport Inc. (1995), 99 C.C.C. (3d) 143, 125 D.L.R. (4th) 1, 61 C.P.R. (3d) 339, 24 O.R. (3d) 564, 40 C.P.C. (3d) 160, 83 O.A.C. 1, 1995 CarswellOnt 993 (Ont. C.A.) — considered

R. v. Palmer (1979), [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, 1979 CarswellBC 533, 1979 CarswellBC 541 (S.C.C.) — followed

SolarBlue LLC v. Aus (2013), 2013 ONSC 7638, 2013 CarswellOnt 17650 (Ont. S.C.J.) — referred to

Telesis Technologies Inc. v. Sure Controls Systems Inc. (2010), 2010 ONSC 5288, 2010 CarswellOnt 8678 (Ont. S.C.J.) — referred to

Third Chandris Shipping Co. v. Unimarine SA (1979), [1979] 2 All E.R. 972, [1979] Q.B. 645, [1979] 2 Lloyd's Rep. 184 (Eng. C.A.) — followed

2057552 Ontario Inc. v. Dick (2015), 2015 ONSC 3182, 2015 CarswellOnt 7463 (Ont. S.C.J.) — referred to

Cases considered by *L.A. Pattillo J.* (dissenting):

Aetna Financial Services Ltd. v. Feigelman (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985 CarswellMan 379 (S.C.C.) — considered in a minority or dissenting opinion

Chesapeake & Ohio Railway v. Ball (1953), [1953] O.R. 843, [1953] O.W.N. 801, 1953 CarswellOnt 335 (Ont. H.C.) — considered in a minority or dissenting opinion

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — considered in a minority or dissenting opinion

Croatian (Toronto) Credit Union Ltd. v. Vinski (2010), 2010 ONSC 1197, 2010 CarswellOnt 1026 (Ont. S.C.J.) — refered to in a minority or dissenting opinion

Di Menza v. Richardson Greenshields of Canada Ltd. (1989), 43 C.P.C. (2d) 87, 74 O.R. (2d) 172, 1989 CarswellOnt 476 (Ont. Div. Ct.) — refered to in a minority or dissenting opinion

Lister & Co. v. Stubbs (1890), [1886-90] All E.R. Rep. 797, 45 Ch. D. 1 (Eng. C.A.) — considered in a minority or dissenting opinion

Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board))* 118 O.R. (3d) 800 (note) (S.C.C.) — considered in a minority or dissenting opinion

R. v. Consolidated Fastfrate Transport Inc. (1995), 99 C.C.C. (3d) 143, 125 D.L.R. (4th) 1, 61 C.P.R. (3d) 339, 24 O.R. (3d) 564, 40 C.P.C. (3d) 160, 83 O.A.C. 1, 1995 CarswellOnt 993 (Ont. C.A.) — considered in a minority or dissenting opinion

Sibley & Associates LP v. Ross (2011), 2011 ONSC 2951, 2011 CarswellOnt 4671, 334 D.L.R. (4th) 645, 106 O.R. (3d) 494 (Ont. S.C.J.) — refered to in a minority or dissenting opinion

Third Chandris Shipping Co. v. Unimarine SA (1979), [1979] 2 All E.R. 972, [1979] Q.B. 645, [1979] 2 Lloyd's Rep. 184 (Eng. C.A.) — considered in a minority or dissenting opinion

United States v. Yemec (2005), 2005 CarswellOnt 1164, 196 O.A.C. 163, 75 O.R. (3d) 52, 12 C.P.C. (6th) 318 (Ont. Div. Ct.) — refered to in a minority or dissenting opinion

2057552 Ontario Inc. v. Dick (2015), 2015 ONSC 3182, 2015 CarswellOnt 7463 (Ont. S.C.J.) — refered to in a minority or dissenting opinion

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101(1) — considered

Words and phrases considered:

Mareva injunction

A Mareva injunction is an equitable remedy and . . . this remedy evolves as facts and circumstances merit.

APPEAL by defendant from decision of motion judge confirming issuance of Mareva injunction.

***L.C. Leitch J.*:**

1 This is an appeal from an Order of Hainey J. dated January 21, 2016 confirming a worldwide *Mareva* injunction against the appellant, which was originally granted *ex parte* on August 28, 2014.

2 The appellant requests an order setting aside, or varying, the injunction; an order requiring the respondent to provide a proper undertaking for damages if the injunction is not discharged or set aside; an order requiring the respondent to post security for its undertaking or otherwise establish that it has sufficient current assets in Ontario to satisfy the undertaking; and an order requiring the respondent to pay $4 million dollars into court as security for costs of the appellant, or such other amount as this court may determine.

Background Facts

3 The respondent was the Chief Executive Officer of Sino-Forest Corporation which was incorporated under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44. Its registered head office was located in Mississauga, Ontario and its executive office was located in Hong Kong. The respondent has brought this action alleging that the appellant has perpetuated a significant fraud on Sino-Forest Corporation, its creditors and investors.

4 Sino-Forest Corporation was a forest product company with assets predominantly located in the People's Republic of China. It carried out a sale process through the *Companies' Creditors Arrangement Act*, R.S.C., 1985 c. C-36 (the "CCAA") which ultimately failed.

5 Sino-Forest Corporation then applied under the CCAA for an order approving a plan of compromise and reorganization. On December 12, 2012 the Superior Court of Justice sanctioned the plan. The respondent was appointed as trustee of the SFC Litigation trust, which was assigned all of the litigation rights of Sino-Forest Corporation. Pursuant to the plan, substantially all of the assets of Sino-Forest Corporation were transferred to Emerald Plantation Holding Ltd. ("Emerald Plantation"). The accepted *situs* of the trust is in Hong Kong where the trustee is located.

6 On August 28, 2014, the respondent brought an *ex parte* motion for a worldwide injunction against the appellant. The motions judge found that there was "a very strong *prima-facie* case of fraud on the part of [the appellant]" and granted the injunction.

7 In April 2015, the appellant brought a motion to vary, set aside or discharge the injunction, arguing that the motions judge had applied the wrong test in granting the injunction. Specifically, the appellant argued that a *Mareva* injunction could only be granted if a defendant has assets in the jurisdiction, which the appellant did not. The motions judge denied the appellant's motion, holding that the test for a *Mareva* injunction did not require that a defendant have assets in the jurisdiction.

8 Rule 40.03 requires a party seeking an injunction to undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party, unless the court orders otherwise.

9 When granting the *Mareva* injunction on the *ex parte* motion the motions judge required a personal undertaking from the respondent as to damages. As the appellant notes, the respondent did not give a personal undertaking for more than a year after the injunction was obtained *ex parte.*

10 When confirming the injunction on January 21, 2016 the motions judge ordered that Emerald Plantation must also provide an undertaking as to damages. As he stated, it was not clear on the evidence before him that the respondent had sufficient assets within the jurisdiction to satisfy the appellant's potential damages arising from the *Mareva* injunction. The motions judge further required Emerald Plantation to provide an undertaking in relation to costs as well as to notify the appellant in the event it experienced a material change in its financial position affecting its undertakings. At that time Emerald Plantation held assets in excess of USD $226,000,000.

11 The motions judge found that although there was no evidence that the respondent had assets in the jurisdiction, it need not post security for its undertaking or for the costs of this action and instead, as the appellant notes, the motion judge accepted an undertaking from a foreign corporate non-party that also has no assets in the jurisdiction. As a consequence, the appellant asserts that the court does not have jurisdiction over this foreign corporate non-party and no ability to enforce its direction.

12 Leave to appeal to this court was granted on the issue of whether the motions judge erred in law (i) in holding that an Ontario court may grant a *Mareva* injunction where the defendant has no assets in the jurisdiction and (ii) in holding that the respondent's undertaking as to damages, along with the undertaking from Emerald Plantation, was a sufficient undertaking and that such undertaking was sufficient to provide security for costs.

Issue #1: Did the motions judge err in law in holding that an Ontario Court may grant a Mareva injunction where the defendant has no assets in the jurisdiction?

13 I begin by noting that the motion materials included a motion by the respondents to adduce fresh evidence to establish that the appellant had paid retainers to three law firms in the jurisdiction. As a result, the respondent's factum asserted that there was no factual foundation for the primary ground of appeal and the appeal was moot. However, the court made it clear at the hearing of the appeal that even if the court granted leave to admit this fresh evidence, it did not consider that these payments amounted to the appellant having assets in the jurisdiction. The respondent conceded that because the appellant's only assets in the jurisdiction had been pledged for legal fees, the appeal would be argued on the basis that the appellant had no assets in the jurisdiction.

14 In *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.), the Ontario Court of Appeal dealt with a reference directed to them to clarify the jurisprudence as to the availability of a *Mareva* injunction in Ontario. It is clear from *Chitel v. Rothbart* that the equitable remedy, or a *Mareva* injunction, has as its history the English jurisprudence outlined by the Ontario Court of Appeal in *Chitel*. Immediately prior to considering the English case law, the court observed, at para. 30 the following:

> 30. The almost exponential growth of the *Mareva* injunction and the extension of the grounds for such injunctions, seemingly without regard to long-established principles, has raised questions, and caused critics to describe them (as indeed did the Motions Court Judge in the Court below), as being "tantamount to execution before judgment". That, strictly speaking, is not so. What such orders do is tie up the assets of the defendant, specific or general, pending any judgment adverse to the defendant so that they would then be available for execution in satisfaction of that judgment. It is certainly ordering security before judgment.

15 The impetus to pursue a Mareva injunction was described by the Supreme Court of Canada in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.) at para. 27 as follows:

> The overriding consideration qualifying the plaintiff to receive [a Mareva order] is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment.

16 As the Court of Appeal noted in *Chitel*, at para. 33, the *Mareva* injunction was "the modern departure" from the "traditional view in England as well as in this province that an interlocutory injunction would not be granted to restrain a defendant from disposing of his assets or removing them from the jurisdiction prior to judgment". The Court of Appeal further noted at para. 31 that the "modern departure from that view" had "its genesis in a trilogy" of cases from England.

17 After reviewing the English case law, the court in *Chitel* set out at para. 44, the guidelines established by Lord Denning in *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645 (Eng. C.A.), as follows:

> (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
>
> (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.
>
> (iii) The plaintiff should give some ground for believing that the defendants have assets here.
>
> (iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied.
>
> (v) The plaintiff must give an undertaking as to damages.

18 The Court of Appeal observed in para. 44 that items (i), (ii) and (v) are "standard guidelines in this province in considering whether to grant an interlocutory injunction in the ordinary case".

19 Further, in *Chitel* at para. 56 the court restated that proposition in relation to items (i), (ii) and (v) of Lord Denning's guidelines, noting that "when an application for a *Mareva* injunction is before the court, the material under items (i) and (ii) of the guidelines must be such, as I have already said, as persuades the court that the plaintiff has a strong *prima facie* case on the merits".

20 The court then went on to discuss guidelines (iii) and (iv) which, as it described at para. 57, are "unique to the *Mareva* injunction". With respect to guideline (iii), the court provided the following guidance:

> 57. The material under item (iii), which deals with the assets of the defendant within the jurisdiction, should establish those assets with as much precision as possible so that, if a *Mareva* injunction is warranted, it is directed towards specific assets or bank accounts. It would be unusual and in a sense punitive to tie up all the assets and income of a defendant who is a citizen and resident within the jurisdiction. Damages, covered by an undertaking as to damages, might be far from compensating for the ramifications and destructive effect of such an order. In the instant case, this was the order sought and initially secured without any attempted identification of assets to which the order would be directed. It may well be that a plaintiff may have no knowledge of any of the defendant's assets or their location, but that was not stated to be the case in the instant application.

21 In *Chitel*, the court made it clear that the court has jurisdiction to grant a *Mareva* injunction in a proper case. I note parenthetically that the appellant accepted and admitted that courts have jurisdiction to grant world-wide *Mareva* injunctions. In *Chitel*, the court cautioned at para. 62 that "the courts must be careful to ensure that the "new" *Mareva* injunction is not used as and does not become a weapon in the hands of plaintiffs to force inequitable settlements from defendants who cannot afford to risk ruin by having an asset or assets completely tied up for a lengthy period of time awaiting trial".

22 In regard to what must be established in order to obtain a *Mareva* injunction, it is significant that throughout their reasons in *Chitel*, the Court of Appeal described the factors to be considered in relation to the issuance of a *Mareva* injunction as "guidelines".

23 It is only in the penultimate paragraph of their reasons that the court states that it agrees with the view that a plaintiff with a cause of action for fraud should be given assurance of recovery under a judgment and they have "sought to point out the conditions that must be satisfied before a *Mareva* injunction can be granted".

24 Since *Chitel* was decided, Ontario courts have consistently referenced and applied that decision in relation to *Mareva* injunctions: see *2057552 Ontario Inc. v. Dick*, 2015 ONSC 3182 (Ont. S.C.J.).

25 The appellant asserts that the *Chitel* criteria are well-known and are firmly-established as the criteria a plaintiff must satisfy to be granted a *Mareva* injunction from an Ontario court. Failure to satisfy any one of those criteria is an independent ground for setting aside the *Mareva* Order. The appellant's position is that in order to obtain an injunction, there is a substantive requirement that a defendant have assets in the jurisdiction to be subject to the restraining order. The appellants say there must be assets in this jurisdiction to ensure the order of the court is capable of implementation.

26 I do not accept the appellant's assertion. I recognize that in *Chitel* the injunction was sought to restrain the dissipation of assets in Ontario. Similarly, in virtually all of the cases referenced by counsel on this appeal, the assets which were at the risk of dissipation existed in Ontario.

27 However, a court's *in personam* jurisdiction over a defendant justifying the issuance of a *Mareva* injunction is not dependant, related to or "tied to" a requirement that a defendant has some assets in the jurisdiction.

28 Section 101(1) of the *Courts of Justice Act* provides the court with jurisdiction to grant an interlocutory junction or mandatory order "where it appears to a judge of the court to be just or convenient to do so".

29 A *Mareva* injunction is an equitable remedy and as such I agree with the respondent's submission that this remedy evolves as facts and circumstances merit.

30 The availability of the equitable remedy of a *Mareva* injunction in England has evolved. This evolution was commented on by Sharpe J.A. in Injunctions and Specific Performance, Looseleaf ed. (Toronto: Canada Law Book, 2015) where he observed at para. 2.910 the following:

> The strict rule requiring assets in the jurisdiction has now been abandoned and, in special circumstances the English courts will grant *Mareva* Orders to restrain disposition of assets elsewhere. The basis upon which "world-wide" *Mareva* Orders

> are made is that the English courts assert "unlimited jurisdiction . . . *in personam* against any person, whether an individual or a corporation, who is, under English procedure, properly made a party to proceedings pending before the English court".

31 Sharpe J.A. also observed that "orders of this kind have also been made by Canadian courts", referencing, amongst other cases, *Mooney v. Orr* [1994 CarswellBC 26 (B.C. S.C.)], a case considered by Weiler J.A. in in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564 (Ont. C.A.) as set out below.

32 The English evolution was described in the U.K. Court of Appeal decision in *Derby & Co. v. Weldon* (1988), [1989] 2 W.L.R. 276 (Eng. C.A.); at para. 6 as follows:

> 6. It seems to me that the time has come to state unequivocally that in an appropriate case the court has power to grant an interlocutory injunction even on a worldwide basis against any person who is properly before the court, so as to prevent that person by the transfer of his property frustrating a future judgment of the court. The jurisdiction to grant such injunctions is one which the court requires and it seems to me that it is consistent with the wide words of section 37(1) of the Act of 1981.
>
> In matters of this kind it is essential that the court should adapt the guidelines for the exercise of a discretion to meet changing circumstances and new conditions provided always the court does not exceed the jurisdiction which is conferred on it by Parliament or by subordinate legislation.
>
> It remains true of course that the jurisdiction must be exercised with care.

33 The concept of a *Mareva* injunction being an evolving remedy was also commented on by Weiler J.A. in *Consolidated Fast Frate Transport Inc.* at para. 140 as follows:

> 140. The practice with respect to the granting of *Mareva* injunctions is still in the process of evolving. The early *Mareva* cases involving foreigners were simply concerned with the fact that the assets might be removed from England and that any judgment granted would be unenforceable. However, in *Barclay-Johnson v. Yuill*, [1980] 3 AII E.R. 190 (Ch.D.) and *Prince Abdul Ralman bin Turki Al Sudairy v. Abu-Taha*, [1980] 3 AII E.R. 409 (C.A.), injunctions were granted against English nationals as opposed to foreigners. In *Derby & Co. Ltd. v. Weldon (No. 1)* (1988), [1989] 1 All E.R. 469 (C.A.) a *Mareva* injunction was granted on a worldwide basis on the condition that certain undertakings were given by the applicant which would protect the defendant from oppression and misuse of information and protect the position of third parties. Most recently, *Mooney v. Orr* (24 November 1994) (unreported, Vancouver Registry No. C908539)[reported (1994), 33 C.P.C. (3d) 31], Huddart J. granted a worldwide *Mareva* injunction against Mooney, who, prior to entering into business dealings with the Orrs, had so arranged his affairs as to protect any offshore property he might have from execution. Huddart J. cited the decision of the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), where McLachlin J.A. said at p. 346:
>
> > . . . the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.

34 These observations set out above were noted by Weiler J.A. in relation to her finding that in order to obtain a *Mareva* injunction it is unnecessary to incorporate a requirement that a dissipation or transfer of assets was pursued for an improper purpose.

35 In relation to *Chitel*, Weiler J.A. made the following observation at para. 145:

> 145. In commenting as he did on the fourth guideline, I am of the opinion that MacKinnon A.C.J.O. was attempting to encapsulate the essence of the English authorities he had just reviewed and to give guidance as to when the requirements for granting a *Mareva* injunction would be met. I do not think that in recognizing the availability of the remedy in Ontario he meant to foresee and to foreclose all of the kinds of situations where a *Mareva* injunction could be granted.

36 Therefore, I think it is clear that when an equitable remedy is sought the court ought to consider the guidelines set out in *Chitel*, but ultimately the court must consider what is just or convenient.

37 Furthermore, I note also that at para. 152 Weiler J.A. observed that "the threatened removal of assets outside of Canada is more likely to lead to the granting of a *Mareva* injunction because, generally, it is more difficult to enforce a judgment outside the jurisdiction". These are the very circumstances before the court.

38 The usual case is that a party seeks a *Mareva* injunction to prevent assets from leaving the jurisdiction. However, *Mareva* injunctions have been granted on a worldwide basis with increasing frequency in our global economy. The purpose of the injunction in both circumstances is to ensure that a judgment can be enforced in the exceptional circumstances where the plaintiff, after making the required full and frank disclosure, establishes a strong *prima facie* case on the merits.

39 The record before the motion judge included an affidavit of the trustee sworn August 22, 2014 in which he deposed at para. 322 that, based on information provided by Lipman Koras, his lawyers in Hong Kong, the granting of the *Mareva* injunction in Ontario would be regarded "as an important step to similar freezing orders being obtained in respect of [the appellants] assets in Hong Kong". He specifically indicated at para. 322(iii) that:

> Broadly speaking, in the event that the SFC Litigation Trust is successful at trial against Chan and a monetary award is made, that award is likely to be capable of being enforced in Hong Kong at common law assuming the Hong Kong Court has jurisdiction over Chan and Chan has assets in Hong Kong capable of being applied towards the judgment debt. It is anticipated that jurisdiction of the Hong Kong Court over Chan will be established assuming Chan, who is a Hong Kong resident, can be served in Hong Kong, although this is not the exclusive means of establishing jurisdiction. The evidence that Chan has assets in the jurisdiction is set out above.

40 Further he deposed at para. 322(iv) that while there was no specific requirement under Hong Kong law that the *Mareva* injunction be obtained in Ontario, where the substantive proceedings are taking place is a "prerequisite to an application in Hong Kong",

> However, the Hong Kong court has indicated that, unless circumstances are demonstrated to show why this approach would not be appropriate, it is desirable for a worldwide *Mareva* injunction to be sought from the Court seized with the substantive dispute between the parties as that court is likely to have an excellent "feel" for the case, given it has been pleaded in that court. I am informed by Lipman Karas that this is particularly likely to be the case on the present facts as the Ontario Court has already had extensive dealings with the circumstances relating to SFC's demise and is the Court most familiar with the case.

41 I note that, as pointed out by appellant's counsel, Sharpe J. A. also outlined that the English Court of Appeal has set out guidelines for when permission would be granted to enforce a worldwide freezing order in another jurisdiction in *Dadourian Group Int. Inc. v. Simms*, [2006] 1 W.L.R. 2499 (Eng. & Wales C.A. (Civil)) at para. 25. I note that these guidelines relate to the enforcement of the order as opposed to the granting of the order itself. The fact that no court in this jurisdiction has discussed guidelines for enforcement does not detract from a conclusion that the order of the motions judge was correctly made.

42 It is significant that the appellant worked in Ontario. He was the Chief Executive Officer of a company carrying on business in Ontario. The appellant has been sued in this jurisdiction. He has retained counsel and he has attorned to this jurisdiction. As counsel for the respondent notes, the appellant appeared through counsel throughout the CCAA proceeding and is, as they put it, "not a stranger" to this court. He was a litigant by choice in the CCAA proceeding. He is also a defendant in an on-going class action and is subject to an investigation by the Ontario Securities Commission. The appellant, as Chief Executive Officer, chose to list Sino-Forrest Corporation in the Toronto capital markets. He chose to be a Director and Officer of that company. The *in personam* jurisdiction of the court is clear.

43 It is also significant that the motions judge found a strong *prima facie* case that the appellant committed fraud and that there was evidence that he dissipated assets.

44 These circumstances reflect the "overriding consideration" described in *Feigelman*, qualifying the respondent to obtain a *Mareva* injunction.

45 Considering the Ontario court's *in personam* jurisdiction, the purpose of a *Mareva* injunction, and the evolutionary development of this equitable remedy beginning with the guidelines set out by Lord Denning, as outlined by the Ontario Court of Appeal in *Chitel*, I am satisfied that the motions judge committed no error in law in finding it just and convenient to issue the *Mareva* injunction.

Issue #2: Did the motions judge err in law in holding that the respondent's proposed undertaking as to damages along with the undertaking from Emerald Plantation was a sufficient undertaking and was sufficient to provide security for costs.

46 The appellant sought leave to adduce two pieces of fresh evidence: a writ of summons filed against the appellant with the Hong Kong court in 2013 and a public notice of the sale of, what the appellant indicates is, a majority of Emerald Plantation's assets on June 7, 2016.

47 Fresh evidence may be admitted if it meets the four criteria established by the Supreme Court of Canada in *R. v. Palmer* (1979), 106 D.L.R. (3d) 212 (S.C.C.): the evidence was not available at the time the motion was heard, the evidence is relevant in the sense that it bears upon a decisive issue on the motion, it is credible in the sense that it is reasonably capable of belief and if believed it could reasonably, when taken with the other evidence presented on the motion, be expected to have affected the result.

48 The writ of summons does not meet the *Palmer* test. It is only relevant to the issue of jurisdiction and whether a court in Ontario was the proper forum to issue a *Mareva* injunction. Given the scope of the appeal established by Pattillo J. in granting leave to appeal, the writ of summons is not relevant to the appeal. As noted above, the appellant has attorned to this jurisdiction.

49 In relation to the notice of sale, I find that it does meet the *Palmer* test. The sale did not occur until June 7, 2016. Evidence of the sale is credible and uncontradicted. The sale of assets is relevant to whether Emerald Plantation's undertaking is sufficient to provide security for costs and damages.

50 However, although I am prepared to admit the notice of sale as fresh evidence on the appeal, I observe that the sufficiency of the undertaking as to damages ordered by the motions judge is a question of fact and was in the discretion of the motions' judge. Similarly, the motion judge's finding that Emerald Plantations' undertaking as to damages was sufficient to secure the appellants' cost in the action reflects a discretionary exercise of judgment. The appellant has not established any palpable and overriding error of fact or error in principle by the motion judge justifying a reversal of those decisions.

51 Courts have accepted undertakings from non-residents with foreign assets (see *SolarBlue LLC v. Aus*, 2013 ONSC 7638 (Ont. S.C.J.) at para. 22, *Telesis Technologies Inc. v. Sure Controls Systems Inc.*, 2010 ONSC 5288 (Ont. S.C.J.) at paras. 61-67) and the appellant has pointed to no legal or statutory authority which indicates that doing so constitutes an error in principle.

52 As noted above, as part of its undertaking, Emerald Plantation was obliged to notify the appellant if it experienced a material change in its financial position affecting its undertaking. If the appellant contends that Emerald Plantation has not complied with of the order of the motions judge such an issue can be brought before the motion judge for his consideration.

Conclusion

53 For the reasons given I would dismiss the appeal. I decline to set aside or vary the *Mareva* injunction or grant the relief sought by the appellant.

Costs

54 At the conclusion of the hearing of the appeal, counsel advised that they had agreed that the successful party be awarded all inclusive costs of $60,000. The respondent was successful on the appeal and is therefore awarded costs in the amount agreed upon by counsel.

***H. Sachs J.*:**

I agree.

Pattillo J. **(dissenting):**

55 I have reviewed the reasons of my colleague and with great respect, while I agree with her disposition of the appellant's motion to adduce fresh evidence on the appeal, I am unable to agree with her reasons dismissing the appeal. In my view, the learned Motion Judge erred in granting the Mareva injunction given that the appellant had no assets in the jurisdiction. I am further of the view that the Motion Judge erred in concluding that the undertaking of Emerald Plantation Holding Ltd. ("Emerald Plantation") together with the undertaking of Cosimo Borrelli personally was sufficient security for the appellant's damages or costs. Accordingly, I would allow the appeal and set aside the Mareva injunction.

56 Except as otherwise set out herein, I agree with the background facts as set out at paragraphs 3 to12 of Madame Justice Leitch's reasons.

Mareva Injunctions:

57 A *Mareva* injunction operates to freeze the defendant's eligible assets until judgment. It is an extraordinary remedy which can and often does result in extremely harsh consequences.

58 The *Mareva* injunction had its genesis in the Courts of England between 1975 and 1980. It was developed, as Estey J. said in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.) at para. 41 "to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce." It is an exception to the rule in *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (Eng. C.A.) that the court will not grant an injunction to enable execution before judgment.

59 The purpose of the Mareva injunction is to pre-empt any action by the defendant to remove his or her assets from the jurisdiction and therefore negate any judgment given by the court in the action.

60 The leading case in Ontario in respect of the granting of *Mareva* injunctions is the Court of Appeal's decision in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.). In *Chitel*, after reviewing the English authority that gave rise to the *Mareva*, MacKinnon A.C.J.O., writing on behalf of the Court, adopted what Lord Denning M.R. referred to as "guidelines" in *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 2 Lloyd's Rep. 184 (Eng. C.A.) at pp. 894-5, with some notable changes.

Those "guidelines" provide that the moving party must establish:

1. A strong *prima facie* case;

2. That the defendant has assets in the jurisdiction;

3. That there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets to avoid judgment;

4. That the moving party will suffer irreparable harm if the injunction is not granted;

5. That the balance of convenience favours granting the injunction; and

6. The moving party must give an undertaking as to damages.

61 Since *Chitel*, the courts of Ontario have followed the requirements set down in *Chitel* for granting Mareva injunctions. See for example: *Di Menza v. Richardson Greenshields of Canada Ltd.* (1989), 74 O.R. (2d) 172 (Ont. Div. Ct.); *United States v. Yemec* (2005), 75 O.R. (3d) 52 (Ont. Div. Ct.); *Croatian (Toronto) Credit Union Ltd. v. Vinski*, [2010] O.J. No. 700 (Ont.

S.C.J.); *Sibley & Associates LP v. Ross* (2011), 106 O.R. (3d) 494 (Ont. S.C.J.); *2057552 Ontario Inc. v. Dick*, 2015 ONSC 3182 (Ont. S.C.J.).

62 In *Aetna*, the Supreme Court considered the question of whether a *Mareva* injunction was available in a federal setting. In considering the issue, the court canvassed how the courts of Canada have dealt with the *Mareva* injunction. In so doing, the court referred to the Court of Appeal's decision in *Chitel* and the test it established. Estey J. summarized the *Chitel* decision as follows at para. 30: "In summary, the Ontario Court of Appeal recognised *Lister* as the general rule, and *Mareva* as a 'limited exception' to it, the exceptional injunction being available only where there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets 'to avoid the possibility of a judgment . . . '".

63 Section 101(1) of the *Courts of Justice Act* provides, in part, that in the Superior Court of Justice, an interlocutory injunction may be granted where it appears to a judge of the court to be "just or convenient to do so".

64 As noted by McRurer C.J.H.C. in *Chesapeake & Ohio Railway v. Ball*, [1953] O.R. 843 (Ont. H.C.) at p. 854, the granting of an interlocutory injunction is a matter of judicial discretion, "but it is a discretion to be exercised on judicial principles."

65 Whether the requirements for the issuance of a *Mareva* injunction as set out in *Chitel* are referred to as "guidelines", "rules", "criteria", "requirements" or a "test", they represent the judicial principles upon which the court shall exercise its discretion to issue a *Mareva* injunction.

66 In the present case, there is no issue that the appellant had no assets in Ontario or in Canada. In such circumstances, the respondent was unable to meet the requirement in *Chitel* that the appellant had assets in the jurisdiction. Accordingly, the Motion Judge erred in granting the *Mareva* in this case with the result that it should be set aside. In my view, *Chitel* remains the law of Ontario and it does not lie in this court to hold otherwise.

67 In *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 (S.C.C.) at para. 27, the Supreme Court stated that one of the grounds for setting aside a discretionary decision of a lower court is if that court misdirected itself. In my view, in failing to follow the requirements set out in *Chitel*, the Motion Judge misdirected himself.

68 Unlike my colleagues, I do not consider the issue in this case to be one of jurisdiction. There is no issue that the appellant attorned to the jurisdiction of the court. Rather, I view the issue as an error by the Motion Judge in the exercise of his discretion.

69 Whether a Mareva injunction should be expanded to encompass assets outside the jurisdiction in the absence of assets in the jurisdiction in circumstances such as here where the defendant is not a resident of the jurisdiction raises policy issues that I do not need to get into.

70 I need only say that I do not disagree with the comments of Weiler J.A. in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 83 O.A.C. 1, 24 O.R. (3d) 564 (Ont. C.A.) at para. 145 that in recognizing the availability of the Mareva injunction in Ontario, *Chitel* does not foreclose all situations where a *Mareva* can be granted. I am of the view, however, that if the requirements for a *Mareva* as set out in *Chitel* are to change, it is the Court of Appeal and not this court that must change them.

The Undertaking

71 As noted, the *Mareva* injunction is a harsh remedy, particularly given that it is most often granted on an *ex parte* basis. As stated by Estey J. in *Aetna*, at para. 43, "There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets." For that reason, the courts have put in place various safeguards to prevent abuse and injustice. One such safeguard which was set out by Lord Denning in the *Third Chandris Shipping Corp.* and adopted in *Chitel* is the requirement that the moving party must provide an undertaking as to damages.

72 In his brief endorsement granting the *ex parte Mareva* injunction on August 28, 2014, the Motion Judge made no mention of an undertaking. In fairness, however, in the last paragraph of his endorsement, the Motion Judge ordered that a *Mareva* injunction shall issue on the terms of the attached order. The August 28, 2014 order (the "Order") provides in part, in the second

preamble, "and on noting the undertaking of the Plaintiff to abide by any Order this Court may make concerning damages arising from the granting and enforcement of this Order."

73 Cosimo Borrelli, the Trustee of the SFC Litigation Trust (the "Trustee") and the Plaintiff in the action filed two affidavits in support of the *Mareva* motion. The first affidavit, sworn August 22, 2014 was filed in support of the initial *ex parte* order. The second affidavit, sworn June 6, 2015, supplements the first affidavit and was filed in response to the appellant's motion to set aside or vary the *Mareva* injunction.

74 The Trustee's first affidavit contains 330 paragraphs and is 111 pages in length. The last two paragraphs deal with the undertaking and are as follows:

> 329. I understand that unless relieved of the obligation by this Court, the SFC Litigation Trust must provide an undertaking to abide by any order concerning damages that the Court may make if it ultimately appears that the granting of the order it seeks has caused damage to Chan for which the SFC Litigation Trust ought to compensate Chan. On behalf of the SFC Litigation Trust, I am prepared to provide that undertaking if it is required.
>
> 330. Given the lack of transparency with respect to the location of billions of dollars in assets, the Litigation Trust's ability to provide an undertaking as to damages is somewhat constrained. However, the Litigation Trust currently holds several choses in action in Hong Kong and Ontario against a number of third parties and outstanding litigation in Ontario against a number of other third parties. The Litigation Trust also holds assets in Canada by way of accounts receivables in relation to the settlement of certain litigation.

75 It is clear from the last sentence in paragraph 329 above that, despite the pre-amble in the Order, the Trustee was not providing an undertaking as to damages, unless required. I do not blame the Motion Judge for the disconnect, given the volume of material before him and the urgency of the situation. It was up to counsel to point out that no undertaking was offered unless required by the court.

76 Following the Order, it is clear that the Trustee considered no undertaking was required because no undertaking was provided. It was not until February 23, 2015, some six months after the Order, that the Trustee provided an undertaking and then only because the appellant's counsel raised the issue before the Motions Judge at an appearance on January 30, 2015 and the Motion Judge indicates that he intended that the undertaking be provided. Even then, the undertaking provided was by the Litigation Trust and signed by the Trustee. The appellant objected to the form of the undertaking and took the position that it should come from the Trustee personally.

77 The appellant's motion to vary the *Mareva* injunction was commenced on April 24, 2015 and included requests for orders that the Trustee provide a proper undertaking for damages; that the Trustee post security for his undertaking; and requiring the Trustee to post security for costs.

78 The Trustee's second affidavit, which is 99 pages long and contains 311 paragraphs, makes no mention of the undertaking.

79 On the return of the motion, the respondent attached as Schedule "D" to its factum a letter from Emerald Plantation dated August 12, 2015 signed on its behalf by James Dubow, its Chief Executive Officer. The letter provides, among other things, that if the Ontario Court was not prepared to accept the adequacy of the Trustee's undertaking, Emerald Plantation agreed "to provide a similar undertaking in damages to the Court in respect of the *Mareva* injunction in support of the Trustee's claim against the Defendant." The letter further states that "if necessary", Emerald Plantation will undertake to pay any costs orders made against the Trustee in the action.

80 The letter sets out that Emerald Plantation was a newly incorporated entity owned by certain creditors of Sino Forest Corporation ("SFC") which, pursuant a Plan of Compromise and Reorganization under the *Companies' Creditors Arrangement Act* and the *Canada Business Corporations Act*, involving SFC, received substantially all SFC's assets and business. The letter also refers to consolidated Financial Statements of Emerald Plantation which indicated it had net assets of US$348,681,000

as at December 31, 2013. Mr. Dubow further confirmed that Emerald Plantation's net assets as at December 31, 2014 were US$226,000,000.

81 In his January 21, 2016 reasons for decision confirming the *Mareva*, the Motion Judge directed (paragraph 64) that the Trustee provide his personal undertaking as to damages. However, because it was not clear on the evidence that the Trustee had sufficient assets within the jurisdiction to satisfy the appellant's potential damages arising from the *Mareva* injunction, the Motion Judge further ordered that Emerald Plantation must also provide an undertaking as to damages on "essentially the same terms as the draft undertaking as to damages attached as Appendix D to the plaintiff's factum."

82 In addition, based on the undertaking in the Dubow letter to pay costs, the Motion Judge stated he was satisfied that the undertaking as to damages by Emerald Plantation was sufficient to protect the appellant with respect to his costs (paragraph 65).

83 In my view, the determination of the sufficiency of an undertaking as to damages is discretionary and accordingly can only be set aside if the Motion Judge misdirected himself or where the decision is so clearly wrong that it amounts to an injustice or gives no or insufficient weight to relevant considerations: *Penner* at para. 27.

84 In my view, having determined that the Trustee's personal undertaking was insufficient, the Motion Judge was clearly wrong on the basis of the evidence and more particularly the lack of evidence in holding that Emerald Plantation's undertaking was sufficient. Emerald Plantation was not a party to the action. It had filed no affidavit and was not subject to cross-examination concerning the undertaking. Emerald Plantation is a foreign entity and there was no evidence that it had sufficient assets within the jurisdiction, let alone any assets, to satisfy any potential damages the appellant might suffer. The concern the Motion Judge expressed with respect to adequacy of the Trustee's personal undertaking was also present in respect of Emerald Plantation's undertaking.

85 Given the potential damages that can arise from a *Mareva* improperly issued, the undertaking to abide by any order of the court concerning those damages must be meaningful and have substance. The Motion Judge was aware that in order for the Trustee's undertaking to be acceptable, there had to be evidence of assets in the jurisdiction to support the undertaking. To permit Emerald Plantation's undertaking in the absence of any evidence of assets in the jurisdiction or any posted security was clearly wrong in my view. Further, it creates an injustice in that the undertakings of both the Trustee and Emerald Plantation have no substance given the absence of either assets in the jurisdiction or posted security. In such circumstances, the undertakings are unenforceable by the court and therefore of no protection to the appellant.

86 For the same reasons, I am of the view that the Motion Judge's decision that the undertaking of Emerald Plantation was sufficient to cover the appellant's request for security for costs was also clearly wrong.

87 As a result, I would also allow the appeal in respect of the issue of the adequacy of the undertakings. If the issue of the undertakings was the only issue before us, I would remit the question of the undertaking back to the Motion Judge for reconsideration. Such an order is not necessary, however, given that I have concluded that the Motion Judge erred in granting the *Mareva*.

88 For the above reasons, therefore, I would allow the appeal, set the Mareva injunction aside and refer the matter back to the Motions Judge for a determination of the damages suffered by the appellant, if any.

Appeal dismissed.

End of Document

TAB 11

1994 CarswellBC 488
British Columbia Supreme Court

Mooney v. Orr

1994 CarswellBC 488, [1994] B.C.W.L.D. 2651, [1994] B.C.J. No. 2322, [1995] 1 W.W.R. 517, 33 C.P.C. (3d) 13, 98 B.C.L.R. (2d) 318

J. DAVID MOONEY v. THOMAS FREDERICK ORR, JR., THOMAS FREDERICK ORR, SR. and MARY FRANCES ORR; 3473 INVESTMENTS LTD. and HAROLD DORFMAN (Defendants by Counterclaim)

Newbury J. [in Chambers]

Heard: September 24, 1994
Judgment: September 30, 1994
Docket: Doc. Vancouver C908539

Counsel: *J.D. McAlpine, Q.C., H.A. Mickelson* and *B. Elwood*, for defendants (applicants).

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.a Use of affidavit evidence
XIV.7.a.ii Miscellaneous
Remedies
II Injunctions
II.8 Practice and procedure
II.8.a Jurisdiction
Headnote
Injunctions --- Rules governing injunctions — Mareva injunctions — General
Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — General
Injunctions — Interlocutory or interim injunctions — Mareva injunctions — Court having jurisdiction in appropriate cases to grant Mareva injunction as to ex juris assets.
Civil procedure — Affidavits — Content — Information and belief — Plaintiff by counterclaim seeking ex parte Mareva injunction as to ex juris assets of defendant by counterclaim — Plaintiff relying in part on affidavit of private investigator retained to inquire into defendant's foreign assets — Affidavit not stating source of information although affidavit based on information and belief — Affidavit inadmissible.
Injunctions — Injunctions generally — Evidence on application — Plaintiff by counterclaim seeking ex parte Mareva injunction as to ex juris assets of defendant by counterclaim — Plaintiff relying in part on affidavit of private investigator retained to inquire into defendant's foreign assets — Affidavit not stating source of information although affidavit based on information and belief — Affidavit inadmissible.
The plaintiff, who was also a defendant by counterclaim, was a resident of British Columbia. A business associate deposed to the plaintiff's scheme for structuring complex commercial transactions to make oneself "bullet proof" from creditors. The plaintiff also told his associate that he intended to conceal his offshore assets from his wife in expected divorce proceedings. Searches of the plaintiff's assets in British Columbia suggested that they were not sufficient to satisfy certain foreign judgments in excess of $1.75 million that were outstanding and registered against him in British Columbia. Further, one of the judgment

creditors was attacking as a fraudulent conveyance the 1992 transfer of the plaintiff's residence to his wife for $1. The plaintiff and defendants were in the middle of a complex trial in which the defendants' counterclaim against the plaintiff amounted to almost $1 million. The defendants applied for an ex parte Mareva injunction against the plaintiff restraining him from dealing with any of his assets including those situate outside the province.

Held:

Application allowed.

The court has the authority in an appropriate case to restrain a party who is properly subject to the jurisdiction of the court from transferring or dealing with assets, including assets ex juris, where necessary to prevent the frustration of an order or possible future order of the court. In this day of instant communication and paperless cross-border transfers, courts must adapt to new circumstances in order to preserve the effectiveness of their judgments. The defendants had made out a good arguable case on their counterclaim. The evidence, particularly the existence of two unsatisfied judgments and the plaintiff's predilection for and experience in using offshore trusts to make himself "bullet proof," showed a relative deficiency of assets in British Columbia and a real risk of his transferring or concealing significant assets elsewhere.

An affidavit the defendants sought to enter, sworn by the manager of their private investigating firm in London, was inadmissible. It was based on information and belief and did not state the source of the information. It was not a convincing analogy to compare the information sources of private investigators acting for private litigants in civil cases to information received from police informants in criminal investigations. Nevertheless, there was sufficient admissible evidence to support the application.

Table of Authorities

Cases considered:

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 56 N.R. 241, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241 — *considered*

All Starr Video, Re, [1993] Times L.R. 171 — *referred to*

Ashtiani v. Kashi (1986), [1987] Q.B. 888, [1986] 2 All E.R. 970 (C.A.) — *not followed*

Babanaft International Co. S.A. v. Bassanto, [1990] Ch. 13, [1989] 1 All E.R. 433 (C.A.) — *applied*

Clunies-Ross, Re; Ex parte Totterdell (1987), 72 A.L.R. 241 (F.C.) — *referred to*

Coombs & Barei Constructions Pty. Ltd. v. Dynasty Pty. Ltd., [1986] 42 S.A.S.R. 413 (S.C.) — *referred to*

Derby & Co. v. Weldon (1989), [1990] Ch. 48, [1989] 1 All E.R. 469 (C.A.) — *considered*

Derby & Co. v. Weldon (Nos. 3 & 4), [1989] 1 All E.R. 1002 (C.A.) — *applied*

Derby & Co. v. Weldon, [1990] 1 W.L.R. 1139, [1990] 3 All E.R. 263 (C.A.) — *considered*

Ghoth v. Ghoth, [1992] 2 All E.R. 920 (C.A.) — *referred to*

Hospital Products Ltd. v. Ballabil Holdings Pty. Ltd., [1984] 2 N.S.W.L.R. 622 (S.C.) — *applied*

Interpool Ltd. v. Galani (1987), [1988] Q.B. 738, [1987] 2 All E.R. 981 (C.A.) — *referred to*

Jackson v. Sterling Industries Ltd. (1987), 71 A.L.R. 457 (H.C.) — *referred to*

Maclaine Watson & Co. v. International Tin Council, [1988] 3 All E.R. 257 (C.A.) — *referred to*

R. v. Hunter (1987), 57 C.R. (3d) 1, 19 O.A.C. 131, 59 O.R. (2d) 364, 34 C.C.C. (3d) 14 — *distinguished*

Republic of Haiti v. Duvalier (1989), [1990] 1 Q.B. 202, [1989] 1 All E.R. 456 (C.A.) — *referred to*

Scarr v. Gower (1956), 18 W.W.R. 184, 2 D.L.R. (2d) 402 (B.C.C.A.) — *applied*

Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima (1982), 42 B.C.L.R. 1, 33 C.P.C. 42 (C.A.) — *referred to*

Zellers Inc. v. Doobay, 34 B.C.L.R. (2d) 187, [1989] 3 W.W.R. 497 (S.C.) — *not followed*

Statutes considered:

Law and Equity Act, R.S.B.C. 1979, c. 224

s. 36*considered*

Supreme Court Act, 1981 (U.K.), 1981, c. 54

s. 37*considered*

Rules considered:

British Columbia, Rules of Court (1990)

R. 51(10)(b)*referred to*

R. 52(8)(b)*referred to*

Application for Mareva injunction.

***Newbury J.*:**

1 The defendants in this action seek an ex parte Mareva injunction against the plaintiff and defendant by counterclaim, Mr. Mooney. If only because it is brought in the middle of a complex trial (now in its ninth week) currently being heard before another judge of this Court, the application is unusual; but even more noteworthy is the fact that the injunction, if granted, would extend to restrain Mr. Mooney (a resident of this province) from dealing with any of his assets, including those situate *outside* British Columbia. As far as I am aware, no Canadian court has granted a Mareva injunction that purports to have such extra-territorial effect. Indeed a judge of this Court ruled in 1989 that he did not have the jurisdiction to do so: see *Zellers Inc. v. Doobay* (1989), 34 B.C.L.R. (2d) 187 [[1989] 3 W.W.R. 497]. Mr. McAlpine argues, however, that subsequent decisions in England and Australia have affected the validity of that ruling and that the courts in Canada, no less than in other jurisdictions, must heed the "insistent demand of justice which gave birth to the remedy of Mareva injunctions ... that it extend, in appropriate cases, to a defendant's assets outside the jurisdiction." (*Hospital Products Ltd. v. Ballabil Holdings Pty. Ltd.*, [1984] 2 N.S.W.L.R. 622 (S.C.), at p. 665.)

2 The specific order sought herein is threefold — first that Mr. Mooney by himself, his agents, servants or trustees, be restrained from disposing of or dealing with any of his assets, whether held directly or indirectly, and wherever situate, until the final disposition of this action; second, that within 14 days of service of the order upon him, he disclose the full value of his assets, identifying their location and how they are held; and last, that Coopers & Lybrand Ltd. be appointed as a receiver of those assets and that within 21 days of the order, Mr. Mooney transfer to the receiver such assets as are located outside the jurisdiction of this Court. It is also proposed that the entire order be subject to a proviso as follows:

> ... in so far as this Order purports to have any effect outside of the jurisdiction of this court, no person shall be affected by it or concerned by the terms of it until this Order is declared enforceable or registered or enforced by a foreign court, unless that person is:
>
> (a) a party to this Action or an officer or an agent appointed by Power of Attorney of a party to this Action; or
>
> (b) a person who is subject to the jurisdiction of this court and given written notice of this Order at his, her or its residence or place of business within the jurisdiction.

This is a modified version of the proviso formulated by the Court of Appeal in one of the seminal English cases on the subject of "worldwide" Mareva orders, *Babanaft International Co. S.A. v. Bassatne*, [1989] 1 All E.R. 433.

The Jurisdiction Question

3 In *Babanaft*, the defendants were Lebanese nationals who led an "unusually peripatetic" lifestyle. Vinelott J. had ruled at the end of a trial that they were liable to the plaintiff in an amount in excess of £15 mil lion. He initially granted a Mareva injunction restraining the defendants from disposing of assets in the United Kingdom, but the plaintiff then applied to have the order extended to their assets abroad. These appeared to be considerable, but were scattered in various jurisdictions including the United Kingdom, Switzerland, Panama, Liberia and the Dutch Antilles. The judge found that the plaintiff was "likely to meet considerable difficulties in ascertaining the extent of the assets available to meet the judgment it has obtained, and in enforcing that judgment" and that the defendants "would be likely to take any step open to them to frustrate or delay execution of the judgment." Accordingly, and to ensure that they did not dispose of assets before the plaintiff could consider "whether it can take effective steps to execute the judgment in the jurisdiction where those assets are situate", Vinelott J. granted the extension. The defendants were restrained from dealing with their assets ex juris without giving the plaintiff reasonable notice of their intention to do so, on the reasoning that (quoted at [1989] 1 All E.R. 437):

> Once the existence of an asset with which [the defendants] propose to deal has been disclosed, it will be open to [the plaintiff] to take any steps available in the jurisdiction where the asset is situate to execute the judgment or to prevent [the defendants] from disposing of it or, if appropriate, to make a further application to this court for, for instance, the appointment of a receiver. An injunction in those limited terms would not, it seems to me, create the difficulties developed by counsel for the defendants.

4 The defendants appealed Vinelott J.'s order, relying on *Ashtiani v. Kashi*, [1986] 2 All E.R. 970 (C.A.), where the Court had held that an order for discovery of assets made ancillary to the grant of a Mareva injunction must be restricted to requiring disclosure of assets within the jurisdiction. In *Babanaft*, however, the Court of Appeal substantially qualified this ruling. It held that "in appropriate cases, though these may well be rare, there is nothing to preclude our courts from granting Mareva-type injunctions against defendants which extend to their assets outside the jurisdiction." (at p. 440). This jurisdiction was grounded in s. 37 of the English *Supreme Court Act*, 1981, which gave the English High Court the power to grant injunctions or appoint receivers "in all cases in which it appears to the Court to be just and convenient to do so" — wording very similar to that of s. 36 of the *Law and Equity Act* of this province, R.S.B.C. 1979, c. 224. The Court rejected the argument that s. 37(3) of the statute, which referred to orders restraining a party from removing or otherwise dealing with assets located within the jurisdiction, meant that Mareva injunctions must be limited to assets located within the jurisdiction. According to Kerr L.J (p. 440):

> The purpose of sub-s (3) was not to restrict the territorial ambit of Mareva injunctions but to ensure that there should be no discrimination against persons not domiciled, resident or present within the jurisdiction. Subsection (3) does not restrict the scope, geographical or otherwise, of sub-s (1). And it is perhaps worth noting that the appointment of a receiver pursuant to sub-s (1) may extend to assets outside the jurisdiction, whether movable or immovable (see 8 Halsbury's Laws (4th ed), para 648 (Conflict of Laws) and 39 ibid para 855 (Receivers).
>
> And, in regard to the proper scope of the exercise of the court's discretion, the practice is clearly still in a state of development which has moved on since then. Thus, the Australian courts have not followed the policy indicated in *Ashtiani v. Kashi* by granting Mareva injunctions before judgment covering assets located in other Australian jurisdictions.

At the same time, recognizing that an unqualified injunction over foreign assets would involve an "exorbitant assertion of extra-territorial jurisdiction over third parties" and that the Court could exert only in personam jurisdiction, their Lordships added the following proviso to the proposed order (at p. 450):

> Provided always that no person other than the defendants themselves shall in any wise be affected by the terms of this order ... or concerned to enquire whether any instruction given by or on behalf of either defendant or by anyone else, or any other act or omission of either defendant or anyone else, whether acting on behalf of either defendant or otherwise, is or may be a breach of this order ... by either defendant.

5 As indicated, the applicant in *Babanaft* was a judgment creditor — a fact that provided one basis for distinguishing the case from *Ashtiani v. Kashi*, supra: see the comments of Kerr L.J. at pp. 444-45, Neill L.J. at p. 449, and Nicholls L.J. at pp. 451-52. This distinction was noted in *Zellers Inc. v. Doobay* by Melnick L.J.S.C. (as he then was), who continued (at p. 195):

> The Mareva injunction, although still relatively new in the legal world, is still an extraordinary remedy, particularly when sought in these circumstances, ex parte before judgment. Notwithstanding those cases discussed in these reasons which either have taken or in obiter discussion would be inclined to take the Mareva injunction beyond *Ashtiani*, I am of the view that the more restrictive approach in *Ashtiani* is the better one. I conclude that I do not have the jurisdiction to order a Mareva injunction to affect assets of Doobay or others in her family outside the jurisdiction of this court. Zellers has already followed what I feel to be the appropriate course of action, that is, commencing an action in the province of Ontario where the asset in question is known to be. In any event, I am of the view that the weight of authority is against the extension of the Mareva injunction to the Ontario property.

6 Since the ruling in *Zellers* the reluctance of the English courts to grant Mareva injunctions with extra-territorial effect in pre-judgment situations has been overcome. A series of judgments made in an action called *Derby & Co. v. Weldon* provides

the most extensive and helpful exposition of subsequent developments, although they do not stand alone: see also *Republic of Haiti v. Duvalier*, [1989] 1 All E.R. 456 (C.A.); *Interpool Ltd. v. Galani*, [1987] 2 All E.R. 981 (C.A.); and *MacLaine Watson & Co. v. International Tin Council*, [1988] 3 All E.R. 257 (C.A.); and *Ghoth v. Ghoth*, [1992] 2 All E.R. 920 (C.A.). In *Derby & Co. v. Weldon (No. 1)*, [1989] 1 All E.R. 469, the Court of Appeal ruled that a Chambers judge had misdirected himself in refusing a "worldwide" injunction on the basis of *Ashtiani* notwithstanding his findings that there were grounds for supposing that the defendants had acted dishonestly, "coupled with the fact that they have the ability to lock away assets in inaccessible overseas companies." Parker L.J. reasoned as follows (pp. 474-75):

> The mere fact that the plaintiff shows a good arguable case and a real risk of disposal or hiding of English assets, the requisites for an internal Mareva, clearly cannot by itself be sufficient to justify an extra-territorial Mareva either worldwide or at all. Such a Mareva would clearly be unjustified if, for example, there were sufficient English assets to cover the appropriate sum, or if the court were not satisfied that there were foreign assets or that there was a real risk of disposal of the same, or if it would in all the circumstances be oppressive to make the order.
>
> Here, however, it is accepted that there are foreign assets. The judge has found, correctly in my view, that there is a high risk of disposal of such assets. The English assets are wholly insufficient to afford protection. The defendants are clearly sophisticated operators who have amply demonstrated their ability to render assets untraceable and a determination not to reveal them.
>
> In those circumstances it appears to me that there is every justification for a worldwide Mareva, so long as, by undertaking or proviso or a combination of both, (a) oppression of the defendants by way of exposure to a multiplicity of proceedings is avoided, (b) the defendants are protected against the misuse of information gained from the ordinary order for disclosure in aid of the Mareva, (c) the position of third parties is protected.

7 In *Derby & Co. v. Weldon (Nos. 3 & 4)*, [1989] 1 All E.R. 1002 (C.A.), the Court dealt inter alia with whether the third defendant, resident in Panama (where it was doubtful an order of an English court would be recognized), and the fourth defendant, which had no assets in England, should be the subjects of a worldwide Mareva injunction and whether an order for disclosure of assets and for the appointment of a receiver was appropriate. The Court affirmed its general jurisdiction to make a worldwide order pre-judgment, emphasizing the need for courts to adapt to the changing conditions in which sophisticated parties can dissipate or conceal assets. Lord Donaldson of Lymington M.R. said this (pp. 1006-1007):

> The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment it may not be possible for him to obtain satisfaction of that judgment fully or at all, *the court should not permit the defendant artificially to create such a situation*.
>
> The jurisdictional basis of the Mareva injunction is to be found in s. 37(1) to (3) of the *Supreme Court Act* 1981 ...
>
> In *Beddow v. Beddow* (1878) 9 Ch D 89 at 93 Jessel MR said:
>
> > ... I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles.
>
> *That remains the position to this day, the only issue being whether in particular circumstances the grant is "right or just". What changes is not the power or the principles but the circumstances, both special and general, in which courts are asked to exercise this jurisdiction. This can and does call for changes in the practice of the courts. We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current*

> *wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case*. Hence it comes about that ... this is a developing branch of the law." [emphasis added]

8 On the two specific questions I have noted, the Court ruled that its discretion to make worldwide Mareva orders should not be precluded by the fact that a defendant has assets in the jurisdiction, of however little value. Again in the words of Lord Donaldson M.R., "the existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it." Nor did the Court accept that the inability of a plaintiff to enforce specifically a Mareva injunction in another jurisdiction precluded such an order, since in the event of disobedience, the English court still retained the right to bar the defendant's right to defend. However, in order to avoid the "circular effect" which the Babanaft proviso was having with respect to extra-territorial orders under the European Judgments Convention, the Court suggested modified wording as follows [p. 1013]:

> PROVIDED THAT, in so far as this order purports to have any extra-territorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement UNLESS they are (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of this order.

9 In *Derby & Co. v. Weldon (No. 6)*, [1990] 3 All E.R. 263, the Court of Appeal was asked to decide whether various deposits and other assets of the defendants which had come into the possession of the Court-appointed receiver should be ordered returned to Switzerland and whether other assets (the "external assets") should be transferred out of that country. Switzerland was unlikely to recognize or enforce an English judgment and its laws prohibited a foreign receiver from transacting business in that country. Again, the Court did not regard the possibility of non-recognition or non-enforcement of the English judgment as an absolute bar to the granting of relief in personam. Dillon L. J. noted (at pp. 272-73):

> To regard the grant of a Mareva injunction not as a matter of territorial jurisdiction to be exercised court by court throughout the various countries of the world where it may be appropriate but as a matter of unlimited jurisdiction in personam of the English court over persons who have properly been made parties, under English procedure, to proceedings pending before the English court is consistent with the approach of the English court to the appointment of receivers of the British and foreign assets of English companies. The court has always been ready to appoint a receiver over the foreign as well as the British assets of an English company, even though it has recognised that in relation to foreign assets the appointment may not prove effective without assistance from a foreign court ...
>
> The object of a Mareva injunction is stated by Lord Donaldson MR in *Derby v. Weldon (No. 2)* ... as being that within the limits of its powers no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case ...
>
> I see no reason why that should not extend, in principle and in an appropriate case, to ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognized ...

Having confirmed that it had jurisdiction, the Court, however, ruled that the step of ordering that the assets in Switzerland be transferred elsewhere was unnecessary in that the assets appeared "safe from dissipation under the present regime" (under which they were being held by the receiver and another person jointly); and that the order sought would be inappropriate in respect of the external assets, given the limited extent to which it could be enforced in the Swiss courts.

10 Parallel to the development in England of the extra-territorial Mareva injunction, various courts in Australia have granted the remedy in appropriate cases, also on the basis of in personam authority grounded in statutes similar to the *Law and Equity Act*

of this province: see *Re Clunies-Ross; Ex parte Totterdell* (1987), 72 A.L.R. 241 (F.C. Aust.); *Coombs & Barei Constructions Pty. Ltd. v. Dynasty Pty. Ltd.*, [1986] 42 S.A.S.R. 413 (S.C.); *Hospital Products Ltd. v. Ballabil Holdings Pty. Ltd.*, supra; and *Jackson v. Sterling Industries Ltd.* (1987), 71 A.L.R. 457 (H.C. Aust.). Like their English counterparts, Australian judges have emphasized that extra-territorial orders may be justified both as a "matter of logic and as a matter of commercial reality". As noted by Rogers J. in the *Hospital Products Case*, supra (at p. 664):

> I should say at the outset that it appears to me that the purpose nominated as the raison d'etre for the remedy could fail to be satisfied in given circumstances if relief is restricted to assets within the jurisdiction. To take the most simple situation, let it be assumed that a defendant, within the jurisdiction, has assets overseas against which execution could be levied in the event of judgment being obtained against the defendant within the jurisdiction. Is the court powerless to prevent such a defendant from transferring the foreign assets into the anonymity of a numbered Swiss bank account in the face of clear statements by the defendant of an intention to do so? Putting the question another way, why should the attempt of a defendant, within the jurisdiction, to make himself judgment proof in relation to foreign assets be any more permissible or any less inimical to the proper administration of justice than similar action with respect to locally owned assets ... Is there premium to be placed on foresight in removal of assets before the grant of injunctive relief where the purpose is to render the defendant judgment proof?

11 In my view, this reasoning is compelling both as a matter of logic and as a matter of commercial reality in this jurisdiction as well. The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia — the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.

12 Accordingly, I conclude that the developments I have described do constitute an evolution of the law sufficient to warrant a reconsideration of this Court's ruling in *Zellers Inc. v. Doobay*, supra. Melnick L.J.S.C. himself recognized in that case that *Babanaft* had broken new ground, and that *Ashtiani*, on which he relied fairly heavily, was likely not the "last word" on Mareva injunctions. Since then, the authority of *Ashtiani* has been effectively superseded. Furthermore, the defendant in *Zellers* was alleged to be dissipating her assets in Ontario, and as clearly indicated by the Supreme Court of Canada in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 2 W.W.R. 97, the risk of a defendant's frustrating a judgment creditor by transferring assets to another province in Canada is much less than in a case where the other jurisdiction is non-reciprocating. (Parenthetically, I also note here that the judgment of Estey J. for the Court in *Aetna* seems to have left open the possibility of Mareva injunctions with extra-territorial effect: at p. 117, he observed that "unless there is a genuine risk of disappearance of assets, *either inside or outside the jurisdiction*, the injunction will not issue.") Thus I believe it is open to me to depart from the conclusion reached in *Zellers* concerning the jurisdiction to grant "worldwide" Mareva injunctions generally, and to do so without doubting in any way the actual result reached in that case, with which result I respectfully agree. On the question of jurisdiction, then, I regard this Court as having the authority, in an appropriate case, to restrain a party who is properly subject to the jurisdiction of the Court, from transferring or dealing with assets, including assets ex juris, where necessary to prevent his frustrating an order or possible future order of this Court.

The Case at Bar

13 Is this, then, an "appropriate case"? As with any Mareva injunction, it is trite law that the applicants must, after making full disclosure of all relevant and material facts in their knowledge, satisfy the Chambers judge that they have a "strong *prima facie* case" (see *Aetna Financial Services*, supra, at p. 118) and that there is a "real risk" of removal or dissipation of his assets to avoid judgment. (*Aetna*, supra, at p. 119; *Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima* (1982), 42 B.C.L.R. 1 (C.A.), at p. 6; Sharpe, *Injunctions and Specific Performance* (2nd ed., 1993) at §2.870.) Where an applicant seeks to enjoin the transfer of assets worldwide, one grafts onto these conditions the further requirement that there exist assets ex juris the disposition or concealment of which would be likely to frustrate any judgment obtained against the defendant. And, although it is not necessary to prove that the defendant does not have assets *in* the jurisdiction, the less the value of those assets, the more likely the Court is to grant relief with extra-territorial effect: see *Derby & Co. v. Weldon (No. 2)*, supra, at p. 1009.

14 Underlying all these elements in each case is the realization that a Mareva injunction can result in substantial harm and inconvenience to a defendant, which harm and inconvenience are obviated only in part by the undertaking as to damages normally required to be given by the applicant. The courts are understandably unwilling to allow Mareva injunctions, much less those with extra-territorial effect, to become the norm, especially before a judgment has been given against the defendant. This is why the "risk" must be a "real" and substantiated one, not simply an apprehension arising out of the suspicion that normally exists between litigants, or a stratagem to obtain security for costs not otherwise available under the Rules. As noted by Nicholls L.J. in *Derby & Co. v. Weldon (No. 1)*, supra (at p. 478):

> An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the plaintiff will be subject is that of the dissipation or secretion of assets *abroad*. This risk must, on the facts, be appropriately grave before it will be just and convenient for such a draconian order to be made. It goes without saying that before such an order is made the court will scrutinize the facts with particular care ... I do not think that it is correct that, if an order is made in the present case regarding overseas assets, such an order will become, or should become, the norm in cases where a restraint order is made regarding assets within the jurisdiction.

15 Bearing these comments in mind, I turn to the question of whether the applicants in the case at bar have shown that they have a strong prima facie case in the action, and that there is a real risk that any judgment they might obtain would be frustrated by the transfer or concealment of assets outside the jurisdiction. The first issue is easily resolved. I do not intend in these reasons to recount the evidence before me, but having read the pleadings, (which concern a large commercial transaction and contain allegations of breach of contract and fiduciary duty, fraud and conspiracy), excerpts from the testimony given by Mr. Mooney at trial thus far, and other documents adduced by the applicants, I find that a good arguable case on the applicants' counterclaim against Mr. Mooney (the amount of which is close to $1,000,000) has been made out. It is perhaps unnecessary to add that that conclusion is and will remain entirely irrelevant to the trial judge, who may very well reach the opposite conclusion once all the evidence is in. For this reason, I agree with Mr. McAlpine's determination that this application would not have been properly brought before the trial judge. Both the substance and appearance of justice would be brought into question had that judge been asked to hear evidence and to determine the issues before me on an ex parte basis. (On this procedural point, see also the summary of *Re All Starr Video* at [1993] Times L.R. 171 (March 25, 1993)).

16 The more difficult issue is that of "real risk." Mr. McAlpine does not contend that Mr. Mooney has no assets in British Columbia, but the evidence of searches of public records suggests that those assets are not sufficient to satisfy even the judgments that are now outstanding and registered against him in this province. These judgments, both given by the English High Court, are in the amounts of £34,426 and £767,069 respectively — in excess of $1,750,000 (Cdn.). The fact that they remain unsatisfied, together with the fact that holders of the first judgment are attacking the transfer by Mr. Mooney of his West Vancouver residence to his wife for $1 in 1992 as a fraudulent conveyance, are cause for concern.

17 As for what assets Mr. Mooney holds in British Columbia, it appears that he holds, directly or through a company known as Hudson Holdings Ltd., certain shares in a VSE traded company known as Clarion Environmental Technologies Inc. ("Clarion") and that he has been selling his own shares over the last many months by private transaction. Clarion's recent financial results were such that none of the performance shares (held by Hudson Holdings Ltd.) still held in escrow qualify to be released as yet. One deponent, a lawyer familiar with the VSE rules and practice, predicts that Clarion will have negative cash flow as at its present year end, so that the shares are unlikely to be released in the near future. Mr. McAlpine's searches also indicate that Mr. Mooney is a director and/or officer of Hudson Holdings Ltd., Hudson Developments Ltd. and Hudson Equities Ltd., none of which holds any real property in British Columbia.

18 Of more significance is the affidavit evidence provided by a business associate of Mr. Mooney's, Mr. Nicholson. He first became acquainted with Mr. Mooney when the latter expressed an interest in investing in Mr. Nicholson's company through his (Mr. Mooney's) company, Hanover Holdings Corporation. (In the trial of this action, Mr. Mooney has testified that he has no direct or indirect interest whatsoever in this corporation, but Mr. McAlpine has provided a copy of an agreement dated July 6, 1989 between another company and Hanover Holdings Corporation, described as incorporated under the laws of the British

Virgin Islands, which was signed by Mr. Mooney on its behalf.) Mr. Nicholson deposes to the course of dealings he had with Mr. Mooney in 1989-90, during which Mr. Mooney told him that he had control of various companies, including Hanover Holdings, Jannock Investments (C.I.) Ltd., and Galena Investments (C.I.) Ltd., the latter two of which would appear to be incorporated in the Channel Islands. Mr. Mooney also introduced him to a Mr. Ian Ledger as a trustee of "General Trust", located in Monaco, and, says Mr. Nicholson:

> 22. As part of my 'tutoring' in the acquisition of the Concord Group Mr. Mooney described to me his model for structuring complex commercial transactions. The objective, he explained, was to move all assets offshore so as to make yourself 'bullet proof' from creditors in the event the deal went wrong. More specifically, Mr. Mooney described the model as follows:
>
> (a) to set up various offshore companies owed by a trust in another jurisdiction, such as the British Virgin Islands or Turks and Caicos;
>
> (b) all the shares in those companies were to be held as bearer shares;
>
> (c) The nominee beneficiaries of the trust were to be international charitable organizations such as the Red Cross;
>
> (d) The trust was to be structured in such a fashion that the nominee beneficiaries would not receive any of the income or capital of the trust; and
>
> (e) In this manner, all the assets of the trust were controlled by the trustee who acted on Mr. Mooney's instructions.
>
> 23. By structuring affairs in this manner, Mr. Mooney stated that one could make oneself 'impenetrable' or words to that effect from the claims of ones creditors.
>
> 24. Furthermore, Mr. Mooney stated that he had previously employed this type of trust structure in relation to the acquisition of an English collection agency.
>
> 26. During the period that I was assisting Mr. Mooney, he explained to me that he was experiencing marital problems with his third wife. As I had recently been through divorce proceedings, Mr. Mooney confided in me that he intended to conceal his offshore assets from his wife whom he anticipated would be bringing divorce maintenance proceedings against him.

19 Mr. McAlpine engaged a private investigating firm in London to inquire further into the nature, location and value of Mr. Mooney's assets in Europe and the manner in which they are held. It is here that he encountered a serious evidentiary difficulty. The investigations manager of that firm deposed to the results of the firm's investigation, as reported to him by the individual investigator assigned to the file. However, that investigator's name was contained only in a second affidavit, which Mr. McAlpine was unable to provide except "under seal", which I ruled was not open to him. Second, the sources of the investigator's information were not disclosed, since according to the manager, his firm's methods are "closely guarded trade secrets and cannot be revealed without jeopardizing all [its] future inquiries and operations" in Monaco and elsewhere.

20 Mr. McAlpine acknowledged the "general rule", applied with particular stringency to ex parte applications, that where affidavit evidence is based on information and belief, the deponent must state the source of the information. As noted in *Scarr v. Gower* (1956), 18 W.W.R. 184 (B.C.C.A.), "if the source of the information is not disclosed in other material on the motion the offending paragraphs are regarded as worthless and not to be looked at by the court." (at p. 188). Mr. McAlpine contends that R. 52(8)(*b*), which permits a Chambers judge to admit "other forms of evidence", taken together with R. 51(10)(*b*), create a discretion to admit affidavit evidence that might otherwise be inadmissible, and that that discretion should be exercised here in the same way that information received from police informants is admitted without disclosure of the identity of the informant. That "privilege", however, is based on the "[importance] of the role of informers in the solution of crimes and the apprehension of criminals": per Cory J.A. (as he then was) in *R. v. Hunter* (1987), 34 C.C.C. (3d) 14 (Ont. C.A.), quoted in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 806. The same reasoning does not in my view apply to private investigators involved in carrying out the wishes of private litigants in civil cases, and one would require very strong authority before extending it to such persons, notwithstanding that the disclosure of their sources might be embarrassing to their sources

or jeopardize future investigations. In the absence of such authority I conclude that the affidavit of the investigation firm's manager, as well of course as that of the individual investigator, are not admissible. The affidavits are to be returned to Mr. McAlpine as unfiled.

21 Even so, I am of the view that the evidence that is properly before me — in particular, the existence of the two unsatisfied judgments registered in British Columbia and the evidence of Mr. Mooney's predilection and experience in the use of offshore trusts and companies to make himself "bulletproof" — are sufficient to show a relative deficiency of assets held by Mr. Mooney in the province and that there is a "real risk" of his transferring or concealing significant assets elsewhere. Obviously, I make no conclusive finding of impropriety or dishonesty on Mr. Mooney's part, or that he has taken or intends to take any particular action in any particular jurisdiction. It may well be that at the end of the day his activities outside Canada will prove to be entirely above-board and that if judgment is entered against him, he will attend promptly to its payment. I say only that given what is before me, there is a significant chance that any judgment the applicants might obtain in these proceedings would be frustrated by Mr. Mooney's transfer or concealment of assets ex juris.

The Order

22 I turn next to the terms of the draft order Mr. McAlpine proposes. My first difficulty is with the second part of the order, which requires Mr. Mooney to disclose the full *value* of his assets as well as to identify their nature and location. I agree that disclosure of the nature and location of the assets is a necessary adjunct of the restriction on disposition (see *Sekisui House*, supra; and *Derby & Co. v. Weldon (No. 2)*, supra, at p. 1014) and I note that disclosure of value seems to be required by the English courts as a matter of course. I suspect, however, that a real hardship might be worked on Mr. Mooney were he required to obtain appraisals of non-liquid assets such as real property or shares in private companies. Accordingly, the order should be modified to require that Mr. Mooney indicate the value only of those assets that are publicly traded shares, bank deposits or similar securities, or where the value can be ascertained without the necessity of expert appraisal evidence.

23 Also in connection with the "disclosure" aspect of the order, I note that the applicants have not included an undertaking on their part not to make use of the information so disclosed by Mr. Mooney in proceedings abroad without the leave of this Court. Such an undertaking was said by the Court in *Derby & Co. v. Weldon (No. 1)* to be "reasonable protection ... to ensure that the information compulsorily disclosed is not misused and that it does not lead to the defendants being harassed or oppressed by having to face litigation ... in overseas courts throughout the world." (Supra, at p. 477). That approach seems a sound one, and again, the order should be amended accordingly.

24 The third part of the order contemplates the appointment of Coopers & Lybrand Ltd. as the receiver of Mr. Mooney's assets and the transfer to it, within 21 days, of assets that are outside the jurisdiction of this Court. There is no evidence as to whether the proposed receiver has offices abroad such that it is in a position to take possession of Mr. Mooney's foreign assets in the various jurisdictions where they are located; and it is not clear to me whether the applicants intend that assets in other jurisdictions be transferred to this province. If so, I suspect that the tax consequences of such transfers could be disastrous to Mr. Mooney, quite apart from the complexities of trust and corporate law that could be encountered. At this stage I therefore propose to require that the prior approval of either this Court or Mr. Mooney be obtained before the receiver would be empowered to move an asset from one jurisdiction to another. The order will therefore go, subject to the addition of the following words, beginning at the end of the first paragraph on p. 5 of the draft:

> ... of this Court, provided however that this Order shall not be construed to require or empower the Receiver to alter the situs of any of the Assets which are situate outside the jurisdiction of this Court, without the prior consent of either the said J. David Mooney or of this Court.

25 The applicants have included in the order a proviso based on the refined Babanaft proviso suggested in *Derby & Co. v. Weldon (No. 2)*, supra, at p. 1013. Their suggested wording, quoted at p. 3 above, is satisfactory, except that the words "has been" should be inserted prior to "given written notice" in subpara. (*b*) at p. 6 of the draft.

26 Last, I note that the applicants' undertaking as to damages referred to in the draft order mentions damages sustained only by the defendants by counterclaim or any third party served with notice of the order. The undertaking must be extended to damages that Mr. Mooney might suffer by reason of the granting of the injunction, should he ultimately prevail at trial. After all, it is he who stands to be prejudiced most by the granting of this injunction ex parte.

27 Mr. Mooney will be authorized to apply to set aside or vary the order upon giving two days' notice to the defendants' solicitors of his intention to do so.

28 Subject to the foregoing, the order will go.

Application allowed.

TAB 12

2011 ONSC 2951
Ontario Superior Court of Justice

Sibley & Associates LP v. Ross

2011 CarswellOnt 4671, 2011 ONSC 2951, [2011] O.J. No. 2656,
106 O.R. (3d) 494, 203 A.C.W.S. (3d) 831, 334 D.L.R. (4th) 645

Sibley & Associates LP, Plaintiff/Moving Party and Sean Ross and Olive Douglas, a.k.a. Olive Robinson, Defendants/Respondents

G.R. Strathy J.

Heard: April 19, 2011
Judgment: May 16, 2011
Docket: CV-11-424427

Counsel: John P. Ormston, James Brink, for Plaintiff / Moving Party
No one for Defendants / Respondents

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets

Headnote

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets — Miscellaneous

Defendant R was former employee in plaintiff S's accounting department — R resigned abruptly in March 2011, after he was informed of impending audit of S's financial records — It was discovered that numerous unauthorized payments had been made to defendant D, R's mother, from April 2008 to February 2011 — S commenced action against R and D for conversion and fraud — S brought ex parte motion for interim Mareva injunction — Motion granted — Plaintiff made out very strong prima facie case — Plaintiff made full and frank disclosure, gave particulars of claim, had grounds to believe that R and D had assets in jurisdiction, and gave undertaking as to damages — Evidence of fraud as so strong that, coupled with surrounding circumstances, it gave rise to inference that there was real risk that R and D would attempt to dissipate or hide their assets or remove them from jurisdiction — R had already attempted to hide his tracks by making payments to his mother — There was reason to believe that R destroyed evidence in order to conceal his activities and avoid detection — R's conduct bore badges of fraud — R resigned from S shortly after being told of forthcoming audit — Assets at issue were R and D's bank accounts, which were liquid, easily transferable, and difficult to trace once transferred.

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s. 35 — considered

MOTION by plaintiff for interim ex parte Mareva injunction.

***G.R. Strathy J.*:**

1 This was a motion, made without notice, for an interim *Mareva* injunction.

2 The plaintiff, Sibley and Associates LP ("Sibley"), provides disability and rehabilitation management services to insurance companies, employers and government organizations.

3 The defendant, Sean Ross ("Ross"), is a former employee in Sibley's accounting department. The defendant, Olive Douglas ("Douglas"), also known as Olive Robinson, is Ross's mother.

4 Ross was employed by Sibley from March 2008 to March 2011. He resigned abruptly in March 2011 after being informed of an impending audit of the company's financial records.

5 In the course of that audit, it was discovered that unauthorized payments, amounting to at least $310,160.32, had been made to Douglas over a period of several years. Douglas did not appear on Sibley's payroll records and she was not identified as a service provider or as someone who was entitled to receive payments from Sibley. The payments to her had not been authorized by anyone at Sibley.

6 It was determined that regular payments, of approximately $5,000 per month or less, had been made to Douglas every two weeks between April 2008 and February 2011. The payments were made by cheque until November 2010, at which time Sibley converted from cheques to an electronic funds transfer ("EFT") system. After November 2010, most of the payments to Douglas were made by EFT.

7 Sibley discovered that the cheque "stubs" for the cheques in question were missing from the numerically-sequenced cheque records. It was unable to locate any records authorizing EFT payments to Douglas.

8 There is overwhelming circumstantial evidence that Ross made these payments to Douglas:

(a) Douglas is Ross's mother;

(b) Ross was directly responsible for preparation of cheques and EFT payments to external consultants;

(c) Ross had access to one of Sibley's cheque signature stamps — cheques of up to $5,000 required only one signature and almost all of the cheques at issue were under the $5,000 limit;

(d) the unauthorized payments began in April 2008, shortly after Ross's employment at Sibley began, and ended in February 2011, shortly before Ross left Sibley's employ;

(e) Ross quit his job at Sibley shortly after being advised that its auditors would be performing an audit;

(f) Ross was the only person in Sibley's accounting department who was employed throughout the relevant period and who had the capability to issue cheques or make EFT payments;

(g) there was no record of any of the banking information that would have been required to authorize Douglas to receive EFT payments from Sibley; and

(h) Ross has a bank account at the branch where Douglas's account was located.

9 This evidence establishes a very strong *prima facie* case that Ross fraudulently made the payments to Douglas and that Douglas was either an active or passive accomplice in the fraud.

10 Sibley has commenced an action against Ross and Douglas for conversion and fraud. It seeks an interim *ex parte Mareva* injunction.

Requirements of a Mareva Injunction

11 There are five requirements for a *Mareva* injunction:

(a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;

(b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;

(c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;

(d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and

(e) the plaintiff must give an undertaking as to damages.

See: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268 (Ont. C.A.), referred to C.A. by Andersen J. in 36 (1982), 36 O.R. (2d) 124, [1982] O.J. No. 3197 (Ont. H.C.); *Third Chandris Shipping Co. v. Unimarine SA*, [1979] Q.B. 645, [1979] 2 All E.R. 972 (Eng. C.A.).

12 It is a condition-precedent to the order that the plaintiff demonstrate a strong *prima facie* case: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161 (S.C.C.), at 27.

13 When this matter initially came before me, I was satisfied that the plaintiff had made out a very strong *prima facie* case. I also concluded that the plaintiff had satisfied items (a), (b) and (e), which are requirements of the standard injunction test, as noted at 532 of *Chitel v. Rothbart*, above.

14 I was also reasonably satisfied that the plaintiff had met the requirement of item (c) as there is evidence that the defendants have assets, in the form of bank accounts, in this jurisdiction.

15 The difficulty I had in this case was that there was no direct evidence of Ross's or Douglas's financial circumstances. Nor was there any direct evidence that Ross or Douglas were dissipating their assets or proposing to remove them from the

jurisdiction. There was therefore no direct evidence that there was a serious risk that the defendants would remove or dissipate their assets if an injunction was not granted.

The So-Called "Fraud Exception" — Mills v. Petrovic

16 Plaintiff's counsel anticipated this concern and submitted that this case does not fall within the rule against execution before judgment in *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (Eng. C.A.). He relies on what has been described as the "fraud exception" to that rule: see *Campbell v. Campbell* (1881), 29 Gr. 252, [1881] O.J. No. 201 (Ont. Ch.); *Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.), at 239; *Aetna Financial Services Ltd. v. Feigelman* at 14; *Toronto (City) v. McIntosh* (1977), 16 O.R. (2d) 257 (Ont. H.C.).

17 I indicated to counsel that I had some doubt about whether such an exception exists, and pointed out that in the leading Canadian text, Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Aurora, On: Canada Law Book, 2010), it is stated in the section on *Mareva* injunctions, at para. 2.880:

> Proof of a serious risk of removal or disposition of assets is required even where the action is based on fraud and it is shown that the defendant has committed a fraudulent act.

18 As well, the authority of *Mills v. Petrovic* has been called into question by the thorough analysis of Cullity J. in *663309 Ontario Inc. v. Bauman* (2000), 190 D.L.R. (4th) 491, [2000] O.J. No. 2674 (Ont. S.C.J.), aff'd [2001] O.J. No. 1213 (Ont. Div. Ct.).

19 I therefore asked counsel to consider these authorities and to make further submissions on the issue, which they subsequently did. After considering those authorities, I concluded that it was appropriate to grant a limited *Mareva* order freezing the defendants' bank accounts. These are my reasons for granting that order.

20 One of the leading cases is *Campbell v. Campbell*, above, a decision of Chancellor Boyd. The plaintiff had sued her husband for alimony. She also sued her brother-in-law, seeking to set aside a conveyance of property made to him by her husband. It was admitted that the husband and the brother-in-law had conspired to transfer the property to prevent the plaintiff from recovering alimony. Chancellor Boyd enjoined further dealing with the property, stating, at QL para. 7:

> Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

21 This statement of the law was clearly confined to a case where there had already been a fraudulent disposition of the property, to avoid a creditor, and the injunction related to that very property.

22 The genesis of the "fraud exception" appears to be the brief oral judgment of Galligan J. in *Mills v. Petrovic*. The plaintiffs brought an application for an interlocutory injunction restraining the defendants from disposing of a house that they jointly owned. One of the defendants had been employed by the plaintiffs as an accountant and it was alleged that she had stolen $100,000 from the plaintiff. She was charged with fraud. Galligan J. said, at 239, that "equity demands that there be an exception to that principle [against execution before judgment] where there is substantial evidence supporting an allegation that the defendant has defrauded or stolen from the plaintiff".

23 Galligan J. did not refer to *Campbell v. Campbell*. He noted, however, that the case was not on all fours with the facts before Steele J. in *Toronto (City) v. McIntosh*, above [1] and *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.* (1977), 17 O.R. (2d) 717, 25 C.B.R. (N.S.) 162 (Ont. H.C.) [2], but found, at 239, that it would not be an "unreasonable extension of the principle upon which he acted in those cases to permit equity to give a person who has been defrauded or stolen from

by a defendant, some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues".

24 Galligan J. acknowledged that the order he was making "may be a somewhat novel one", but he noted that the evidence presented by the plaintiffs, which was unchallenged, was very strong. He concluded that "equity cries out for relief" and ordered that the defendants be restrained from selling or encumbering their residence.

25 It has been noted that *Mills v. Petrovic* represented a significant expansion of the "fraud exception", because there was no connection between the defendant's alleged fraud and the property that was the object of the order: see Loreta Zubas, "Interlocutory Injunctions to Preserve Assets for Future Judgments: The Convergence of the Fraud Exception and the *Mareva* Injunction" (2001-02) 25 Advocates Q. 323 at 339.

Doubts Concerning Mills v. Petrovic

26 It was not long before doubts were expressed about the authority of *Mills v. Petrovic*. In *Chitel v. Rothbart*, the seminal *Mareva* case in Ontario, Anderson J., at first instance, expressed the view that *Mills v. Petrovic* had been wrongly decided. He noted that *Toronto (City) v. McIntosh* and *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.*, which had been relied upon by Galligan J., were cases in which there had been an allegation of a fraudulent conveyance and the injunction pertained to the very property that was the subject of the litigation. Cases of that kind fell within an existing exemption to the *Lister & Co. v. Stubbs* principle expressed in *Campbell v. Campbell*, above, and acknowledged in *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 20 O.R. (2d) 566, [1978] O.J. No. 3460 (Ont. H.C.).

27 Anderson J. saw no justification for giving a plaintiff in an action alleging fraud an interlocutory injunction that would not be granted to a plaintiff in any other civil action. Rather than follow *Mills v. Petrovic*, he referred the case to the Court of Appeal under s. 35 of the *Judicature Act*, R.S.O. 1980, c. 223. Anderson J. noted that there was strong evidence that the defendant had converted the plaintiff's securities, but found that there was no convincing evidence of any intention to transfer or dissipate assets or to remove them from the jurisdiction.

28 The Court of Appeal held that the plaintiff had failed to make full and fair disclosure and, for that reason alone, would not continue the injunction. Nevertheless, it took the opportunity to comment on the law with respect to the then-new *Mareva* injunction.

29 Plaintiff's counsel had argued that it was not necessary to rely on the *Mareva* authorities and that there were two exceptions to the rule in *Lister & Co. v. Stubbs*, the first being where the asset being "frozen" is the very subject-matter of the dispute and the second where there is a strong *prima facie* case being made out of theft or fraud. The plaintiff relied on *Campbell v. Campbell* in support of the second exception. MacKinnon A.C.J.O. stated at 521 that:

> It would be difficult to conceive of a stronger case for the intervention of the court than *Campbell v. Campbell*. I have no reason to doubt that the court would take the same position today if similar facts were to arise, and hold that such an order was "just or convenient". In the instant case, of course, there is no admitted fraud and there is certainly no evidence of further intended alienation of any specific property by a co-conspirator in the fraud.

30 Turning to *Mills v. Petrovic*, he noted that the facts of the case were not given in any detail, but there was some evidence that the defendants had been attempting to sell the house that they jointly owned and "one can surmise that it was being alleged that some of the money stolen went into the purchase of the home" (at 521). He also noted that there were observations by Galligan J. that may have reflected a finding that theft had been committed. He concluded, at 521, "It may be that the facts justified the order made, but, in any event, that is not this case."

31 MacKinnon A.C.J.O. proceeded to set out the now well-known conditions for the grant of a *Mareva* injunction. At the conclusion of his reasons, he returned to the issue of the "fraud exception", stating at 534:

> Mr. Justice Anderson in the instant case said, 'I can see no reason why the plaintiff with a cause of action for fraud should be given assurance of recovery under such a judgment and not if the judgment stemmed from some other cause'... I agree with this view and I have sought to point out the conditions that must be satisfied before a *Mareva* injunction can be granted.

32 This seems to be a clear statement that the standard requirements of a *Mareva* injunction must be met, even where the plaintiff's claim is in fraud.

33 In the subsequent case of *Ontario (Attorney General) v. Stranges* (1984), 46 O.R. (2d) 452, [1984] O.J. No. 2661 (Ont. H.C.), aff'd (1984), 47 O.R. (2d) 348, [1984] O.J. No. 3223 (Ont. Div. Ct.), Galligan J. suggested that the Court of Appeal in *Chitel v. Rothbart* had refrained from saying that his decision in *Mills v. Petrovic* had been correct due to the scarcity of facts, but suggested that the reasons of MacKinnon A.C.J.O. amounted to an approval of the principle expressed — at 456:

> As I read the reasons of MacKinnon A.C.J.O.... he approved the principle upon which I acted, namely, that equity can provide to a person who has been stolen from or defrauded some measure of relief that would not be available to a plaintiff in an action in which fraud or theft are not involved. When a person is stolen from I do not think equity should be reticent about helping him recover his loss from the thief nor particularly solicitous to the thief.

34 In *Aetna Financial Services Ltd. v. Feigelman*, the Supreme Court of Canada recognized the validity of *Mareva* injunctions, but noted that their application in cases involving the removal of assets from province to province required a consideration of factors unique to the Canadian federal system. The plaintiff relies on a portion of the reasons of Estey J., on behalf of the Court, in which he stated some of the exceptions to the rule in *Lister & Co. v. Stubbs*, at 12-14, namely:

> (a) "for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute";
>
> (b) "where generally the processes of the court must be protected even by initiatives taken by the court itself";
>
> (c) "to prevent fraud both on the court and on the adversary"; and
>
> (d) "under extreme circumstances, which include a real or impending threat to remove contested assets from the jurisdiction."

35 Estey J. referred to the third heading as the "fraud exception" and quoted the extract from the judgment of Chancellor Boyd in *Campbell v. Campbell*, to which I have referred above. He described *Mills v. Petrovic* and *Toronto (City) v. McIntosh* as cases in which that exception had been applied.

36 In *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564, [1995] O.J. No. 1855 (Ont. C.A.), Weiler J., concurring in the result, referred with approval to *Mills v. Petrovic*, suggesting that it represented an expansion of the "fraud exception" from being applicable only to the property at issue to having wider application. She observed, at 600-601:

> Thus, it would appear that an allegation of past dishonest conduct in the action may result in an injunction being obtained even *where there is no evidence of any intention to deal with the asset enjoined in any improper manner.*
>
> This decision is significant because often an allegation of fraud is made in an action in which an interlocutory *Mareva* injunction is sought. If evidence of improper purpose with respect to a transfer of assets were required, an unwarranted complication in the law would be introduced. It would then be necessary to consider whether the application for the injunction fit within the fraud exception (where no evidence of improper purpose in relation to the assets enjoined is required) or the *Mareva* exception (where improper purpose in relation to the assets enjoined would have to be shown). The real focus in either case should be on the availability of assets to satisfy a judgment which is likely to be obtained because a strong *prima facie* case has been made out.
>
> [Emphasis in original].

37 These observations were made in the context of Weiler J.A.'s consideration of whether it is necessary to show that a disposition of assets had been made for an improper purpose. She held, disagreeing with the majority, that it was not necessary to do so.

38 The "fraud exception" was re-visited by Cullity J. in *663309 Ontario Inc. v. Bauman*, above. He noted that while the existence of the exception had been recognized in a number of cases, including *Aetna Financial Services Ltd. v. Feigelman*, *Chitel v. Rothbart*, and *R. v. Consolidated Fastfrate Transport Inc.*, its significance in the context of *quia timet* injunctions, as opposed to under the *Fraudulent Conveyances Act*, was derived entirely from *Mills v. Petrovic*. He suggested, as did Anderson J. in *Chitel v. Rothbart*, that the authorities to which Galligan J. referred were cases under the statute.

39 After reviewing a number of the authorities, including *Chitel v. Rothbart*, Cullity J. concluded, not without some hesitation, that *Mills v. Petrovic* does not establish a special rule in the case of fraud that dispenses with the conditions required to support a *Mareva* injunction. He concluded that where there has been no fraudulent disposition, it is necessary, even in a case where fraud is alleged, to show the usual requirements of a *Mareva* injunction — at para. 29:

> On the present state of the authorities [proof of a real risk that assets will be removed or disposed of] is a requirement for *Mareva* orders and I believe I must follow what appears to me to be implicit in the reasons of the Court of Appeal in *Chitel* - the only decision cited to me in which the status of the decision in *Mills* and the relationship between "the fraud exception" and the requirements for *Mareva* orders were directly in issue - and proceed on the footing that *Mills* does not widen "the fraud exception" beyond its historical foundations in the *Fraudulent Conveyances Act* to the extent that it would cover any proceedings where fraud is alleged and nothing more than a strong *prima facie* case is shown. This means that, where no allegedly fraudulent disposition has occurred and it is sought to restrain the defendant from disposing of assets, the requirements for a *Mareva* order must be satisfied even where the plaintiff's cause of action is based on fraud.

40 Cullity J. acknowledged, however, that the court could infer a risk of disposition from the facts on which the plaintiff's claim was based — at para. 41:

> In principle, there is no reason why the existence of a sufficient risk of disposition should not be inferred from the evidence of the material facts on which the plaintiff's cause of action is based. I agree that this is particularly likely to be the case where, as in *Mills*, a strong *prima facie* case of fraudulent misappropriation is established on the material before the court. Even in such a case, the question must still, in my opinion, be whether such an inference can reasonably be drawn from the facts. I do not think relative degrees of moral turpitude that might be attributed to the conduct of the defendant on which the cause of action is based are, by themselves, necessarily relevant considerations.

41 He concluded, on the facts before him, that there was not a strong *prima facie* case of fraud and no sufficient evidence of a risk of dissipation. His decision was affirmed by the Divisional Court.

Subsequent Case Law

42 The subsequent case law concerning the "fraud exception" in *Mills v. Petrovic* on the one hand and the views of Cullity J. in *663309 Ontario Inc. v. Bauman* on the other hand does not point one in an entirely uniform direction.

43 *Mills v. Petrovic* was followed in *Manufacturers Life Insurance Co. v. Suggett* (1992), 13 C.P.C. (3d) 171, [1992] O.J. No. 2600 (Ont. Gen. Div.), a case in which the plaintiff sued a former employee for fraud and sought to restrain the employee and his spouse from disposing of their interest in their matrimonial home. Philp J. found that there was substantial unanswered evidence of misrepresentation, fraud and possible forgery and held that the case fell within an exception to the "no execution before judgment" rule and required that the defendants pay the proceeds of the sale of their house into court.

44 *Mills v. Petrovic* was also followed in the Alberta cases of *J.R. Paine & Associates Ltd. v. Cairns* (1987), 55 Alta. L.R. (2d) 293, [1987] A.J. No. 901 (Alta. Q.B.) and *Osman Auction Inc. v. Belland*, 1998 ABQB 1095, [1998] A.J. No. 1443 (Alta. Q.B.). The *Paine* case involved a former bookkeeper of the plaintiff who allegedly stole some $330,000. The court granted

wide-ranging *Mareva* relief, finding that the case came within the fraud exception to the rule against execution before judgment. In the *Osman* case, the court stated, at para. 28:

> I am satisfied that where the cause of action is in fraud and the plaintiff has shown a reasonable likelihood that the cause of action will be established, the court may conclude, on that basis alone, that there are reasonable grounds for believing the defendant is likely to deal with his exigible property to the plaintiff's prejudice.

45 *Mills v. Petrovic* was also followed in *Brown v. Brewin*, [2003] O.J. No. 3905 (Ont. S.C.J.). Dawson J. held that although there was no clear evidence that the defendants would remove assets from the jurisdiction, there was relatively strong evidence of fraud. There was also evidence that the defendant had misappropriated funds that had been paid to him in trust.

46 In *Gateway Internet Solutions Inc. v. Gonsalves*, [2007] O.J. No. 2114 (Ont. S.C.J.), Lederer J. suggested that the conclusion in *Brown v. Brewin* could be interpreted as meaning that the evidence of fraud in a particular case, could, on its own, give rise to an inference of dissipation of assets, at para. 29:

> there may be cases where the fraud is so egregious and the theft so obvious that, on its own, the presence of fraud will infer dissipation of the defendant's assets. The circumstances of this case do not justify that determination.

47 Lederer J. also concluded, based on the observation of Estey J. in *Aetna Financial Services Ltd. v. Feigelman*, that the "fraud exception" could also be available, but held that a strong *prima facie* case was not present.

48 On the other hand, in *Don Bodkin Leasing Ltd. v. Dwyer*, [2001] O.J. No. 1581 (Ont. S.C.J.), Kealey J. found that a strong *prima facie* case of theft or fraud was not sufficient to support a *Mareva* injunction, unless there was a relationship between the alleged fraudulent activity and the assets sought to be "impounded".

49 Other cases have either rejected the "fraud exception" or have held that it was inapplicable on the facts. These include:

- *Israel Discount Bank of Canada v. Genova* (1992), 13 C.P.C. (3d) 104, [1992] O.J. No. 509 (Ont. Gen. Div.), in which Dunnet J. recognized the "fraud exception", but held that a case of fraud had not been made out in the case before her.

- *Allegretti v. Bertelsen*, [2002] O.J. No. 4157 (Ont. S.C.J.), where Lane J. recognized the "fraud exception" but declined to apply it because the case before him was a tort claim rather than a fraud claim.

- *Nippon Express Canada Ltd. v. Provan*, [2002] O.J. No. 2643 (Ont. S.C.J.), in which Blair J. suggested that the application of the "fraud exception" could support a *Mareva* injunction, if the other conditions of such an injunction were met.

- *Voketel Inc. v. More*, [2006] O.J. No. 4781 (Ont. S.C.J.) and *State Farm Insurance Co. v. Brijlal*, [2007] O.J. No. 2439 (Ont. S.C.J.), in which Brown J., referring to *Mills v. Petrovic* and Sarabia, Akman and Ricci, "The Case for Mills Injunctions" (2006), 31 Advocates Q. 355, suggested that a *Mareva* injunction can be granted even in the absence of evidence of a risk of dissipation if there is a *prima facie* case of fraud. In the former case, he found that the requisite strong *prima facie* case was not present. In the latter case, he granted a *Mareva* injunction, finding that there was a real risk of dissipation of assets as well as a strong *prima facie* case of fraud.

- *Patel v. Shikar Properties Inc.*, [2009] O.J. No. 1779 (Ont. S.C.J.), in which Richetti J., without deciding whether a strong *prima facie* case of fraud displaces the need to show dissipation of assets and the intention to avoid the plaintiff's claim, concluded that the plaintiff had not established the requisite *prima facie* case of fraud.

50 Still other cases have suggested that fraud, on its own, is not sufficient to justify a *Mareva* injunction, but that the circumstances of the case must be examined to determine whether there is a real risk of removal or dissipation of assets.

51 Dupont J. considered the "fraud exception" in an early, post-*Mareva* decision, *Caisse populaire Laurier d'Ottawa Ltée v. Guertin* (1983), 36 C.P.C. 63, [1983] O.J. No. 2221 (Ont. H.C.). The decision has received no consideration in Ontario, although it was followed at first instance in *Insurance Corp. of British Columbia v. Patko*, 2007 BCSC 743, 50 M.V.R. (5th) 200 (B.C.

S.C. [In Chambers]), rev'd in part 2008 BCCA 65, 290 D.L.R. (4th) 687 (B.C. C.A.), and also mentioned in the decision of the British Columbia Court of Appeal. Dupont J. noted that counsel had referred him to the proposition that where a strong *prima facie* case of fraud had been made out, an injunction could be granted. He did not, in the result, find it necessary to find that fraud is a special category, but made some interesting observations about how a risk of dissipation can be found — at 72:

> To determine whether there is a "real risk" of the assets being removed or dissipated it is necessary to look at all of the circumstances, including the nature of the conduct alleged, the type of assets involved and the general circumstances are all to be considered in an application such as this. The "real risk" to be assessed is whether in all of those circumstances the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff's attempts to realize on any judgment they might obtain. Here, the defendants have also been charged and will be tried criminally. The fact of those charges are relevant only to the issue of "real risk".
>
> The assets in this case are all quite liquid, being in the form of bank accounts and term deposits. If an injunction is not granted, there is a real risk that the defendants will deal with the assets "in a manner clearly distinct from usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law", (*Chitel*, *supra*) pp. 532-33.

52 In *Transmaris Farms Ltd. v. Sieber* (1999), 30 C.P.C. (4th) 369, [1999] O.J. No. 300 (Ont. Gen. Div. [Commercial List]), Blair J. granted a *Mareva* injunction based on allegations of fraud, and referred to *Mills v. Petrovic*. There is language in the judgment to suggest that Blair J. considered all the surrounding circumstances, including the *nexus* between the alleged fraud and the property sought to be enjoined: see para. 74.

53 In *United States v. Yemec* (2003), 67 O.R. (3d) 394, [2003] O.J. No. 3863 (Ont. S.C.J.), aff'd (2005), 75 O.R. (3d) 52, [2005] O.J. No. 1165 (Ont. Div. Ct.), Gans J. dissolved an interim injunction on several grounds, including a failure to establish a *prima facie* case of fraud. At para. 50, he described the observations of Cullity J. in *663309 Ontario Inc. v. Bauman*, "that in some circumstances an inference of risk of dissipation of assets can be drawn from the nature of the fraudulent activity alleged", and suggested that this should be applied to override the requirement of evidence to establish a concern for the dissipation of assets necessary to satisfy judgment, as was set out in *Chitel v. Rothbart*.

54 The Divisional Court gave a somewhat more nuanced interpretation to the conclusions of Cullity J., stating, at para. 23:

> In *663309 Ontario Ltd. v. Bauman*... Cullity J. stated that a court can infer from the defendant's fraudulent conduct a sufficient risk of the dissipation of assets or removal from the jurisdiction (at para. 41). He noted that this was particularly the case where there is a strong *prima facie* case of fraudulent misappropriation, although he went on to say, "Even in such a case, the question must still, in my opinion, be whether such an inference can reasonably be drawn from the facts." However, he went on to conclude, based on the totality of the evidence, that the Plaintiff had not established a real risk of dissipation or hiding of assets. On appeal, the Divisional Court held that he made no error in his findings on the evidence in the case. [References omitted].

55 Although the decision was not fully reported, it appears that Jennings J. took an approach similar to this in a case referred to in *Zathy v. Bank of Nova Scotia*, [2004] O.J. No. 3636 (Ont. S.C.J.). He is reported as having observed that although there was no evidence of dissipation of assets, it was appropriate to conclude, based on the defendants. fraud and other circumstances, that there was a real risk of dissipation:

> There is no evidence before me that the Defendants are about to leave the jurisdiction, are without other assets, or, apart from the cross-application, about to dissipate their assets.
>
> What I am being asked to do is find that because of the strong evidence of fraud, or of assisting in a fraud, an inference should be drawn that dissipation is likely.

> The evidence of wrongdoing is not that shown in *Mills v. Petrovic*,... where its Defendant faced criminal charges for theft. Here, I have false representations made by Donna so as to enable her to negotiate the cheques, as well as a reasonably elaborate preparatory course of conduct.
>
> This was the situation facing my brother Cullity J. in *Refco v. Keuroghlian* 00-CV-185624 [unreported]. *Mareva* injunctions are draconian in effect, and are not to be given out for the asking.
>
> I consider that now that the scheme carried out by the Defendants has been detected, the funds are at risk. I also consider that because the proceeds of the scheme have remained in tact [sic], they are not immediately required to meet ordinary expenses. Having considered the matter carefully, and finding as I do that the other criteria in *Chitel* have been met, I find the very suspicious circumstances outlined tip the balance in favour of the injunction, as I draw the inference that the now discovered conduct proved makes dissipation likely.

56 In *Durnford v. Hayles*, [2001] O.J. No. 1949 (Ont. S.C.J.), Pitt J. continued an interim *Mareva* injunction, following *663309 Ontario Inc. v. Bauman*, noting that the defendants had not disputed the allegations of fraud and had filed no material.

57 In *Bank of Montreal v. Misir* (2004), 8 C.P.C. (6th) 91, [2004] O.J. No. 5223 (Ont. S.C.J. [Commercial List]), Cumming J. acknowledged that a strong *prima facie* case of fraud, on its own, is insufficient to sanction "the very exceptional remedy" of a *Mareva* injunction. However, in the case before him there was evidence that the defendant had a "*prima facie* history of fraudulently and surreptitiously attempting to remove and dispose of assets... from the reach of the Bank, a secured creditor. The strong *prima facie* case of fraud involves accomplices in an apparent conspiracy" (at para. 35). Cumming J. concluded, at para. 38, that the evidence "as a whole" suggested that there was a real risk of dissipation:

> In my view, the evidence as a whole relating to the actions of Mr. Misir to date pertaining to Integrated and the clinics and the secured financing by the Bank as seen in the record for the action at hand, #04-CL-5662, in itself suggests a real risk that Mr. Misir may fraudulently dissipate or dispose of his remaining assets in a manner clearly distinct from the ordinary course of business, such as to render the possibility of making it impossible, or at least significantly more difficult, to trace and realize upon such assets in enforcing any judgment in favor of the Bank.

58 In *Sansone v. D'Addario* (2006), 26 C.P.C. (6th) 156, [2006] O.J. No. 1434 (Ont. S.C.J. [Commercial List]), Mesbur J., relying on both *Chitel v. Rothbart* and the observations in Justice Sharpe's book, held that the requirements for a *Mareva* injunction must be met, even where the claim is for fraud.

59 In *Popack v. Lipszyc*, [2008] O.J. No. 3380 (Ont. S.C.J.), Pollak J. accepted the analysis of Cullity J. in *663309 Ontario Inc. v. Bauman* and said, at para. 57: "It is not clear in the jurisprudence that such an exception exists, in cases where there is substantial evidence of fraud has been established." She concluded that there was not a *prima facie* case of fraud made out and the "Mills exception" would not be applicable in any event.

60 The issue has not escaped the attention of the academic writers. Zubas, above, has suggested that the "fraud exception" should be confined to its historic roots and that the expansion reflected in *Mills v. Petrovic* is unwise. She suggests that, as Cullity J. observed in *663309 Ontario Inc. v. Bauman*, evidence of improper purpose can be inferred from fraudulent conduct. She states, at 356:

> As *Bauman* suggests, in appropriate cases, evidence of improper purposes can be inferred from fraudulent conduct. However, this is not a reasonable or necessary inference in every case in which fraud is alleged.
>
> The practical judicial approach should take into account policy concerns. One writer has suggested that the courts should consider evidence regarding the defendant's character, gleaned from facts about the defendant's business, domicile, location of known assets and the circumstances under which the underlying issues arose. If the court concludes that the defendant is likely to dissipate assets, it must inquire into the nature of the harm the plaintiff will suffer as a result of the dissipation.

61 Other authors have expressed the view that the so-called "*Mills* injunction" should be available in all cases where fraud is alleged, without the necessity of proof that the alleged fraudster is likely to dissipate assets: see Sarabia et al, above. They argue that the *ad hoc* use of inferences and exceptions leads to uncertainty in the law and is confusing for lawyers and judges (at 359-60). They make the case, at 372, that:

> the courts should embrace Mills Injunctions in this era of heightened concern over fraud and dishonesty as a further tool to deter those willing to engage in fraudulent conduct. Even if the courts do not all agree with the reasoning of *Mills*, the public's and the legislatures. desire to combat fraud is reason enough to extend Mills Injunctions to all cases where a party alleges fraud. The focus should not be on the question of why a plaintiff should get an advantage in fraud cases. Rather, the focus should be on why alleged perpetrators of fraud should not be subject to an injunction to preserve their assets for innocent plaintiffs.

Conclusions

62 From *Chitel v. Rothbart* to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong *prima facie* case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.

63 Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the *Mareva* requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

64 The risk of removal or alienation can be inferred by evidence suggestive of the defendant's fraudulent criminal activity: *Insurance Corp. of British Columbia v. Leland*, [1999] B.C.J. No. 2073 (B.C. S.C.); *Insurance Corp. of British Columbia v. Patko* (2008), 290 D.L.R. (4th) 687 (B.C. C.A.). In referring to these authorities, I have not overlooked the fact that British Columbia applies a somewhat more flexible approach to the grant of a *Mareva* injunction than the courts of Ontario have applied: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309, [1998] B.C.J. No. 2887 (B.C. C.A.); *Mooney v. Orr* (1994), 33 C.P.C. (3d) 31, [1994] B.C.J. No. 2652 (B.C. S.C.), supp. reasons (1994), 33 C.P.C. (3d) 54, [1994] B.C.J. No. 3242 (B.C. S.C.); *Clark v. Nucare PLC*, 2006 MBCA 101, 274 D.L.R. (4th) 479 (Man. C.A.) at paras. 28 — 48; *Pollard v. Falconer*, [2006] B.C.J. No. 424 (B.C. S.C. [In Chambers]). It seems to me, however, that in some cases a pattern of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue.

65 I have concluded that this is one of those cases in which the evidence of fraud is so strong that, coupled with the surrounding circumstances, it gives rise to an inference that there is a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction.

66 In coming to this conclusion, I have considered, in particular, the following circumstances:

(a) There is evidence Ross has already attempted to hide his tracks by making the payments to his mother.

(b) There is reason to believe that Ross has destroyed evidence by removing the cheque stubs and electronic banking information in order to conceal his activities and avoid detection.

(c) Ross's conduct bears the badges of fraud - a pattern of clandestine and deceitful action over a prolonged period of time, including the attempt to avoid detection by using a nominee or a "dummy" to conceal the fraudulent activity.

(d) Ross resigned from Sibley shortly after being told of the forthcoming audit — this is indicative of an acknowledgment of guilt and a desire to avoid confrontation and questioning.

(e) The assets particularly at issue — the defendants. bank accounts — are liquid, easily transferable, and difficult to trace once transferred.

67 It is a reasonable inference from these circumstances, as well as the circumstantial evidence of fraud referred to earlier, that, knowing the plaintiff may be on his trail, Ross is likely to attempt other means to put the plaintiff's money out of its reach.

68 Bearing in mind the observations of MacKinnon A.C.J.O. in *Chitel v. Rothbart* that the injunction should, if possible, be directed towards specific assets or accounts, I have made an interim order enjoining dealings with Douglas's bank account into which the funds were paid and Ross's bank account at the same institution. I have also ordered that the financial institution disclose to the plaintiff the particulars of the transactions in those accounts.

69 I adjourned the balance of the relief sought to be brought on short notice, returnable on April 30, 2011. The parties appeared on that date and requested an adjournment, with the injunction to be continued in the interim. I so ordered.

Motion granted.

Footnotes

1 In *Toronto (City) v. McIntosh*, the defendant was a former employee of the City of Toronto, responsible for the collection of money from parking meters. He was charged and convicted of theft. Between the time of his arrest and his conviction he conveyed certain property to his children, the other defendants. The plaintiff brought proceedings against the defendant for conversion and against all the defendants to declare that the conveyance was void under the *Fraudulent Conveyances Act*, R.S.O. 1970, 182. A motion was brought for an interlocutory injunction restraining the defendants from dealing with the property until trial. Steele J. found that the case fell within *Campbell v. Campbell*. The defendant had been convicted of theft and there was strong *prima facie* case made out that the conveyance was fraudulent.

2 In *Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd.*, the plaintiff sued on two promissory notes and for the price of goods sold and delivered to the defendant. The plaintiff claimed that the defendant had sold the goods to a third party at a significant discount. Steele J. granted an injunction restraining the defendant from dealing with the goods, but ordered that they could be sold in the normal course of business, provided the proceeds were paid into a trust account as security for the plaintiff's claim.

TAB 13

2022 ONSC 5485
Ontario Superior Court of Justice

Waters Estate v. Henry

2022 CarswellOnt 15051, 2022 ONSC 5485

The Estate of William Robert Waters, by his Estate Trustees Lindsay Histrop and Agnes Kussinger (Plaintiff) and Gillian Henry, Noelle Henry, Matthew Alexzander Henry, Donna McGrath, Cedric Noel Butters, Jean Elaine Butters, Michelle Amanda Lloyd, Shamile Lloyd, Richard Anthony Lloyd, 2325587 Ontario Limited, 2329223 Ontario Limited, 7222874 Canada Inc., King of Hearts Stables Ltd., John Doe #1, Jane Doe #1, John Doe #2, Jane Doe #2, And John Doe Corp. (Defendants)

Robert Centa J.

Heard: August 31, 2022
Judgment: September 27, 2022
Docket: CV-22-680467

Counsel: Lorne Silver, Jonathan Shepherd, for Plaintiff
Arie Gaertner, William Levitt, for Certain Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Evidence

Headnote

Civil practice and procedure
Estates and trusts
Evidence
Remedies

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s. 5 — referred to

s. 7 — referred to

s. 13 — referred to

s. 32 — referred to

s. 34 — referred to

s. 34.1 [en. 1999, c. 12, Sched. B, s. 7(2)] — referred to

s. 35 — referred to

s. 39 — referred to

s. 44 — referred to

s. 45 — referred to

s. 47 — referred to

s. 48 — referred to

s. 52 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.01(6) — referred to

R. 39.03 — referred to

***Robert Centa J.*:**

1 On May 4, 2009, the defendant Gillian Henry began to work as a personal services worker for Phyllis Waters. The parties dispute whether or not Ms. Henry also provided services to Phyllis's husband, Dr. William Waters, who paid Ms. Henry $2,500 every two weeks.

2 By June 2, 2009, Dr. Waters had paid Ms. Henry $5,000 in fees for service. In addition, Dr. Waters had also transferred over $500,000 to her. By the end of 2009, this number had climbed to over $3 million. By December 3, 2019, Dr. Waters had made some 390 transfers to Ms. Henry totalling more than $29.4 million.

3 Ms. Henry stopped providing services to Mrs. Waters in December 2019. That also appears to be when Dr. Waters stopped making very large transfers to Ms. Henry.

4 Dr. Waters' health began to deteriorate more rapidly and on May 4, 2020, the powers of attorney for personal care and management of property were exercised. Agnes Kussinger was named as co-attorney. In January 2021, Ms. Kussinger spoke to Dr. Waters about debts that might be owed to him. On February 15, 2021, Ms. Kussinger spoke with Ms. Henry about documentation of certain debts that Ms. Henry appeared to owe to Dr. Waters. Shortly after that call, Ms. Henry started selling and mortgaging properties and transferring money to her family members.

5 Dr. Waters died on July 28, 2021, at the age of 88. His estate trustees, Lindsay Histrop and Ms. Kussinger, began the complicated process of winding up Dr. Waters' financial affairs. Much to their surprise, they learned that Dr. Waters' bank accounts contained only $535,000. The ongoing care for Mrs. Waters cost, at a minimum, $35,000 per month.

6 On April 29, 2022, the plaintiff issued a notice of action in this proceeding. On June 7, 2022, Myers J. signed an *ex parte Mareva* order. The order froze the worldwide assets of Ms. Henry, 2325587 Ontario Limited, 2329223 Ontario Limited, 7222874 Canada Inc., and King of Hearts Stables Ltd. (the "Henry defendants"). The order also imposed certificates of pending litigation on a number of properties in which the plaintiff claimed an interest. This order has been amended and extended on a number of occasions. [1]

7 The Henry defendants now move to set aside the *Mareva* order on two grounds. First, they submit that the plaintiff failed to make full and frank disclosure of material facts on the *ex parte* motion before Myers J. Second, the Henry defendants submit that, with the benefit of Ms. Henry's evidence and submissions, the plaintiff does not meet the test to obtain a *Mareva* order and, therefore, it should not be continued.

8 I disagree. The plaintiff made full and frank disclosure of the evidence in its possession. The plaintiff did not seek to obtain an unfair advantage through improper means. In my view, any concerns about the material placed before Myers J. are minor and do not justify setting aside the order.

9 Reviewing all the evidence placed before me, and considering the matter *de novo*, I am satisfied that the injunction should remain in place until trial. The plaintiff has presented a strong *prima facie* case that some or all of the funds transferred to Ms. Henry are impressed with a resulting trust, that Ms. Henry has been unjustly enriched by receipt of the funds, that Ms. Henry obtained the transfers through civil fraud, the exercise of undue influence, or in breach of a fiduciary duty owed to Dr. Waters.

10 While it will be for the trial judge to make final determinations of what happened, Ms. Henry's evidence does not make me doubt the strength of the plaintiff's case. Her evidence about her intimate relationship with Dr. Waters is uncorroborated. The documents she references do not provide clear evidence, much less clear and contemporaneous evidence that Dr. Waters gifted her the vast majority of the money she received. She has raised doubts about her credibility by breaching the *Mareva* injunction, admitting that she knowingly filed documents containing false statements in a prior court proceeding, and tendering documents that may well have been altered.

11 I find that there is a significant risk that the Henry defendants will dissipate their assets in advance of trial and that injunctive relief is appropriate. Stepping back, $27 to $29 million has changed hands in highly unusual circumstances. It will take a lengthy and complicated trial to sort out exactly what happened. It is entirely possible that some of the 390 transfers will be found at the end of trial to represent gifts to Ms. Henry. However, on this record, I am satisfied that the plaintiffs have presented a strong *prima facie* case with respect to the overwhelming majority of the $29 million that changed hands. It is in the interests of justice that the assets of the Henry defendants be frozen until trial so that they may be available to satisfy any judgment that is rendered in favour of the plaintiff.

Plaintiff's motion to strike Ms. Henry's affidavit

12 On July 20, 2022, Ms. Henry swore a 28-page, 104-paragraph affidavit for use on this motion. The plaintiff brought a motion to strike out the affidavit in its entirety, or, in the alternative, to strike out 38 paragraphs from the affidavit.

13 Most importantly, the plaintiffs move to strike out 27 paragraphs of the affidavit on the basis that they are inadmissible as contrary to s. 13 of the Evidence Act, R.S.O. 1990, c. E.23. I disagree.

14 Section 13 of the Evidence Act provides that:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

15 Section 13 of the Evidence Act displaces the general rule that the testimony of a single witness, if believed to the requisite degree of certainty, is a sufficient basis for decision in a civil case: *Radford v.* MacDonald(1891), 18 O.A.R. 159 (C.A.), at p. 171; R. v. Khela, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 2; R. v. Vetrovec, [1982] 1 S.C.R. 811, at pp. 819-20.

16 At one time, persons with an interest in a matter were completely prohibited from testifying. Statutes have eroded this common law rule. For example, in Ontario, s. 7 of the Evidence Act provides that "Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of the action and although he or she has been previously convicted of a crime or offence."

17 Although persons with an interest can now testify, an enduring suspicion has remained where an interested person testifies in an action involving a deceased person. Justice Laskin succinctly described "the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events": Burns Estate v. Mellon(2000), 48 O.R. (3d) 641 (C.A.), at para. 5.

18 To respond to this concern, the Legislature made corroboration of a witness mandatory in circumstances where s. 13 of the Evidence Act applies. This rule requires additional evidence beyond that of an interested party, who is deemed to be a potentially unreliable witness.

19 Section 13 applies to this action because it is an action by the executors of a deceased person. Ms. Henry is clearly an opposite or interested party in this action. Ms. Henry, therefore, shall not obtain a judgment or decision on her own evidence in respect of any matter occurring before the death of Dr. Waters, unless such evidence is corroborated by some other material evidence. Section 13 requires evidence independent of the evidence of Ms. Henry that shows that her evidence is true. The

corroborating evidence can be a single piece of evidence, or several pieces considered cumulatively: *Burns Estate* , at para. 29; Paquette v. Chubb(1988), 65 O.R. (2d) 321 (C.A.), approving Sands Estate v. Sonnwald (1986), 22 E.T.R. 282 (Ont. H.C.).

20 I disagree with the plaintiff's submission that Ms. Henry's evidence is inadmissible absent corroboration. In my view, that interpretation is contrary to the modern principle of statutory interpretation, which holds that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature: Barker v. Barker, 2022 ONCA 567, 84 C.C.L.T. (4th) 1, at para. 207; Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. The modern principle takes a holistic view of legislation and recognizes that statutory interpretation cannot be founded on the wording of the legislation alone but must have regard to legislative intent, textual meaning, and legal norms: Rooney v. ArcelorMittal S.A., 2016 ONCA 630, 133 O.R. (3d) 287, at paras. 10-14.

21 First, s. 13 must be read in harmony with s. 7, which makes clear that Ms. Henry's evidence is admissible, despite her being an interested person. I do not see anything in the text of s. 13 that derogates from imperative direction "shall be admitted" found in s. 7.

22 Second, when the *Evidence Act* addresses the admissibility or inadmissibility of evidence, it does so directly and uses those specific words to express its intent: ss. 5, 7, 32, 34, 34.1, 35, 39, 44, 45, 47, 48, and 52. Given the frequency with which the Legislature used the words admissible and inadmissible in the Act, I do not see anything in the scheme or object of the Act that persuades me that I should interpret s. 13 as affecting the admissibility of Ms. Henry's evidence where the section does not use those words.

23 Third, interpreting s. 13 as affecting the admissibility of the evidence would create significant problems at trial. If Ms. Henry gave this evidence from the witness box, an objection to its admissibility on the basis of the absence of corroboration would have to be made as she answered the question. The corroborating evidence, however, may not yet have been tendered, either from a subsequent witness or subsequent documents. This unwieldly situation should be avoided unless the language of s. 13 compels it.

24 I recognize that some cases have described uncorroborated evidence from an adverse party about matters occurring before the death of the testator as inadmissible: Orfus Estate v. Samuel and Bessie Orfus Family Foundation, 2011 ONSC 3043, 71 E.T.R. (3d) 210, aff'd 2013 ONCA 225, 304 O.A.C. 349. However, I think the better interpretation is to view s. 13 as requiring corroborating evidence before the court may grant judgment or make a decision in favour of an interested person on the basis of her own evidence about matters that took place before death.

25 For this reason, I decline to strike out as inadmissible the 27 paragraphs of the affidavit that were challenged by the plaintiff on the basis of s. 13.

26 The plaintiff also seeks to strike certain other paragraphs of Ms. Henry's affidavit on the basis that they contain opinion or do not properly state the source of her information and belief. I do not think it is necessary to do so. It is true that some of the paragraphs contain opinions or statements that do not clearly state the source of Ms. Henry's information and belief. I will simply discount the weight to be assigned to those paragraphs, several of which are immaterial to the matters raised on this motion.

Overview of the positions of the parties

27 I will summarize briefly the evidence relied on by both parties and explain their theories of the case before considering in detail whether or not the plaintiff made full and frank disclosure to Myers J. and whether or not the injunction should be set aside.

28 The CaseLines file on this motion exceeded 8,000 pages. There are significant factual disputes between the parties. On this motion, I am not required to make final determinations about what happened. It will be for the trial judge to decide on a balance of probabilities whether or not the plaintiff makes out its allegations.

29 The plaintiff filed extensive evidence before Myers J. and on this motion. The plaintiff filed a 55-page affidavit from Ms. Kussinger, sworn May 30, 2022. The affidavit attached 192 exhibits and four schedules. Schedule A contained a chronology and described approximately 40 key exhibits. Schedules B and C contained summaries of the transfers from Dr. Waters to Ms. Henry. Schedule D contained a chronological list of the land transactions at issue from March 4, 2011, to January 7, 2022. The plaintiff also filed a supplementary 10-page affidavit of Ms. Kussinger, sworn July 27, 2022. The supplementary affidavit attached a further 18 exhibits.

30 The Henry defendants filed a 29-page affidavit from Ms. Henry, sworn July 20, 2022, which attached 14 exhibits, a two-page affidavit from Ms. Henry, sworn on August 2, 2022, an eight-page affidavit from Ms. Henry, sworn on July 15, 2022, and a two-page affidavit from Jean Butters, sworn on July 8, 2022.

31 The parties also filed transcripts of the cross-examinations of Ms. Kussinger and Ms. Henry, the rule 39.03 examinations of Meredith Brown, Ian Hawkins, and Jeff Brown, 1100 pages of answers to undertakings.

Plaintiff's evidence

32 Dr. Waters earned his Ph.D. in economics and finance from the University of Chicago. In 1962, he joined the faculty of the University of Toronto, where he taught until his retirement. In 1968, he married Phyllis. They had no children and Dr. Waters had no siblings. Dr. Waters developed and sold two very successful businesses, Financial Models Inc. and Portfolio Analytics. These two ventures provided him with the bulk of his wealth.

33 The plaintiff states that in May 2009, Dr. Waters hired Ms. Henry as a personal support worker ("PSW") for both Dr. Waters and Mrs. Waters. By this time, Mrs. Waters suffered mightily with chronic pain and become reclusive, seldom leaving her room. The plaintiff points to correspondence from Dr. Waters in which he commends Ms. Henry and states that "[w]e were very impressed with [Ms.] Henry's caring attitude, efficiency and care to both of us" and text messages in which Ms. Henry describes showering Dr. Waters and paying attention to his dialysis port. It is undisputed that she provided significant companionship to Dr. Waters during her employment. Although the invoices from Ms. Henry's company indicated that the services were provided to Mrs. Waters only, that was because Dr. Waters could deduct the fees from the PSW services for Mrs. Waters from taxes because she was disabled. Dr. Waters paid Ms. Henry approximately $83,600 per year toward the end of her employment.

34 Dr. Waters died on July 28, 2021. Mrs. Waters survived him, and she continued to require support and care that cost in excess of $35,000 per month. The estate trustees for Dr. Waters began to piece together the estate's finances. They concluded that Dr. Waters had transferred at least $29.4 million to Ms. Henry between May 2009 and December 2019. This represented almost the entirety of his estate and likely left insufficient funds to care for Mrs. Waters for the balance of her life.

35 The plaintiff submits that Dr. Waters provided the overwhelming majority of these transfers to Ms. Henry as "capital investment to establish real estate holding companies which would own property and receive corresponding profits ultimately for his and his estate's benefit." Dr. Waters understood that he would be the majority shareholder in several numbered companies that would own real estate assets that would both generate rental income and appreciate in value to his benefit. The plaintiff points to a series of emails and handwritten notes that it says support this characterization of the transfers.

36 The plaintiff places significant reliance on evidence of Dr. Waters testamentary intentions, including that he signed a secondary will in 2018, which provided that Ms. Henry would receive some shares from his estate "provided she pays to my estate the assets she holds for me on resulting trust."

37 The plaintiff submits that the evidence shows that Ms. Henry defeated this intention. She used only $12 million of the funds provided by Dr. Waters to purchase 17 properties. Some but not all of these purchases were supported by loan agreements in the amount of $2.8 million. She did not make Dr. Waters a shareholder or director of the numbered corporations. She used some of the transferred funds to support an extravagant lifestyle or to make private loans and gifts to her family and friends.

38 Ms. Henry has returned approximately $1.7 million of the funds she received to Dr. Waters or to the estate. On February 15, 2021, Ms. Kussinger spoke by telephone to Ms. Henry regarding documentation related to the debts owing to the estate. Ms. Henry stated that she owed the estate about $1 million. Shortly thereafter, Ms. Henry sold six properties that she owned, listed one asset for sale at a much lower price than it had been listed at four months earlier, and encumbered four more properties. The plaintiff points to this as evidence that Ms. Henry knew that the estate was on to her and began to dissipate her assets to prevent recovery.

Henry defendants' evidence

39 Ms. Henry states that she only provided care and support to Mrs. Waters never to Dr. Waters. She relies on the invoices from her company that only mention Mrs. Waters as the client.

40 Ms. Henry states that "Dr. Waters developed an intimate relationship with [her]," and that they had "conjugal contact." She states that they were to be married after Mrs. Waters died, and that Dr. Waters had given her a diamond ring to symbolize their "union." Because of this relationship, Dr. Waters gave Ms. Henry $29.4 million dollars for her own uses, which included acquiring and improving property in her own name, travel, educational expenses, and gifts to her family. Dr. Waters wanted her to become financially independent, to make money in the market, and for her to have nice things.

41 Ms. Henry states that at no time did Dr. Waters give her money to invest for the benefit of his estate. She says that it would make no sense for Dr. Waters, a retired professor of economics and finance, to entrust Ms. Henry, who had only a grade 11 education, to set up a multimillion-dollar business venture. She points to certain handwritten notes and documents that she says support her version of events. She maintains that she owed only about $1.4 million to the estate and has now repaid almost all of that amount.

42 I am mindful that some of Ms. Henry's evidence, particularly her intimate relationship with Dr. Waters, is not corroborated by any independent evidence.

Full and frank disclosure

Legal principles

43 The plaintiff moved *ex parte* for injunctive relief and was required to make full and fair disclosure of all material facts. The failure to do so is in itself sufficient ground for setting aside the order: rule 39.01(6), Rules of Civil Procedure, R.R.O. 1990, Reg. 194. A party moving *ex parte* must be fair: Moses v. Metro Hardware and Maintenance Inc., 2020 ONSC 6684, at para. 26, leave to appeal denied, 2021 ONSC 877 (Div. Ct.). In United States v. Friedland, [1996] O.J. No. 4399 (Gen. Div.), at paras. 27-28, Sharpe J. (as he then was) described the duty on a party moving *ex parte* as follows:

> That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts [and] law. The moving party must state its own case fairly and must inform the Court of any points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.
>
> If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

44 The moving party is under a duty to place before the court all material facts that, viewed objectively, are relevant to the court's assessment of the motion. All matters which are relevant to the 'weighing operation' that the court has to make in deciding whether or not to grant the order must be disclosed.

45 However, the duty of full and frank disclosure is not to be imposed in a formal or mechanical manner. Motions brought *ex parte* are almost always brought quickly and with little time for the preparation of material. The moving party should not be deprived of a remedy because there are "mere imperfections in the affidavit or because inconsequential facts have not been disclosed": *Friedland* , at para. 31; *Two*-Tyme Recycling Inc. v. Woods, 2009 CanLII 64803 (Ont. S.C.), at para. 21.

46 The rules regarding non-disclosure should not be interpreted too strictly as it might encourage unscrupulous defendants to allege material non-disclosure when they have a hopeless case on the merits: Univalor Trust S.A. v. Link Resource Partners Inc., 2012 ONSC 6034, 42 C.P.C. (7th) 149, at para. 5; *Two-Tyme*, at para. 44. Prior cases teach that some latitude must be given to the moving party and the defects complained of must be relevant and material to the discretion to be exercised by the Court: *Friedland* , at para. 31; Mooney v. Orr (1994), 100 B.C.L.R. (2d) 335 (S.C.); Rust Check Canada Inc. v. Buchowski(1994), 58 C.P.R. (3d) 324 (Ont. Gen. Div.).

47 The test on whether to set aside an *ex parte* order for non-disclosure of material facts is whether the omitted disclosure might have had an impact on the original order being made: Hazelton Homes Corporation v. Mehta, 2020 ONSC 849, 63 E.T.R. (4th) 147, at para. 21; *Two-Tyme*, at para. 20; United States v. Yemec(2003), 67 O.R. (3d) 394 (S.C.), at para. 35; Wachsmann v. Zahler, 2002 CarswellOnt 3594 (S.C.), at para. 8. In a case where the Court finds that such a matter of non-disclosure was not material, it may decline to vacate the injunction: see, for example, Alberta (Securities Commission) v. Maitland Capital Ltd., 2008 CarswellOnt 4141 (S.C.).

Documents that the Henry defendants submit were not disclosed

48 I find that the Henry documents did not breach their obligation of full disclosure by failing to put material documents before the court. Ms. Kussinger's unchallenged evidence is that she included "all signed and unsigned documentation relating to the transfer of funds between [Dr.] Waters and [Ms.] Henry found in the boxes of [Dr.] Waters' files" in her original affidavit. That effort goes a long way to satisfying me that the plaintiff did not fail to disclose material facts. I will consider each of the specific issues raised by the Henry defendants in turn.

Exhibits 8 and 9 to Ms. Henry's affidavit

49 The Henry defendants submit that the plaintiff should have disclosed two documents that are attached to Ms. Henry's affidavit as exhibits 8 and 9. The first is a handwritten note dated April 8, 2014, from Dr. Waters to Ian Hawkins regarding Ms. Henry's tax return, with attachments. The second is a handwritten note dated April 11, 2014, from Dr. Waters to Mr. Hawkins regarding Ms. Henry's taxes.

50 The Henry defendants describe these notes as instructions from Dr. Waters to Mr. Hawkins, who was both Dr. Waters' own financial advisor and also assisted with the preparation of tax returns for Ms. Henry. The Henry defendants submit that these notes indicate that Dr. Waters instructed Mr. Hawkins to attribute to Ms. Henry the rental income from certain properties purchased with funds from Dr. Waters. They submit that this is evidence that Dr. Waters considered the properties to be owned legally and beneficially by Ms. Henry and that the plaintiff should have put this evidence should have before Myers J.

51 The plaintiff points out that these documents were in Ms. Henry's possession, not in the possession of the plaintiff. Indeed, Ms. Henry states in her affidavit, with respect to Exhibit 9, that "Mr. Waters gave me this document."

52 There is no evidence before me that suggests that the plaintiff had copies of Exhibit 8 or 9 at the time Ms. Kussinger swore her affidavit on May 30, 2022. Failing to put documents one does not possess before the court can not violate the duty to make full and frank disclosure.

Ms. Henry's tax returns for 2009 to 2013

53 The Henry defendants submit that the plaintiff had access to Ms. Henry's tax returns from 2009 to 2013 and should have placed them before Myers J. In her affidavit, Ms. Henry stated that her tax returns were in the possession of Dr. Waters and

Mr. Hawkins. She included her 2013 tax return as an exhibit to her affidavit. She did not include any of her other tax returns in her affidavit.

54 The plaintiff submits that they included with Ms. Kussinger's affidavit all of Dr. Waters' notes and documents that related to Ms. Henry's taxes. For example, exhibits 32 (a handwritten note dated October 10, 2010), 88 (a handwritten note dated February 23, 2010) and 89 (a handwritten note dated November 14, 2010, and updated January 16, 2011), all related to Ms. Henry's taxes.

55 Ms. Kussinger stated on cross-examination that she knew that Ms. Henry's tax returns were in Dr. Waters' office because they were labelled and because she knew that he had assisted Ms. Henry with them. Although she had access to Ms. Henry's tax returns for the years 2009 to 2013, Ms. Kussinger believed those records were private and belonged to Ms. Henry, so she did not review them. Instead, she put them in a bag and delivered them to counsel for the plaintiff.

56 Counsel for the plaintiff also did not review Ms. Henry's tax returns. Counsel for the plaintiff offered to provide the 2009 to 2013 tax information to counsel for the Henry defendants for their review but counsel for the Henry defendants did not ask for them. I infer that if Ms. Henry needed copies of her tax returns or thought that there was anything material or helpful to her in those tax returns, she would have obtained and relied on them.

57 I do not fault the plaintiff for not including Ms. Henry's tax returns in the material it placed before Myers J. It is commonly accepted that tax returns contain highly personal and confidential information. The plaintiff could review Ms. Henry's tax returns (because Ms. Kussinger had access to them) but that does not mean the plaintiff should review Ms. Henry's tax returns. Ms. Kussinger did not have Ms. Henry's permission to review the tax returns, much less to file them with the court and, thereby, make them part of the public record.

58 Moreover, the plaintiff could not have lawfully obtained Ms. Henry's tax returns from her tax preparer, Mr. Hawkins. Mr. Hawkins could not have released Ms. Henry's tax returns to anyone without her authorization and doing so would have violated her expectations of privacy and, possibly, Mr. Hawkwins' own professional obligations: *Latina (Re)*, 2018 ABCPA 11.

59 I find that the plaintiff did not violate the duty to make full and frank disclosure by not putting Ms. Henry's 2009 to 2013 tax returns before Myers J.

Dr. Waters' net worth statements

60 The Henry defendants submit that the plaintiff should have placed Dr. Waters' net worth statements before Myers J. In response to undertakings given during cross-examination, the plaintiff produced the following:

a. a one-page handwritten statement of net worth as of December 31, 2010;

b. a one-page typed statement of net worth as of September 30, 2014;

c. eight pages of incomplete and undated schedules that were faxed on November 17, 2015;

d. eight pages of incomplete schedules dated November 2017

61 The Henry defendants point out that these statements indicate that Dr. Waters:

a. Guaranteed a $1 million mortgage on a residential property owned by Ms. Henry in Aurora;

b. guaranteed a $0.9 million line of credit related to the Aurora property used on the King of Hearts Stables;

c. held a $400,000 mortgage on a property owned by Ms. Henry in Whitby.

62 The Henry defendants highlight that the statements do not list any of the properties at issue as forming part of Dr. Waters' assets, that he did not list any co-ventures with Ms. Henry under the heading, "Investments in Private Companies."

63 The plaintiff submits that these statements were not material to the *ex parte* motion. The plaintiff points out that Ms. Kussinger's affidavit makes clear that Dr. Waters had transferred all his wealth to Ms. Henry and that numbered corporations were the legal owners of the properties. The plaintiff emphasizes that Ms. Henry never caused shares in the numbered companies to be issued to Dr. Waters, which explains why they would not be listed among his shareholdings.

64 I agree with the plaintiff. I do not think these statements are material. I do not think there is any possibility that these statements might have affected the decision on the *ex parte* motion. First, it is not clear whether or not these statements that have been located are complete or if some or all of them are missing pages. Second, although the statements assign dollar values to some amounts, I do not think they are inconsistent with the evidence presented in Ms. Kussinger's affidavit. Ms. Kussinger's affidavit clearly sets out that Ms. Henry owed Dr. Waters a $900,000 loan and that there was an overdue mortgage receivable from Ms. Henry of $400,000. She disclosed that there were security agreements, promissory notes, and mortgages signed in respect of certain properties that were owned by Ms. Henry.

65 Third, the net worth statements do not answer the fundamental thrust of the plaintiff's case: that Dr. Waters transferred tens of millions of dollars to Ms. Henry, she used those funds for a variety of purposes for which he held a beneficial interest or over which there was a resulting trust. The net worth statements simply state the case in a different form. I think Ms. Kussinger's affidavit fairly stated the information in the plaintiff's possession, and I do not think the net worth statements are material or had any prospect of affecting the decision on the *ex parte* motion.

Email exchange between the estate trustees, February 17 and 18, 2021, and evidence of gifts

66 The Henry defendants submit that the plaintiff should have disclosed an email exchange between Ms. Kussinger and Ms. Brown on February 17 and 18, 2021. The Henry defendants submit that Ms. Kussinger knew about gifts that Dr. Waters had made to Ms. Henry and that this should have been put before the court on the *ex parte* motion. Ms. Kussinger's email states as follows:

> Update on [Dr. Waters] finances ... I've been pressing him on that for quite a while now, and he's been procrastinating forever, so I finally put my foot down and I have his blessing to act on some things. Hence my phone call to Gillian. So Gillian thinks that she owes [Dr. Waters] $1 million and that there is some legal paper that he has that says so — she can't find her copy of that document. Needless to say, he can't find it either. Hoping that the next time you go and visit him you'll have better luck.
>
> I pointed out that he gave Gillian a lot more than a million, and if she repays what she think[s] she owes it won't be enough to take care of Phyllis in her old age. That gave him a bit of a pause.
>
> Do you have an actual record of how much money went to her and when? I wouldn't worry about including VISA charges or gifts or tfsa/education fund amounts, just the steady monthly amounts that went out for what I am assuming was to pay her mortgages. I have some of it totalled up (over $17M) that went out of the brokerage accounts.
>
> I am also going to have to come up with a budget of what Phyllis needs. And I am working on reducing the 24-hour care (cc'd you on message to Norma Jean). If you have any other ideas please let me know.

67 The Henry defendants also challenge Ms. Kussinger's statement in paragraph 7 of her affidavit that "for the vast majority of these wealth transfer transactions, I have been unable to located [*sic*] any documentation that these transactions were gifts." The Henry defendants submit that the plaintiffs were required to place any evidence of gifts before the court.

68 I do not believe the failure to provide this email exchange to the court on the *ex parte* motion is a material non-disclosure given the other information the plaintiff put before the court. In paragraph 70 of her affidavit, Ms. Kussinger stated that she understood that Dr. Waters provided Ms. Henry with a VISA charge card for her to use from 2009 to 2020. Over that time, Dr. Waters paid for $2.5 million in charges to that account. Ms. Kussinger stated that she reviewed the transactions and concluded that a large majority of the purchases were for the personal benefit of Ms. Henry, her businesses, and her immediate family. Ms.

Kussinger attached to her affidavit account statements dated December 27, 2014, and December 27, 2015. These statements showed two months of detailed transactions and summaries of the year-to-date spending categories to provide examples of how Ms. Henry used the VISA card. In my view, this is more than sufficient disclosure of the fact that Dr. Waters paid for personal items for Ms. Henry and that her credit card expenses were large.

69 In addition, the plaintiff highlighted in paragraphs 13 and 27 of its factum on the *ex parte* motion that Dr. Waters wrote that he provided "gifts of appreciation" to Ms. Henry. As discussed below, gratuitous transfers are presumed at law to be impressed with a resulting trust unless the recipient is able to prove otherwise: Pecore v. Pecore, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 24 to 25; Public Guardian and Trustee v. Cherneyko et al, 2021 ONSC 107, 154 O.R. (3d) 388, at para. 27. In my view, there are no documents that conclusively demonstrate or even corroborate the suggestion that Dr. Waters transferred the bulk of the disputed funds as gifts: Pettenuzzo v. Charrette, 2011 ONSC 7126, at para. 68. The concern about whether or not the transfers were valid as gifts increases, of course, as the amounts in dispute climb into the millions of dollars.

70 I would not set the *ex parte* order aside on this basis.

Histrop's notes from the preparation of the will

71 The Henry defendants submit that the plaintiff should have included in its motion record Ms. Histrop's notes from any meetings she had with Dr. Waters during the preparation of his 2018 will. They submit that she was his lawyer, and her notes could reveal information about Dr. Waters' understanding of the transfers to Ms. Henry.

72 The plaintiff submits that there was nothing inappropriate with not providing Ms. Histrop's notes. First, those notes (if they exist), would be protected by solicitor-client privilege, which has not been waived. Second, the will itself is not being challenged in this litigation and there is no reason to produce the notes. Third, the defendants are speculating about what might be contained in the notes and that is insufficient to amount to material non-disclosure.

73 I agree with the plaintiff. The Henry defendants provided no authority for the proposition that a party must waive solicitor-client communication privilege over documents if they bring an *ex parte* motion. They did not bring a motion before me to determine whether or not the privilege claim is valid or should be set aside. I have no idea whether or not the notes, even if produced, would contain any relevant information. In these circumstances, I would not set the *ex parte* order aside on this basis.

Conclusion

74 I find that none of the Henry defendants' complaints about non-disclosure of material facts, even considered cumulatively, justify setting aside the injunction: *Friedland* , at para. 31; *Mooney* ; *Rust Check* . The plaintiff did a commendable job of placing the relevant and material facts before the court. I find that none of the omitted disclosure might have had an impact on the original order: *Hazelton Homes* , at para. 21; *Two-Tyme*, at para. 20; *Yemec* , at para. 35; *Wachsmann* , at para. 8.

75 I decline to vacate the injunction on the basis of non-disclosure of material facts.

Failure to lay out the case that would favour the defendant

76 The Henry defendants also allege that the plaintiff failed to present fairly their case on the *ex parte* motion. They make three interrelated submissions. First, the plaintiff failed to make appropriate inquiries before going to court. Second, even if it provided the relevant documents to the court, the plaintiff failed to highlight content in those documents that was helpful to the Henry defendants. Third, the plaintiff should not have proceeded *ex parte*. For the reasons that follow, I disagree with each of these submissions.

The alleged failure to make inquiries

77 The Henry defendants allege that the plaintiff failed to make proper inquiries before bringing its *ex parte* motion. The Henry defendants allege that: first, the plaintiff should have asked Mr. Hawkins, who prepared Ms. Henry's income tax returns from 2008 to 2013 for information about the properties she owned; second, the plaintiff should have asked Ms. Henry whether

or not Dr. Waters gifted her the $27 million; and third Ms. Kussinger should have disclosed to the court that she never asked herself if Dr. Waters had gifted all the transferred money to Ms. Henry.

78 I disagree. First, for the reasons set out above, Mr. Hawkins owed duties of confidentiality to Ms. Henry. He would not have been at liberty to discuss her tax returns or confidential financial information with anyone, for any reason, without Ms. Henry's consent. The plaintiff was under no obligation to attempt to obtain information from him. Indeed, had the plaintiff obtained and relied on such information without Ms. Henry's consent, I anticipate that this would have been raised to challenge the propriety of any injunction.

79 In addition, I have reviewed the transcript of Mr. Hawkins' rule 39.03 examination. It provides no assistance to the Henry defendants. He never spoke with Ms. Henry. He did not complete any tax returns for any corporation that was owned legally or beneficially by Ms. Henry. He was not aware that she owned corporations that owned properties purchased with money from Dr. Waters. He confirmed that if a corporation held property in trust for someone else, the rental income and the expenses would be claimed by the corporation, not the beneficial owner of the property. He never discussed Ms. Henry's tax returns with Dr. Waters. He stated that Dr. Waters never told him that he was buying property for Ms. Henry as a gift. He did not know whether or not Dr. Waters had transferred money to Ms. Henry as a gift or a loan. Indeed, the factum of the Henry defendants contains only one reference to the examination of Mr. Hawkins and that answer was later clarified on examination by the plaintiff. There is no reasonable chance that Mr. Hawkins would have provided evidence of assistance to Ms. Waters, even if the plaintiff could have obtained that information before going to court.

80 Second, Ms. Kussinger called Ms. Henry and asked her about the amounts owing to Dr. Waters in 2021. Ms. Henry told her a much smaller number than Dr. Waters knew she owed to him. In light of that, there was no reason to follow up and inquire about gifts. Moreover, there is no reason to believe that the plaintiff would have accepted Ms. Henry's assertion that Dr. Waters gave her gifts of $27 million. Ms. Henry has provided her version of events to the court and the plaintiff clearly does not accept any of her explanations. There is no reason to believe the plaintiff would have viewed this explanation as more credible earlier in the process.

81 Third, I do not fault Ms. Kussinger for failing to ask herself if the $27 million in gratuitous transfers were gifts. Ms. Kussinger spoke with Dr. Waters who told her that Ms. Henry owed him much more than $1 million. Based on what she knew at the time, it implausible that Dr. Waters gave over $27 million to Ms. Henry as gifts. Nevertheless, Ms. Kussinger fairly put before the court the pieces of evidence that were in her possession that provided some evidence that some of the money may have been given to Ms. Henry.

Failure to highlight information that was before the court and helpful to the Henry defendants

82 The Henry defendants submit that the plaintiff "failed to draw attention to several material documents buried in the record." They submit that these documents provide "ample evidence" that Dr. Waters gifted over $29 million to Ms. Henry. The Henry defendants point to one paragraph of an email sent on September 10, 2015, from Mr. Hawkins to Dr. Waters (Exhibit 70), which referred to gifts to Ms. Henry, excerpts from exhibits 20, 25, 88, 90, 92, and 102 of the Kussinger affidavit, and certain documents that mention the creation of a foundation for Ms. Henry. I do not accept these submissions.

83 First, Ms. Kussinger did highlight exhibits 20, 88, 90, 92, and 102 in Schedule A to her factum. She included a description of each handwritten note and a link directly to each of these exhibits. She explained as follows:

> I attach to this affidavit as Schedule "A" a chart that reflects a number of handwritten notes of [Dr.]Waters that provide, in part, the rational for the transfers, estate planning considerations, a tracking of and Henry's receipt of certain wealth transfers, and in respect of the purchase, maintenance or sale of properties. The "Description" column in the chart is my best attempt to summarize the handwritten notes as accurately as possible. The underline emphasis in the description column is my own.

84 Indeed, the summary of Exhibit 88 in Schedule A to Ms. Kussinger's affidavit excerpts the very text that Ms. Henry pointed to in her submissions.

85 I accept this as a fair attempt to highlight and summarize fairly the handwritten notes. I do not see this approach as unfair to Ms. Henry in any material way.

86 Second, the plaintiff highlights Exhibit 25 in the body of Ms. Kussinger's affidavit and provided the relevant excerpts:

> I have also located a cover letter to the abovementioned Security Agreement that I have reason to believe was written by Waters (unsigned and undated). Attached and marked as Exhibit "25" is a copy of the cover letter and security agreement. Relevant excerpts of the cover letter are provided below:
>
> > [I am] presently 81 years of age and my wife Phyllis in 74. We are both in ill health. [...]
> >
> > [In all], I and my corporation have provided — in addition to salaries and gifts of appreciation, — $10,645,000 in loans in the expectation of her real estate and farm-based endeavours bearing fruit in due time. I also provide my professional expertise in the latter endeavour.
> >
> > [I] have also provided my personal guarantee for the mortgage related to 9 Northern Dancer Lane, Aurora ON L4G 7Y7.

87 At the time that Ms. Kussinger swore her affidavit, she did not have a copy of the signed letter and did not know its purpose. There was little more that she could say about the letter and, in my view, she excerpted the relevant parts directly into her affidavit. I do not agree with the Henry defendants' characterization that Ms. Kussinger buried this exhibit. Ms. Henry later explained that this letter was prepared for use in her family law proceeding in 2014, although she maintains that it was inaccurate and that she knew it was inaccurate when she filed it with the court. I will address this point below.

88 Third, Ms. Kussinger excerpted a portion of Exhibit 20 (Dr. Waters' handwritten note dated January 14, 2011) in her affidavit. I do not see anything else in the note that could be expected to have affected the decision on the motion below.

89 Although Ms. Kussinger did not describe Exhibit 70, the email dated October 9, 2015, from Mr. Hawkins to Dr. Waters, in her affidavit, it was not necessary to do so. In my view, Ms. Henry's case would not have been improved by highlighting Mr. Hawkins' email, which read:

> Mrs. Henry and King of Hearts
>
> > 1. Get a mortgage registered on title to protect what you have lent so far. You may have to be tough here. She has to realise that it is YOUR property not hers - until she pays for it. A title search is needed to check whether she has encumbered the property in the interim.
> >
> > 2. Early on I want a fix on structure. Who owns what. Who owns shares. Who has title to real estate. I want this from documents not verbally.
> >
> > 3. Document what has been spent where and on what (bookkeeping up to date.)
> >
> > 4. A list from you on what you have leant and when - (I assume it was all interest free??)
> >
> > 5. Initial report and clarify plan of attack
> >
> > 6. See financial statements and tax returns.
> >
> > 7. Review all buildings and structures, equipment and facilities.
> >
> > 8. Review with construction firm what they propose, time scale and cost.
> >
> > 9. Report on same

> 10. I also feel obliged to tell you that this has to stop. You have been exploited by this woman. There are thousands of caregivers out there who will work for a salary and do not drive high-end Mercedes SUVs. Do you know how much you have given to her over the years? Does she understand that this latest is a loan and not another in a series of gifts?
>
> 11. She cannot afford this property. She has overreached here. She cannot afford to buy it and she cannot afford the upkeep. Did she really not know that the financing condition was removed by the vendor? When she made her offer conditional on financing just who did she have in mind for provision of the funds?
>
> 12. I could save you my fees by stating at the outset that the property must be sold ASAP. All work must be stopped. Nothing more should be spent. She could get tenants in the residential portions to help pay such things as taxes. She must be focused on making you whole - whatever that takes.

90 While it is true that paragraph 10 of this email contains a reference to gifts, I fail to see how highlighting this email would have helped Ms. Henry. I see this email as far more consistent with the plaintiff's theory that the bulk of the transfers to Ms. Henry were not gifts than with Ms. Henry's theory that they were. During his examination, Mr. Hawkins explained his email by saying that Ms. Henry "was obviously holding the property in trust for him until she paid for it. And she hadn't paid for it. He had." I am not sure how highlighting Mr. Hawkins' view that Dr. Waters had "been exploited by this woman" would have helped Ms. Henry. The passing reference to gifts cannot be cherry-picked from what is otherwise a fairly devastating assessment of Ms. Henry's motives and actions.

91 Fourth, as noted above, Ms. Kussinger did highlight the VISA statements that Dr. Waters paid on behalf of Ms. Henry. The Henry defendants submit that this is evidence of donative intent that should have been placed before the court. I find that it was placed before the court and that it does not undermine the thrust of the plaintiff's submissions about the balance of the $27 million.

92 Fifth, Ms. Kussinger did put before the court documents and handwritten notes that indicate that Dr. Waters contemplated involvement in a foundation "created by [Ms. Henry] in honour of her parents" to support the education of her children and to alleviate family difficulties. The Henry defendants submit that this is clear evidence that Dr. Waters intended to gift money to Ms. Henry. I disagree. Most importantly, such a foundation was never created or funded. That significantly diminishes the weight that I would place on these notes. Even if there was a plan for Dr. Waters to make a gift to fund this foundation (and I think the notes are equivocal on the source of the funds), that intention is not transferrable to the money that actually was transferred to Ms. Henry to be invested in real property.

93 Sixth, Dr. Waters and Ms. Henry did create the Noelle Henry Education Trust in June 2013. The trust property was $500,000 to be provided from the proceeds of sale of one of the properties purchased with funds that Dr. Waters provided to Ms. Henry in March 2014. Those funds had been provided pursuant to a promissory note signed by Ms. Henry, which Dr. Waters voided upon creation of the trust.

94 I find that the plaintiff did highlight these documents sufficiently to bring them to the attention of the court and to put Ms. Henry's case fairly on the *ex parte* motion. Ms. Kussinger described the documents clearly in paragraph 62 of her affidavit and exhibited them to her affidavit. Moreover, in paragraph 31 of the factum on the motion before Myers J., the plaintiff highlighted this evidence stating that Ms. Kussinger "candidly disclosed that there is documentation which suggests that there may be legitimate trusts or foundations established for [Ms.] Henry's family." This fairly put Ms. Henry's case before the court. Nothing more was required.

95 Similarly, Ms. Kussinger referenced in her affidavit documents that suggested that Dr. Waters knew that Ms. Henry was giving some money and benefits to her family. This was sufficient in the circumstances to fairly put that issue before the court. It is important to remember that all of the documents that suggest that Dr. Waters may have intended to give Ms. Henry or her family gifts cover only a small fraction of the total amount that Dr. Waters transferred to her.

96 Seventh, Ms. Henry submits that the plaintiff should have highlighted that Dr. Waters had a security agreement dated May 7, 2014, in respect of a $1.4 million loan made as of April 2014. The agreement pledged three properties as security for the agreement. The Henry defendants submit that this agreement demonstrates that Dr. Waters did not own the properties beneficially and that this should have been highlighted for the court. First, Ms. Kussinger did put this agreement before the court. She described it accurately in paragraph 58 of her affidavit. Second, the plaintiff highlighted the security agreement in paragraphs 13, 27, and Appendix A to the factum filed on the *ex parte* motion. Third, I disagree with the submission that a security agreement is inconsistent with beneficial ownership. Dr. Waters may have wished to obtain additional protection and covenants through use of a security agreement. I do not think the two positions are irreconcilable.

The plaintiff proceeded ex parte

97 The Henry defendants submit that the plaintiff should not have proceeded *ex parte* because there was no good reason to believe that the Henry defendants would, if given notice, act to frustrate the process of justice before the motion can be decided and there was time to provide notice to them: Komarnycky v. Laramee, 2012 ONSC 6503, at para. 22.

98 I agree with the Henry defendants that it was possible for the plaintiff to give them notice of the motion. The plaintiff knew the identity of many of the defendants to the action and knew the addresses for some, if not all of them.

99 I find, however, that there was good reason to believe the Henry defendants would act to frustrate the process of justice if they were given notice. For the reasons set out below, I find that there was evidence that Ms. Henry began to dissipate her assets after she spoke with Ms. Kussinger. In these circumstances, I find that it was appropriate, if risky due to the obligations attaching to an *ex parte* motion, for the plaintiff to proceed without notice to the Henry defendants.

Should the injunction be continued until trial?

100 Pursuant to the original order, as extended, I am to consider *de novo* whether the injunction should be continued until trial. For the reasons that follow, I find that the plaintiff has met the test for injunctive relief. Looking at all of the evidence before me, I find that the plaintiff has established a strong *prima facie* case on several of the causes of action raised in the statement of claim. There is evidence that Ms. Henry attempted to dissipate her assets. The plaintiff would suffer irreparable harm without an injunction. The balance of convenience strongly favours the plaintiff despite the hardship the injunction will cause the Henry defendants.

101 For the reasons below, and considering the matter *de novo*, I dismiss the motion to set aside the injunction.

Test for a Mareva injunction

102 A *Mareva* injunction is available to freeze assets where there is a risk that the assets will be moved or dissipated to avoid judgment. It has been described as a "drastic and extraordinary remedy" because the courts do not generally grant judgment before a determination of the merits of a claim: see Pugliese v. Arcuri, 2011 ONSC 3157, 283 O.A.C. 175 (Div. Ct.), at para. 18; and Furrow Systems International Ltd. v. Island Pools & Landscaping Ltd., 2014 ONSC 1428, 43 C.L.R. (4th) 169, at para. 9.

103 In O2 Electronics Inc. v. Sualim, 2014 ONSC 5050, at para. 67, Perell J. summarized the law relating to *Mareva* injunctions as follows:

> For a *Mareva* injunction, the moving party must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; and (3) that there is a serious risk that the defendant will remove property or dissipate assets before the judgment. A *Mareva* injunction should be issued only if it is shown that the defendant's purpose is to remove his or her assets from the jurisdiction to avoid judgment. The moving party must also establish that he or she would suffer irreparable harm if the injunction were not granted and that the balance of convenience favours granting the injunction.

104 I am to consider whether or not to continue the injunction until trial *de novo*. I am to review the evidence, including the evidence obtained through the injunction, and reach my own conclusion about whether or not the plaintiff is entitled to an injunction.

Strong prima facie case

105 Before assessing each of the plaintiff's requested forms of interlocutory relief, I will assess whether or not the plaintiff has demonstrated a strong *prima facie* case for relief. The plaintiff has pleaded that the funds Dr. Waters transferred to Ms. Henry are impressed with a resulting trust, that Ms. Henry has been unjustly enriched, that Ms. Henry has committed civil fraud, obtained the funds through undue influence and in breach of fiduciary duties she owed to Dr. Waters, and unconscionable procurement. The plaintiff need demonstrate a strong *prima facie* case in respect of only one of the pleaded causes of action.

106 The parties have not yet made documentary production and examinations for discovery have not been conducted. I am required to make findings on the current state of the evidence. A trial judge may reach different conclusions based on the evidence led at trial. Based on the evidence before me, however, I am satisfied that the plaintiff is likely to succeed against the Henry defendants on at least some of the pleaded causes of action.

Resulting trust

107 Ms. Henry submits that Dr. Waters gifted approximately $27 million to her (net of certain repayments and money that was earned as caregiving income). The plaintiff submits that the bulk of the money Dr. Waters transferred to Ms. Henry is impressed with a resulting trust.

108 A valid *inter vivos* gift is one that is intended to take effect during the lifetime of the donor. It consists of a voluntary transfer of property to another with the full intention that the property will not be returned. To establish a gift, one must show intention to donate, sufficient delivery of the gift, and acceptance of the gift: McNamee v. McNamee, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 24.

109 Equity presumes bargains, not gifts. If Dr. Waters gratuitously transferred property to Ms. Henry, the law presumes that she holds the property on a resulting trust for him: *Pecore* , at para. 24. The onus then shifts to Ms. Henry to rebut the presumption by proving Dr. Waters' intention to gift: Sawdon Estate v. Watch Tower Bible and Tract Society of Canada, 2014 ONCA 101, 119 O.R. (3d) 81, at paras. 56-57; Mroz (Litigation guardian of) v. Mroz, 2015 ONCA 171, 125 O.R. (3d) 105, at para. 72. The presumption of resulting trust, therefore, alters the general rule that the plaintiff bears the legal burden: *Pecore* , at para. 24; *Cherneyko et al* , at para. 27. The shift in onus is particularly justified in cases where the party that transferred the funds is deceased. It is the recipient who is better placed to prove the circumstances of the transfer.

110 I must start from that presumption and then assess all the evidence in an attempt to determine Dr. Waters' actual intent at the time of the transfer: *Pecore* , at para. 44; *Sawdon* , at para. 57; *Mroz* , at para. 72. The evidence necessary to rebut the presumption depends on the facts of the case: *Pecore* , at para. 55. Evidence of Dr. Waters' post-transfer conduct is admissible, so long as it is relevant to his intention at the time of the transfer: *Pecore* , at para. 59.

111 I find that the plaintiff has presented a strong *prima facie* case that Ms. Henry will not be able to rebut the presumption of resulting trust at trial. I reach this conclusion for five reasons.

112 First, Dr. Waters' secondary will, which he signed on May 6, 2018, clearly expressed his understanding that Ms. Henry held assets for him on resulting trust. The secondary will provided that:

> Provided GILLIAN HENRY, survives me, and provided she pays to my estate the assets she holds for me on resulting trust, 550,000 shares, for her own use absolutely.

113 It will require a trial to determine what assets Ms. Henry held on resulting trust. However, this is compelling evidence that Dr. Waters did not intend to gift Ms. Henry all of the $27 million that she received.

114 Second, Ms. Henry cannot rely on the presumption of advancement to displace the presumption of resulting trust as she and Dr. Waters were not married: *Pecore* , at para. 28; Hyman v. Hyman, [1934] 4 D.L.R. 532 (S.C.C.), at p. 538.

115 Third, in her evidence, Ms. Henry explains that Dr. Waters gifted her this money because they had an "intimate relationship" and that he wanted her to be financially independent. I find that Ms. Henry's evidence is, at this time, uncorroborated. There is no evidence that Ms. Henry or Dr. Waters ever told anyone about the alleged intimate relationship until Ms. Henry filed her affidavit in this proceeding. Ms. Henry's uncorroborated assertions will not allow her to rebut the presumption of resulting trust: Evidence Act, s. 13; *Burns Estate; Orfus Estate*.

116 Fourth, during the cross-examination on her affidavit, Ms. Henry admitted that she recalled only one conversation with Dr. Waters that resulted in him transferring money to her, despite there being 390 separate transfers. Moreover, on cross-examination she admitted that, even on her version of events, Dr. Waters did not demonstrate a full intention that the property would never have to be returned: "Dr. Waters was the person in control. The money was coming from him to me as a gift, so if he had changed his mind, he could have done that if he wanted to." Ms. Henry admitted that she understood that if Dr. Waters had wanted her to pay back the money, then she would have had to pay back the money. This evidence significantly undermines Ms. Henry's ability to rebut the presumption of resulting trust at trial.

117 Fifth, I have reviewed all of the documents and notes to which Ms. Henry points in support of her assertion that Dr. Waters gifted this money to her. These documents do not, in my view, undermine significantly the strength of the plaintiff's case. None of the notes or documents are contemporaneous with the transfers. Much of the evidence is equally consistent with there being no gift as with there being a gift and is, therefore, not corroborative: *Pettenuzzo* , at para. 68. None of the notes clearly expresses Dr. Waters' intention to gift the money to Ms. Henry. It will be for the trial judge to make the final determination, but at this point I am satisfied that the documentary evidence does not undermine the plaintiff's strong *prima facie* case for a resulting trust.

118 In particular, I have serious doubts about the authenticity of two documents Ms. Henry relies on to support her submission that all of the transfers were gifts.

119 The first document is a letter dated June 13, 2014. It is from Dr. Waters and is addressed "to whom it may concern." There are three versions of the letter in the record. The first is an unsigned draft that was in the possession of the plaintiff and was provided on the *ex parte* motion. The second is a signed version with the date handwritten below the signature line. The third is a signed version with the date stamped below the signature line. Ms. Henry had the second and third versions of the letter in her possession. The key portion of the letter reads as follows:

> Due to my health issues and more particularly those of my wife we have emplo9yed [*sic*] a number of care givers since 1999. In 2007 we employed Mrs. Sharon Prendergast RN to supervise and staff the process. In 2009 introduced me to Mrs. Gillian Henry who began her duties with us in May 2009. We were very impressed with Ms. Henry's caring attitude, efficiency and care to both of us. Given her marital difficulties we were also impressed by her hopes and eagerness to create a life of self-sufficiency for herself and her son (now 23) and daughter (now 17) who graduated from Pickering College on June 13 and who has been accepted at The University of Edinburgh September 2014.
>
> In all, I and my corporation have provided — in addition to salaries and gifts of appreciation, - $10,645,000 in loans in the expectation of her real estate and farm-based endeavours bearing fruit in due time. I also provide my professional expertise in the latter endeavour.
>
> I have also provided my personal guarantee for the mortgage related to 9 Northern Dancer Lane, Aurora ON L4G 7Y7.

120 Ms. Henry explained that this letter was prepared for use in her matrimonial proceeding with her ex-husband. She states that Dr. Waters told her "that he intended his sworn declaration of June 13, 2014 to serve the purpose of assisting me in resisting [her ex-husband's] claim that my real estate assets and investments had been acquired during cohabitation and/or entitled him to spousal support and relieved him of child support obligations." In the financial statement she filed in the family law litigation, Ms. Henry listed a $10 million liability to Dr. Waters and Waters Limited, which she describes as mortgage.

121 On cross-examination, Ms. Henry stated that the letter was untrue and the $10,645,000 was a gift, not a loan. Ms. Henry's evidence was that Dr. Waters knowingly signed a false document and that she knowingly tendered a false financial statement in her family law proceeding in order to reduce any amounts owing to her ex-husband. It is not clear whether or not Ms. Henry later filed an updated financial statement in the family proceeding.

122 Jeffrey Brown, the person who notarized this letter, was examined for the purposes of this motion. Mr. Brown stated that the two signed versions of the letter dated June 13, 2014, were suspicious because neither appeared to have a date stamp beside his signature, which was his invariable practice. He was also concerned because his records indicated that he only notarized one letter that day but there now appeared to be two different versions of the letter. He also stated that the date stamp under Dr. Waters' signature was not placed there by his office as the font was not one that he used.

123 The second letter Ms. Henry relies on is dated August 27, 2014. This letter purports to be from Dr. Waters and is addressed to Ms. Henry. It reads as follows:

> Further to my affidavit dated June 13, 2014 on this matter, this document is an amendment to recognize as "loans" only those covered by formal documentation: i.e., (1) the mortgage on 64 Elder Cres., Brooklin, ON L.1M 2H7 in the amount of $400,000. (Four hundred thousand dollars) and (2) the promissory note relating to No. 1 Delight Way, Brooklin and King of Hearts Stables, Bronte Rd. in the amount of $ 1,000,000. (One million dollars). The additional funds included in the June 13, 2014 affidavit represent non-repayable imbursements.

124 On cross-examination, counsel for Ms. Henry refused to provide the content of the family law file for use on this motion. I draw the inference that the content of the family law file would not support Ms. Henry's submission regarding the meaning or use of the letters. In such circumstances, I am not prepared to conclude that the letter dated August 27, 2014, is authentic or to reach a final conclusion on the meaning of the very unusual and idiosyncratic phrase "non-repayable imbursements." The archaic meaning of imbursement is "money laid up in stock," which may not be consistent with the transfers having been gifts. The interpretation of this letter will be an issue for trial.

125 In conclusion, I find that the plaintiff has demonstrated a strong *prima facie* case that the $27 million in gratuitous transfers from Dr. Waters to Ms. Henry are impressed with a resulting trust.

Unjust enrichment

126 To establish unjust enrichment, a plaintiff must show an enrichment, a corresponding deprivation, and the absence of a juristic reason: Moore v. Sweet, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 37; Sirius Concrete Inc. (Re), 2022 ONCA 524, at para. 18.

127 The plaintiff has presented a strong *prima facie* case that Ms. Henry was enriched, and Dr. Waters' estate was deprived of at least $27 million. Ms. Henry submits that there is a juristic reason for her enrichment: Dr. Waters gifted the money to her.

128 For the reasons set out in paragraphs *[107]* to *[125]*, I find that Ms. Henry is unlikely to rebut the presumption of resulting trust. I do not accept that Ms. Henry has provided ample evidence of Dr. Waters' donative intent. I find that the plaintiff has established a strong *prima facie* case of unjust enrichment.

Civil fraud

129 A plaintiff must establish four things to make out a claim in civil fraud: (a) the defendant made a false representation; (b) the defendant had some level of knowledge that the representation was false; (c) the false representation caused the plaintiff to act; and (d) the plaintiff's actions resulted in a loss: Bruno Appliance and Furniture Inc. v. Hryniak, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21.

130 The plaintiff's theory of the case is that Ms. Henry engaged in a massive fraud. She represented to Dr. Waters that she would purchase and hold properties in numbered corporations for his benefit. Instead, she did not issue shares in the corporations

to Dr. Waters, held the properties in her own name or in her solely owned corporations, gave properties to third parties, and traded them on her own account. The plaintiff alleges that Ms. Henry engaged in a complex series of real estate transactions that defrauded Dr. Waters. For example, the plaintiff points to evidence in the record to support the following acts of fraud:

a. Ms. Henry told Dr. Waters that she was giving the property known as 1374 Linstead to her sister-in-law, as a gift. Instead, however, Ms. Henry sold it for $170,000. She used the sale proceeds to purchase 154 Taunton. At the same time, Ms. Henry obtained funds from Dr. Waters ostensibly to purchase 154 Taunton and then used the funds for some other purpose or otherwise dissipated them.

b. Ms. Henry obtained funds from Dr. Waters to purchase 152 Taunton. She then gifted the property to her sisters and purchased it back from her sisters through one of the numbered corporations again using funds from Dr. Waters.

c. Ms. Henry would often pay to Dr. Waters only some of the proceeds from the sale of properties purchased with funds provided by Dr. Waters:

i. Ms. Henry paid Dr. Waters only $400,000 of the $769,000 in sale proceeds from 7790 Concession;

ii. Ms. Henry paid Dr. Waters' estate only $500,000 from the $643,360 in sale proceeds from 2524 Bromus; and

iii. Ms. Henry paid Dr. Waters' estate only $100,000 from the $532,000 in sale proceeds from the two units at 350 Harry Walker;

d. Ms. Henry encumbered a property in which the plaintiff had a proprietary right and caused a numbered company to use the funds to both purchase her parents' existing house from them for $850,000 and to buy a house for $1.4 million in which her parents lived rent free.

131 The Henry defendants submit that the allegations of fraud are not borne out in the evidence and that the evidence establishes that Dr. Waters, with the exception of certain loans, wanted to gift the funds to Ms. Henry.

132 I do not accept the submissions of the Henry defendants on this point, for the reasons set out above. At trial, the Henry defendants may be able to prove that some of the 390 transfers were gifts. At trial, the plaintiff may not be able to prove that all of the 390 transfers were frauds. However, I am satisfied that the plaintiff has demonstrated a strong *prima facie* case that Ms. Henry committed a fraud in respect of many of the 390 transactions.

Undue Influence

133 Where the potential for domination inheres in the relationship between the transferor and transferee, the presumption of undue influence applies: Goodman Estate v. Geffen, [1991] 2 S.C.R. 353, at p. 378. In this case, that would mean that Ms. Henry must establish on a balance of probabilities that the gift was the result of Dr. Waters' "full, free and informed thought": Goodman Estate, at p. 379.

134 Ms. Henry says that the potential for domination did not inhere in her relationship with Dr. Waters. She states that she was not Dr. Waters' personal support worker as demonstrated by the invoices from her company. She maintains that she was Dr. Waters' employee, but not his service provider. She maintains that she may have brought him tea or covered his dialysis port before he showered but that this did not make her his personal service worker. She maintains that Dr. Waters was independent and mentally astute throughout the period she worked for him.

135 The plaintiff, on the other hand, asserts that Ms. Henry was Dr. Waters personal service worker. The plaintiff points to the notarized letter dated June 13, 2014, discussed above, in in which Dr. Waters wrote, "We were very impressed with Ms. Henry's caring attitude, efficiency and care to both of us." In her supplementary affidavit, Ms. Kussinger stated that she always understood that Ms. Henry was the caregiver for both Dr. Waters and Mrs. Waters based on her own observations over the years. She saw Ms. Henry prepare meals and tea for Dr. Waters and had text messages indicating that Ms. Henry showered

Dr. Waters. In addition, Ms. Kussinger provided a series of email messages sent by Dr. Waters from 2010 through 2017 that describe worsening health issues, his need for home dialysis, and his increasing trouble with his memory.

136 Both the plaintiff and Ms. Henry agree that Ms. Henry was an important person in Dr. Waters' life and provided significant support to him directly and indirectly by caring for his ailing wife.

137 I have some difficulty accepting Ms. Henry's statements at face value. Some of her testimony raises serious concerns about her credibility, including the following:

a. she has testified that she knowingly provided false information, underrepresented her assets, and did not reveal the sale of certain properties in her family law proceeding;

b. until confronted with evidence to the contrary,

i. she denied that, after Dr. Waters' death, she continued to use a home equity line that he had guaranteed;

ii. she denied that she had tried to sell the horse-farm (that was purchased with Dr. Waters' funds) for $15 million after Ms. Kussinger asked her about the debts she owed to Dr. Waters; and

iii. she denied that she had received an offer of $15 million for the horse-farm.

138 Where Ms. Henry's evidence about her relationship with Dr. Waters is inconsistent with the evidence of Ms. Kussinger and the written documents, I prefer the latter.

139 I find that the plaintiff has presented a strong *prima facie* case that the potential for domination inhered in the relationship between Ms. Henry and Dr. Waters. For the reasons set out above with respect to resulting trust, I think it unlikely that Ms. Henry will be able to establish on a balance of probabilities that the 390 transfers were each the result of Dr. Waters' "full, free and informed thought."

Breach of fiduciary duty

140 The plaintiff submits that Ms. Henry owed fiduciary duties to Dr. Waters both as his personal services worker and because they were business partners.

141 The Henry defendants submit that the generic label "caregiver" does not give rise to a fiduciary relationship. Although the Henry defendants did not address this in their factum, I infer that they submit that Ms. Henry and Dr. Waters were not business partners because he gifted her the funds.

142 Even accepting that the plaintiff has established a strong *prima facie* case that Ms. Henry provided caregiving services to Dr. Waters, I find that the plaintiff has not established that a fiduciary relationship arose between Ms. Henry and Dr. Waters in connection with the transfers because she was his personal services worker. Certain status relationships, such as solicitor-client or doctor-patient, give rise to a *per se* fiduciary relationship: Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at para. 30, citing Guerin v. R., [1984] 2 S.C.R. 335, at p. 384. I am not certain that the plaintiff has established a strong *prima facie* case that: (a) the relationship of personal services worker-patient is a status relationship that attracts a fiduciary duty; and (b) that, even if it did, the scope of the fiduciary duty that inheres in that relationship would extend to a $27 million business venture between the two individuals in that relationship. For a fiduciary duty to arise, there must be an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her: Galambos v. Perez, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 75.

143 However, I find that the plaintiff has established a strong *prima facie* case that Ms. Henry breached an *ad hoc* fiduciary duty to Dr. Waters arising from their business dealings. Relationships in which a fiduciary obligation have been imposed have three general characteristics:

a. The fiduciary has scope for the exercise of some discretion or power;

b. The fiduciary can unilaterally exercise that power or discretion to affect the beneficiary's legal or practical interests;

c. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. Elder Advocates of Alberta Society v. Alberta, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 27, citing Frame v. Smith, [1987] 2 S.C.R. 99, at p. 136.

144 An *ad hoc* fiduciary duty can arise where a claimant shows that:

a. the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;

b. a defined person or class of persons is vulnerable to the alleged fiduciary's exercise of discretionary power over them; and

c. the alleged fiduciary's power may affect the beneficiary's legal or substantive practical interests. *Elder* , at paras. 30-34 and 36; Extreme Venture Partners Fund I LP v. Varma, 2021 ONCA 853, 24 B.L.R. (6th) 38, at para. 102, citing *Galambos* , at paras. 66 and 83.

145 I find that the plaintiff has demonstrated a strong *prima facie* case that an *ad hoc* fiduciary relationship arose between Ms. Henry and Dr. Waters. There is evidence that Dr. Waters was vulnerable to Ms. Henry in that:

a. Ms. Henry designed the structure of the business enterprise, including the imposition of the numbered companies, to empower herself to exercise fully the discretion and authority to buy, sell, and improve properties using funds from Dr. Waters;

b. Ms. Henry was the directing mind and sole shareholder of the numbered corporations and never issued shares of any kind to Dr. Waters;

c. Ms. Henry was able to buy and sell properties without the involvement of Dr. Waters (other than the provision of the funds) and was able to misrepresent those sales and to account to him for only some of the proceeds of sale.

146 I am satisfied that the plaintiff has demonstrated a strong *prima facie* case that Ms. Henry gave Dr. Waters an undertaking to act in his best interests with respect to the investments. Dr. Waters was vulnerable to Ms. Henry as a business partner, not just because of his failing health and the nature of their personal service relationship. The vulnerability was inherent in the nature of the business venture and in the wide discretion he granted to Ms. Henry to purchase and improve the properties. He was very vulnerable to Ms. Henry's non-disclosures and misrepresentations. The plaintiffs have established a strong *prima facie* case that Ms. Henry could, and did, exercise her power to affect Dr. Waters' legal or substantive practical interests.

147 I find that the plaintiff has established a strong *prima facie* case that Ms. Henry breached *ad hoc* fiduciary duties owed to Dr. Waters in respect of at least some of the 390 transactions.

Unconscionable procurement

148 The plaintiff submits that it has demonstrated a strong *prima facie* case of unconscionable procurement. The plaintiff relies on the thoughtful decision of Kimmel J. in Gefen v. Gaertner, 2019 ONSC 6015, 148 O.R. (3d) 229, at paras. 159 and 181. However, the status of the doctrine of unconscionable procurement in Ontario remains uncertain. The Court of Appeal for Ontario dismissed the appeal from the decision of Kimmel J. in reasons reported at 2022 ONCA 174, 161 O.R. (3d) 267. At para. 61, however, the Court of Appeal held as follows:

> The parties did not challenge the validity of the doctrine of unconscionable procurement. In the absence of full legal argument on the existence and desirability of any doctrine of unconscionable procurement, I do not propose to address the merits of any such doctrine and whether grounds to attack transactions beyond such traditional grounds as undue influence

> and incapacity should be endorsed. Thus, this decision should not be taken as approval or rejection of unconscionable procurement being part of the law of Ontario.

149 Given the uncertain state of the law, and my findings on the other causes of actions, it is not necessary for me to consider whether or not to uphold the injunction on the basis of the pleaded cause of action of unconscionable procurement. The parties are, of course, free to argue this point at trial.

Conclusion

150 For the reasons set out above, I am satisfied that the plaintiff has made out a strong *prima facie* case in respect of at least some of the pleaded causes of action.

Assets in the jurisdiction

151 There is no dispute that the Henry defendants have assets in the jurisdiction. The original order of Myers J. imposed certificates of pending litigation against 11 different properties owned by the Henry defendants. As a result of the original *Norwich* order, the plaintiff has identified many bank accounts held by the Henry defendants.

152 I find that the plaintiff has satisfied this branch of the test.

Risk of dissipation of assets

153 I am satisfied there is a serious risk that the Henry defendants will remove property or dissipate assets before the judgment. The evidence on this point is overwhelming.

154 In Ontario law, there is no broad "fraud exception" to the usual criteria for a *Mareva* injunction: Sibley & Associates LP v. Ross, 2011 ONSC 2951, 106 O.R. (3d) 494, at paras. 15 to 63; Noreast Electronics Co. Ltd. v. Danis, 2018 ONSC 879, at paras. 51-53. The plaintiff must still demonstrate that there is a serious risk of the dissipation or removal of assets. However, strong proof of fraud is relevant to the assessment of the risk. In Sibley, at para. 63, Strathy J. (as he then was) put it this way:

> It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.

155 In OPFFA v. Atkinson, 2019 ONSC 3877, at para. 8., Diamond J. held that proof of the risk of removal or dissipation of assets may, in the appropriate case, be inferred from the surrounding circumstances of a responding party's misconduct. The list of relevant factors for the court's consideration includes (a) a responding party's attempt to "cover up his/her tracks", (b) a responding party's attempt to destroy, hide or alter evidence, and (c) any conduct demonstrating the traditional "badges of fraud."

156 I find that there is a real risk that the defendants will attempt to dissipate or hide their assets or remove them from the jurisdiction. I reach this conclusion for six reasons.

157 First, of the $29 million transferred by Dr. Waters to Ms. Henry, of which $27 million was transferred gratuitously, the plaintiff has only identified $13 million that is traceable into the purchase of real property. It appears that over $14 million may have already been dissipated through, among other means, consumption and gifts. This highlights the importance of looking carefully at the remaining assets and assessing whether or not they should be preserved pending trial.

158 Second, I find that the call between Ms. Kussinger and Ms. Henry in February 2021 is a highly relevant marker. Ms. Kussinger states that she told Ms. Henry that she was trying to get a picture of Dr. Waters' financial situation and that she was missing documents. Ms. Kussinger states that she asked Ms. Henry to provide full particulars of the debts Ms. Henry owed to Dr. Waters. The Henry defendants strenuously submit that this call was not confrontational and, therefore, would not have triggered Ms. Henry to take any steps to dissipate property and, indeed, she did not do so.

159 I disagree with the submission of the Henry defendants. It does not matter whether or not the call was confrontational. The tone of the call is not what makes it important. The call is important because it marked the first time someone asked Ms. Henry to account for the money she owed to Dr. Waters. Someone other than Dr. Waters was now trying to piece together the state of Dr. Waters' finances. The evidence of the risk of dissipation is found in what Ms. Henry did next.

160 Third, following the call with Ms. Kussinger, Ms. Henry completely altered how she dealt with the properties she had purchased with the funds. Between May 2009 and 2021, Ms. Henry sold three properties. However, in the months after February 2021, Ms. Henry sold six properties for almost $4 million, placed three mortgages worth $5.1 million on four other properties, and tried to sell her largest asset, the horse farm, at a fire sale price, $15.8 million down from $18.8 million she had listed the property at in June 2020. This increased commercial activity supports an inference that Ms. Henry was attempting to extract cash from her inventory of property, which would make it unavailable to repay the amounts owing to the Waters estate. Ms. Henry has not provided a satisfactory explanation for why she engaged in this set of transactions.

161 Fourth, Ms. Henry then engaged in a series of transactions to dissipate the cash she obtained from the property sales. Ms. Henry withdrew hundreds of thousands of dollars in cash from the proceeds of sale. She made large transfers to unknown persons. She transferred $250,000 to her parents.

162 Fifth, I do not accept Ms. Henry's explanations regarding the purpose of these transactions or what happened to the money for three reasons:

a. Ms. Henry could not explain what happened to over $2.5 million of the money she received from the liquidation of the property. On cross-examination, she provided an undertaking to explain what happened, but that undertaking remained unfulfilled.

b. Ms. Henry was evasive during her cross-examination and gave false answers on extremely material issues until confronted with documents disproving her assertions. For example, in 2020, Ms. Henry had listed the horse farm for sale for $18.8 million. After the call with Ms. Kussinger, Ms. Henry re-listed the property for $15.8 million. On cross-examination, Ms. Henry denied that she had attempted to sell the property after February 2021. She denied that she had listed the property for sale when shown an appraisal report that stated the property had been listed for sale on May 3, 2021. She only admitted that she listed the property for sale when she was shown an MLS report of the listing. When she was asked if she obtained an offer to buy the property, she denied receiving such an offer. She finally conceded that point when confronted with evidence to the contrary.

c. Ms. Henry provided evasive answers and incomplete evidence with respect to withdrawals from her Scotiabank account after the *Mareva* order was put in place. On June 27, 2022, she confirmed on cross-examination that she had not withdrawn any money from the account after being served with the interim order. As an answer to an undertaking, she provided an account balance for the Scotiabank account as of June 29, 2022. She then removed money from the Scotiabank account. This was only discovered by the plaintiff when Scotiabank provided original account statements pursuant to the *Norwich* order issued by Myers J. Ms. Henry's actions breached the *Mareva* order. I find that she attempted to cover up this breach by providing inaccurate information about her Scotiabank account in response to her answers to undertakings. This conduct causes me very grave concern about the risk of further dissipation of assets.

163 Sixth, I infer that there is a risk of removal or dissipation of assets from the surrounding circumstances of Ms. Henry's misconduct that the plaintiff has demonstrated to the standard of a strong *prima facie* case: *OPFFA* , at para. 8. I find that Ms. Henry has attempted to cover her tracks, destroy, hide, or alter evidence. As set out above, Ms. Henry's actions demonstrate many of the traditional badges of fraud.

164 For all of these reasons, I conclude that there is a significant risk that the Henry defendants will further dissipate assets absent a continuation of the injunction.

Risk of irreparable harm

165 For of the reasons set out above, I am satisfied that the plaintiff has demonstrated that it will suffer irreparable harm if the injunction is not granted. The normal basis for irreparable harm in cases of this kind is that, if the defendant's assets are not secured, there will be no way for the plaintiff to collect on a money judgment: East Guardian SPC v. Mazur, 2014 ONSC 6403, 64 C.P.C. (7th) 90, at para. 41; *OPFFA* , at para. 25. This principle applies strongly in this case.

Balance of convenience

166 In their factum, the Henry defendants submit that the *Mareva* injunction has caused them severe financial distress. They also note that Ms. Henry has been notified by a credit agency that her credit score has dropped and that certain mortgagees have charged penalties because certain mortgage payments were declined due to the effect of the *Mareva* order.

167 I do not wish to understate the inconvenience of the *Mareva* injunction. The injunction has been adjusted over time to ensure that the month-to-month necessities may be paid. The Henry defendants may apply to the court as necessary to ensure that existing mortgages and properties are serviced.

168 I have considered their other submissions in assessing the balance of convenience. In this case, the balance of convenience strongly favours the plaintiff.

Certificates of pending litigation

169 A two-part test governs the issuance of a CPL. First, the court must determine whether the plaintiff has a triable claim to an interest in land. Second, the court must consider all relevant factors between the parties, including whether damages would be a satisfactory remedy, and balance the interests of the parties in the exercise of its discretion as to issue a CPL: Shirkhodaeitari v. Farkhondeh, 2022 ONSC 3864, at para. 16; Rahbar v. Parvizi, 2022 ONSC 1104, at para. 20.

170 In this case, for the reasons set out above, the plaintiff has demonstrated that they are likely to succeed on their claims against the Henry defendants. It is undisputed that the property in question was purchased with funds obtained from Dr. Waters. Given the potential availability of tracing and other equitable remedies, the plaintiff has a triable claim to an interest in that property.

171 Considering all the relevant factors between the parties, and balancing the interests of the parties, the certificates of pending litigation should remain in place until trial. In reaching this decision, I rely on the same findings that supported the *Mareva* order.

Conclusion

172 For the reasons set out above, I dismiss the Henry defendants' motion to set aside the *Mareva* injunction order issued by Myers J., as amended. I also dismiss the Henry defendants' motion to discharge the registration of the certificates of pending litigation on the properties listed in the order of Myers J.

173 If the parties are not able to resolve costs, the plaintiff may deliver its costs submission of no more than five double-spaced pages to be emailed to my assistant on or before October 3, 2022. The Henry defendants may deliver a single responding submission of no more than five double-spaced pages on or before October 10, 2022. No reply submissions are to be delivered without leave.

Footnotes

1 Orders of Morgan J. dated June 17, 2022, Myers J. dated July 7, 2022, and Vermette J. dated July 21, 2022.

TAB 14

2020 ONSC 1925
Ontario Superior Court of Justice

Christian-Philip v. Rajalingam

2020 CarswellOnt 4295, 2020 ONSC 1925, 317 A.C.W.S. (3d) 669, 58 C.P.C. (8th) 146

Leeroy Christian-Philip and Anusha Kanagasabai (Plaintiffs) and Varatharajan Rajalingam, Kosalai Annalingam, and Max Crossroads Realty Incorporated (Defendants)

S.T. Bale J.

Heard: February 6, 2020
Judgment: March 30, 2020
Docket: 142/18

Counsel: Gerald Matlofsky, for Plaintiffs
Stephanie Turnham, for Defendants, Rajalingam and Annalingam

Subject: Civil Practice and Procedure; Contracts; Property
Related Abridgment Classifications
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.7 Evidence on motions and applications
XIV.7.c Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.3 Security for costs
XXIV.3.e Grounds for refusal to order security
XXIV.3.e.iii Miscellaneous
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets
Headnote
Remedies --- Injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets
Vendors entered into agreement to sell property to purchasers, who did not complete sale — Purchasers brought action against vendors alleging misrepresentation — Vendors brought action against purchasers for failure to complete sale — Order was made that both actions be tried together — Vendors obtained Mareva injunction without notice to purchasers, covering all of their property, though injunction was subsequently amended to include only real estate — Vendors brought motion, in part, for order continuing injunction — Motion granted in this respect — Vendors had strong prima facie case as misrepresentations alleged by purchasers occurred prior to negotiations, and parties signed agreement that contained entire agreement clause — Purchasers had assets in jurisdiction — Four properties were sold by purchasers following scheduled closing of subject transaction; purchasers denied this was to put assets out of reach of vendors but offered no evidence to rebut vendors' assumptions arising from timing of sales — If assets were removed or dissipated this would affect vendors' ability to recover judgment — Purchasers undertook not to sell remaining properties so continuation of injunction would not prejudice them — Purchasers accused vendors of making material non-disclosures with respect to number of meetings between parties, who attended meeting, acquaintance with purchasers' counsel and their financial difficulties, but none of these issues were material to matters before judge.
Civil practice and procedure --- Costs — Security for costs — Grounds for refusal to order security — Miscellaneous

Issues in actions same — Vendors entered into agreement to sell property to purchasers, who did not complete sale — Purchasers brought action against vendors alleging misrepresentation — Vendors brought action against purchasers for failure to complete sale — Order was made that both actions be tried together — Vendors obtained Mareva injunction without notice to purchasers, covering all of their property, though injunction was subsequently amended to include only real estate — Vendors brought motion, in part, for security for costs — Motion dismissed in this respect — Order that actions would be tried together included order that documentary and oral discovery would be common to both actions — Issues in both actions were identical — Defendants had right to defend action without posting security and, given purchasers' counterclaim was essentially reiteration of their defence in vendors' action, it was appropriate to exercise discretion and not order security for costs.

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Miscellaneous

New evidence — Vendors entered into agreement to sell property to purchasers, who did not complete sale — Purchasers brought action against vendors alleging misrepresentation — Vendors brought action against purchasers for failure to complete sale — Order was made that both actions be tried together — Vendors obtained Mareva injunction without notice to purchasers, covering all of their property, though injunction was subsequently amended to include only real estate — Vendors brought motion, in part, to file new evidence — Motion dismissed in this respect — Following hearing of injunction motion, while judgment was reserved, vendors sought to file purported translation and transcript from meeting during which they said certain admissions were made by purchasers — This evidence would not have affected outcome of motion — Conversation was difficult to comprehend and had many gaps — Vendors knew record existed and could have obtained evidence sooner.

Table of Authorities

Cases considered by *S.T. Bale J.*:

Bank of Nova Scotia v. Villafuerte (2007), 2007 CarswellOnt 523, 52 R.P.R. (4th) 148, 26 B.L.R. (4th) 160 (Ont. S.C.J.) — referred to

Bell Canada v. Rogers Communications Inc. (2009), 2009 CarswellOnt 4536, 76 C.P.R. (4th) 61 (Ont. S.C.J.) — referred to

Fairfield Sentry Ltd. v. PricewaterhouseCoopers LLP (2015), 2015 ONSC 4961, 2015 CarswellOnt 12088, 78 C.P.C. (7th) 155 (Ont. S.C.J. [Commercial List]) — referred to

Girsberger v. Kresz (1998), 1998 CarswellOnt 915, 19 C.P.C. (4th) 57 (Ont. Gen. Div.) — referred to

HTS Engineering Ltd. v. Marwah (2019), 2019 ONSC 6351, 2019 CarswellOnt 18938, 170 C.P.R. (4th) 194 (Ont. S.C.J.) — referred to

O2 Electronics Inc. v. Sualim (2014), 2014 ONSC 5050, 2014 CarswellOnt 12203 (Ont. S.C.J.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Scott v. Cook (1970), [1970] 2 O.R. 769, 12 D.L.R. (3d) 113, 1970 CarswellOnt 253 (Ont. H.C.) — referred to

Sibley & Associates LP v. Ross (2011), 2011 ONSC 2951, 2011 CarswellOnt 4671, 334 D.L.R. (4th) 645, 106 O.R. (3d) 494 (Ont. S.C.J.) — referred to

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 150 O.A.C. 12, 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, (sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.)* 2002 C.L.L.C. 210-013, 55 O.R. (3d) 782, 2001 CSC 59 (S.C.C.) — referred to

MOTION by vendors for continuation of Mareva injunction, security for costs and to file new evidence.

***S.T. Bale J.*:**

1 On a motion without notice, the plaintiffs obtained an interim *Mareva* injunction restraining the defendants Rajalingam and Annalingam [1] from dissipating, transferring or encumbering their assets. On a motion with notice to continue the injunction, I reduced the scope of the affected assets, but otherwise reserved judgment. The plaintiffs have also moved for an order for security for costs, and subsequent to the hearing of the two motions, they moved for an order permitting them to file fresh evidence.

2 For the following reasons, the injunction will be continued, but both the motion for the filing of fresh evidence and the motion for security for costs will be dismissed.

Background facts

3 The plaintiffs, as vendors, and the defendants, as purchasers, entered into an agreement of purchase and sale dated April 4, 2017, with respect to 121 Woodview Drive, Pickering. The sale price was $2,500,000, and the agreement was to be completed on July 26, 2017.

4 The agreement was conditional upon financing, a home inspection, and approval of the terms of the agreement by the purchasers' solicitor. On April 13, 2017, the purchasers waived those conditions.

5 On July 24, 2017, the purchasers requested an extension of the closing date to August 4, 2017. Their request was denied, and on July 26, 2017, they failed to complete the agreement.

6 On January 22, 2018, Rajalingam and Annalingam commenced an action against Christian-Philip and Kanagasabai. The basis of their claim was that they had entered into the agreement of purchase and sale in reliance on misrepresentations made by Christian-Philip, Kanagasabai and their real estate agent. On February 2, 2018, Christian-Philip and Kanagasabai commenced this action against Rajalingam and Annalingam, based upon their failure to complete the agreement. The two actions were later ordered to be tried together, or one after the other, as the trial judge may direct.

7 On a motion without notice heard on January 27, 2020, the plaintiffs obtained an interim *Mareva* injunction. The injunction covered all the defendants' property. It was registered against the title to two properties owned by Rajalingam and froze the defendants' bank accounts at Royal Bank of Canada. The order put in jeopardy the closing of a sale of a restaurant, potentially exposing the defendants to litigation, and the freezing of the bank accounts caused automatic debits to be dishonoured. On a motion to continue the injunction heard on February 6, 2020, I reduced the scope of the injunction to cover the real estate, only, without opposition from the plaintiffs.

Analysis

8 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the court articulated a three-part test for obtaining an interlocutory injunction: (1) whether the plaintiff has presented a serious issue to be tried, or in some cases, a strong *prima facie* case; (2) whether the plaintiff will suffer irreparable harm if the injunction is not granted; and (3) whether the balance of convenience favours the granting or refusing to grant the injunction.

9 The test to obtain a *Mareva* injunction includes several additional factors: the plaintiff must establish: (1) a strong *prima facie* case; (2) that the defendant has assets in the jurisdiction; (3) that there is a serious risk that the defendant will remove property or dissipate assets before judgment; (4) that the plaintiff will suffer irreparable harm if the injunction is not granted; and (5) that the balance of convenience favours granting the injunction.

10 The three-part test in *RJR-MacDonald* is a wholistic set of factors and not three separate and distinct requirements. The three factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another: *Bell Canada v. Rogers Communications Inc.*, [2009] O.J. No. 3161 (Ont. S.C.J.), at para. 39. In my view, the same wholistic approach is required in the *Mareva* context where the test includes the additional factors noted above.

Strong prima facie case

11 The plaintiffs have established a strong *prima facie* case.

12 The defendants' position is that they were induced to enter into the agreement of purchase and sale by misrepresentations made by the plaintiffs' agent with respect to the value of the property, that the misrepresentations were made in the course of the agent's employment, and that the plaintiffs are therefore liable for those misrepresentations. [2]

13 However, the alleged misrepresentations were made prior to or during the negotiations resulting in the agreement of purchase and sale, and the agreement contained an "entire agreement" clause, the effect of which is to exclude representations made prior to the signing of the agreement.

14 I also note that the defendants did not provide any evidence in support of their defence, other than to say that they stand by the facts set out in their pleadings.

Assets in the jurisdiction

15 The defendants have assets in Ontario.

Serious risk that the defendants will remove property or dissipate assets before judgment

16 A *Mareva* injunction should issue only if it is shown that the defendant's purpose in dissipating assets, or removing them from the jurisdiction, is to avoid judgment.

17 This requirement may be established by inference, as opposed to direct evidence. It is sufficient to show that all the circumstances demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff: *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.), at para. 63.

18 Evidence of prior fraudulent conduct may support a reasonable inference that there is a real risk that the conduct will continue: *Sibley*, at para. 64.

19 The plaintiffs argue that a real risk that the defendants will attempt to dissipate or hide their assets may be inferred from a pattern of asset disposition in the period subsequent to the defendants' failure to complete the agreement.

20 Prior to the aborted sale, the defendants owned six properties which I will refer to as Walker, 455 Sheppard, Westgate, Rouge Valley, Tywn River and 622 Sheppard. Four of those properties have since been sold, each for a substantial profit.

21 Walker had been purchased by Rajalingam in June 2015. He listed it for sale on July 24, 2017 and sold it on October 11, 2017. According to the parcel register, the purchaser mortgaged the property for a sum greater than the sale price. The plaintiffs submit that I should conclude that the sale price was actually higher than the amount shown, that the defendants had attempted to keep the true proceeds of sale secret in order to impede their ability to satisfy a judgment, and that the defendants had obtained a "hidden payment". This is mere conjecture. There are any number of possible explanations for what appears to be a discrepancy between the sale price and mortgage amount, including the possibility that the purchasers gave further security for the loan.

22 Four fifty-five Sheppard had been purchased by Rajalingam in November 2016. He listed it for sale on August 3, 2018 and sold it on September 28, 2018.

23 Annalingam purchased Westgate in December 2015 and sold it in January 2019. She says that a portion of the proceeds of this and other sales was used both to discharge their mortgages on 622 Sheppard and to invest in her restaurant business.

24 Annalingam purchased Rouge Valley in June 2015 and sold it on May 30, 2019. It was a private sale. The plaintiffs argue that the sale was done privately in order that they would not be aware that she was liquidating her assets and suggest that the defendants may intend to sell other properties by private sale in order to liquidate assets without their knowledge. This again is mere conjecture.

25 Rajalingam continues to own Twyn River. It is the defendants' home and he swears that he has no intention of selling it. Similarly, he continues to own 622 Sheppard. It is currently rented and he swears that he has no intention of selling it. He has provided the plaintiffs with a written undertaking not to sell or further encumber the properties pending the final disposition of the action.

26 Rajalingam incorporated 2407058 Ontario Inc. in February 2014 and in March 2014, the corporation registered the business name "Black Bear Pub & Grill". In September 2017, the records filed with the Ministry of Government and Consumer Services were changed to show Annalingam's brother as the principal of the corporation, and in October 2017, the business name used by the corporation was changed to "King's Castle Bar and Grill". The plaintiffs suggest that there was something suspicious about the transfer of the corporation to her brother. However, as explained by Rajalingam, after he was charged with trafficking cocaine at the restaurant, the liquor licence prohibited him from being there. The charges were later withdrawn, but on condition that he continue to stay away from the premises.

27 In February 2018, Annalingam incorporated 2619030 Ontario Inc. and in August 2018, the corporation registered the business name "Queen's Castle Restaurant and Bar. The plaintiffs say that they believe that some or all the proceeds of sale of Westgate were transferred on a non-arm's length basis to 2619030 Ontario Inc., in whole or in part to put them beyond the reach of a judgment. However, there is nothing wrong with investing one's own money in a corporation by which one carries on a business. And the suggestion that it was done in order to defeat any judgment obtained by the plaintiffs is again mere conjecture.

28 Queen's Castle Restaurant and Bar was sold on February 14, 2020. Notwithstanding that the restaurant was listed and sold through a business broker, the plaintiffs speculate that the actual sale price exceeded the reported sale price. Annalingam's explanation for the sale is that the restaurant was losing money and that the sale was not for the purpose of defeating creditors.

29 In March 2010, Rajalingam was convicted of defrauding CIBC, RBC, TD and Sears Financial of a total of $13,041, and received a one-year conditional sentence. In September 2017, Rajalingam was charged with five counts of trafficking cocaine and three counts of possessing proceeds of property knowing that they had been obtained by the commission of an indictable offence. In March 2018 the charges were stayed. The plaintiffs say that as a result of the fraud conviction and the drug charges they believe that "Rajalingam and Kosalai have the knowledge, experience and proclivity to fraudulently convey assets and to make any judgment that my wife and I may obtain against them of no practical value." I agree that the fraud conviction shows that Rajalingam is capable of dishonesty; however, I must take into consideration the fact that it was ten years ago. The stayed drug charges are not relevant.

30 When one looks past the conjecture and speculation in which the plaintiffs have engaged, what one is left with is the sale of four properties following the scheduled closing of the aborted transaction, the transfer of a restaurant business to a relative for nominal value, the sale of a restaurant business which the defendants say was unprofitable, and an unrelated and dated conviction of one of the defendants for fraud.

31 Although the defendants deny that the sales of the properties were for the purpose of putting assets out of the reach of the plaintiffs, they offer no explanation to rebut any inferences which may be drawn from the timeline.

32 Whether, based upon this evidence, the risk of removal or dissipation of assets is sufficient to establish "serious risk" will depend upon a consideration of this evidence in the context of the other elements of the test.

Irreparable harm

33 Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other: *Bell Canada v. Rogers Communications Inc.*, [2009] O.J. No. 3161 (Ont. S.C.J.), at para. 31. The probability of irreparable harm increases as the probability of recovering damages decreases: *HTS Engineering Ltd. v. Marwah*, 2019 ONSC 6351 (Ont. S.C.J.), at para. 200.

34 In the absence of any evidence of a means to satisfy a judgment if the assets identified by the plaintiffs were removed from the jurisdiction or dissipated, it appears that the plaintiffs would suffer irreparable harm if they obtain judgment and those assets were removed or dissipated.

Balance of convenience

35 The remaining two assets subject to the injunction are the defendants' home and the Sheppard rental property. The defendants have sworn that they have no intention of selling those properties pending final disposition of this action and have undertaken not to do so. If the defendants do not intend to sell the properties, a continuation of the injunction will not be a cause of inconvenience. The balance of convenience therefore favours the plaintiffs.

Failure to make full disclosure

36 A *Mareva* injunction may be set side for failure to disclose all material facts on a motion without notice. Material facts are those that the judge may need to arrive at a decision, nondisclosure of which may affect the outcome: *Girsberger v. Kresz*, [1998] O.J. No. 911 (Ont. Gen. Div.), at para. 29; *O2 Electronics Inc. v. Sualim*, 2014 ONSC 5050 (Ont. S.C.J.), at pars. 71-75.

37 The defendants argue that the plaintiffs failed to disclose material facts on their motion without notice. They say that the plaintiffs should have disclosed that there were four meetings between the parties prior to the one in which Christian-Philip alleges that Rajalingam made certain admissions, and that they should have disclosed that the lawyer whom they allege had advised the defendants to dissipate their assets was an acquaintance of Christian-Philip. I disagree. I do not see how the fact that the parties had had prior meetings would affect the *ex parte* motion judge's consideration. And the fact that the lawyer said to be advising the defendants was an acquaintance of Christian-Philip would be material if the information was said to have come from him, but here, the information was said to have come from Rajalingam himself.

38 The defendants argue that the plaintiffs should have disclosed that Rajalingam attended the meeting alone, at the request of Christian-Philip, notwithstanding that Annalingam had attended the prior meetings. Again, I do not see how that would have affected the *ex parte* motion judge's consideration.

39 The defendants also argue that in giving his undertaking as to damages, Christian-Philip should have disclosed that he is insolvent. However, the evidence upon which they rely is simply evidence that the plaintiffs have been having a hard time financially since the aborted transaction, with no consideration of the assets that they may have to support the undertaking.

Decision on motion to continue the injunction

40 Taking the required wholistic approach to the consideration of the evidence relating to each step of the test, I have decided that the interim order I made on February 6, 2020 will be continued, pending final disposition of the action or further order of the court.

Motion to receive fresh evidence

41 This injunction motion was first made, without notice, on January 24, 2020, at which time Corkery J. adjourned it to February 6, 2020, to be brought on notice. Following the hearing, Christian-Philip arranged to meet with Rajalingam the next day. He then swore a supplementary affidavit in which he attributed a number of admissions to Rajalingam. Counsel then appeared before Corkery J. a second time, again on a without notice basis, and the interim injunction was granted.

42 In the defendants' responding materials, Rajalingam denied having made the admissions attributed to him by Christian-Philip. He said that the meeting was just one of a number of meetings in which settlement was discussed. In the result, when I reserved judgment on February 6, 2020, I was left with contradictory evidence on the issue of whether Rajalingam had made the admissions attributed to him.

43 On February 10, 2020, while my judgment remained under reserve, I received a letter from counsel for the plaintiffs enclosing an affidavit sworn by Christian-Philip to which was attached a transcript purporting to be a translation and transcription of the meeting held on January 25 (apparently the conversation had been in the Tamil language). In the letter, counsel asked that I consider the transcript as a "further submission". I declined to do so and referred him to paragraphs 36 and 62 of the *Principles of Civility for Advocates* published by The Advocates' Society. [3]

44 The plaintiffs then moved for an order permitting the transcript to be filed. I heard the motion on March 11, 2020 and reserved my decision. For the following reasons, the motion is dismissed.

45 Until judgment is entered, a judge has the discretion to reopen the case after the conclusion of evidence in order to admit further evidence. The overriding consideration is that a miscarriage of justice must be avoided. There is a two-part test: first, would the evidence, if presented at trial, probably have changed the result; and second, could the evidence have been obtained before trial by the exercise of reasonable diligence: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.), at para. 20; *Scott v. Cook*, [1970] 2 O.R. 769 (Ont. H.C.).

46 On February 6, 2020, I began by asking counsel for the plaintiffs whether he would be requesting an adjournment to allow cross-examinations or whether he intended that the motion be argued on a final basis. He replied that his intention was to argue the motion on a final basis. Counsel for the defendants was content to proceed in that fashion, and we did.

47 The first that it was made known to me that there was a recording of the January 25, 2020 meeting was when I received counsel's letter of February 10 enclosing a copy of the transcript. As I understand it, this was also the first that counsel for the defendants had heard of it.

48 The meeting was approximately one hour in length. However, the transcript produced by the plaintiffs covers only 22 minutes and 50 seconds. Christian-Philip says that he commenced the recording part way through the meeting.

49 With respect to the first part of the test, the transcript, when considered in the context of all the evidence presented on the motion, would not have affected my disposition of the motion. Although some of the conversation could be interpreted in the way the plaintiffs suggest, it is difficult to comprehend, appears to contain many gaps, and as previously indicated, covers less than half the conversation.

50 With respect to the second part of the test, counsel for the plaintiffs argues that the transcript could not have been obtained before the hearing of the motion, by the exercise of reasonable diligence, because it had not then been prepared. I disagree. The defendants knew that they had a recording of at least a part of the meeting. Had they thought that the recording was important to my decision, they could have requested an adjournment for the purpose of obtaining a translation, particularly when they were invited to make such a request. Instead, they failed to disclose the existence of the recording and proceeded with the hearing of the motion.

Security for costs

51 Christian-Philip and Kanagasabai move for an order for security for costs in the action in which they are defendants. The motion is dismissed. The order that the two actions be tried together also provides that both documentary and oral discovery be common to both actions. The issues in the two actions are identical. The claim of Rajalingam and Annalingam is the same as their defence to the claim of Christian-Philip and Kanagasabai. Defendants have the right to defend without having to post security for costs. Where a counterclaim is in substance a reiteration of the plaintiff by counterclaim's defence to the main action, the court may exercise its discretion to deny a motion for security for costs: *Fairfield Sentry Ltd. v. PricewaterhouseCoopers LLP*, 2015 ONSC 4961 (Ont. S.C.J. [Commercial List]), at para. 9. The same principles apply in the circumstances of this case.

Disposition

52 For the reasons given, there will be an order that the interim injunction granted on February 6, 2020 be continued until the final disposition of this action or further order of the court, and an order dismissing the motion for the filing of fresh evidence and the motion for security for costs.

53 If the parties are unable to agree on costs, I will consider brief written argument provided that it is delivered electronically to my judicial assistant no later than May 10, 2020.

Motion granted in part.

Footnotes

1 As Max Crossroads Realty Incorporated is not a party to the motion, I refer to the defendants Rajalingam and Annalingam as "the defendants".

2 See *Bank of Nova Scotia v. Villafuerte*, [2007] O.J. No. 330 (Ont. S.C.J.) at paras. 21*f.*

3 Since replaced by the *Principles of Civility and Professionalism for Advocates* (February 20, 2020).

End of Document

TAB 15

2019 ONSC 4622
Ontario Superior Court of Justice [Commercial List]

HZC Capital Inc. v. Lee

2019 CarswellOnt 12654, 2019 ONSC 4622, 309 A.C.W.S. (3d) 171

HZC CAPITAL INC., LALU CANADA INC., BIRCHMOUNT LAWRENCE LIMITED PARTNERSHIP, MSR LALU JACKSON POINT INC., LALU 26 BENSON HOLDINGS INC., LALU 10366 YONGE STREET HOLDINGS INC., 1053 16TH AVENUE DEVELOPMENT INC., MCMURRAY MUSKOKA DEVELOPMENTS INC., and 2603774 ONTARIO INC. (Plaintiffs) and GERARD LEE, TONGFANG (CATHY) JIANG, 1435501 ONTARIO INC., 2505805 ONTARIO INC., MASONIC EAST INC., MICHAEL BOWERING, 1483008 ONTARIO INC., MUTUAL GAIN PROJECT MANAGEMENT INC., DOMENIC DI GIRONIMO, ULTIMATE GOLF CENTERS INC. (c.o.b. ULTIMATE DEVELOPMENTS), ALDO PICHETTI, URBAN VISTA DEVELOPMENTS INC., ANTONIO PIAZZA, 2532298 ONTARIO INC., PHILIP LEFKO and LEFKO LAW PROFESSIONAL CORPORATION (Defendants)

L.A. Pattillo J.

Heard: July 23, 2019; July 24, 2019
Judgment: August 2, 2019
Docket: CV-18-00611373-00CL

Counsel: Chris G. Paliare, Kris Borg-Olivier, Hailey Bruckner, for Plaintiffs
Brendon Wong, Ian Matthews, Teagan Markin, Breanna Needham, for Defendants, Gerard Lee and 2505805 Ontario Inc.
M. Donsky, S. Green, for Defendants, Dominic Di Gironimo, Ultimate Golf Centres Inc. (c.o.b. Ultimate Developments) and Urban Vista Developments Inc.
Justin Necpal, for Defendants, Tongfang (Cathy) Jiang, 1435501 Ontario Inc. and Masonic East Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts
Related Abridgment Classifications
Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.iii Real risk of removal of assets
Headnote
Remedies --- Injunctions — Mareva injunctions — Threshold test — Strong prima facie case
Plaintiffs were group of related real estate investment companies that were allegedly victims of fraud perpetrated by number of defendants — Plaintiffs brought action against defendants for relief for breach of contract, breach of fiduciary and statutory duties, conspiracy, and fraud — Plaintiffs brought motion for Mareva injunction freezing assets of certain defendants — Motion dismissed — Plaintiff established strong prima facie case only against defendant L, and there was no real risk of defendants' assets being put out of reach — Defendant L had improperly received acquisition fees as part of his compensation for successful real estate transactions he had brought to primary plaintiff — Payments had been concealed such that plaintiffs could not be said to have been aware of them — Transactions involving defendant J, who was L's spouse, and defendant companies connected with her appeared to be legitimate transactions known by primary plaintiff with no concealment — Evidence concerning defendant D and defendant companies connected with him raised credibility issues and at best established prima facie case rather than strong prima facie case.
Remedies --- Injunctions — Mareva injunctions — Threshold test — Real risk of removal of assets

Plaintiffs were group of related real estate investment companies that were allegedly victims of fraud perpetrated by number of defendants — Plaintiffs brought action against defendants for relief for breach of contract, breach of fiduciary and statutory duties, conspiracy, and fraud — Plaintiffs brought motion for Mareva injunction freezing assets of certain defendants — Motion dismissed — Plaintiffs established strong prima facie case only against defendant L, and they provided no evidence of real risk of defendants' assets being removed from jurisdiction or disposed of in jurisdiction or otherwise being put out of reach — While court could infer risk of dissipation where fraud was established based on all circumstances, circumstances of present case did not demonstrate serious risk of dissipation — L and another defendant had strong roots in jurisdiction and had commenced separate actions against primary plaintiff in respect of monies allegedly owing to them, which exceeded plaintiffs' claims against them — Plaintiffs had not brought motion for almost year after becoming aware of fraud — Plaintiffs' submission that there was real risk that defendants would have insufficient assets to satisfy any judgment was not supported by any evidence, and balance of convenience favoured not granting order.

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985 CarswellMan 379 (S.C.C.) — considered

Chitel v. Rothbart (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, 1982 CarswellOnt 508 (Ont. C.A.) — referred to

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

East Guardian SPC v. Mazur (2014), 2014 ONSC 6403, 2014 CarswellOnt 15935, 19 C.B.R. (6th) 317, 64 C.P.C. (7th) 90 (Ont. S.C.J.) — considered

Rana v. Malik (2014), 2014 ONSC 701, 2014 CarswellOnt 1173 (Ont. S.C.J.) — considered

SFC Litigation Trust (Trustee of) v. Chan (2017), 2017 ONSC 1815, 2017 CarswellOnt 4336, 46 C.B.R. (6th) 253, 137 O.R. (3d) 382 (Ont. Div. Ct.) — referred to

Sibley & Associates LP v. Ross (2011), 2011 ONSC 2951, 2011 CarswellOnt 4671, 334 D.L.R. (4th) 645, 106 O.R. (3d) 494 (Ont. S.C.J.) — considered

Weyerhaeuser Company Limited v. Ontario (Attorney General) (2017), 2017 ONCA 1007, 2017 CarswellOnt 20156, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175 (Ont. C.A.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

MOTION by plaintiffs for Mareva injunction freezing assets of certain defendants.

***L.A. Pattillo J.*:**

Introduction

1 This is a motion by the plaintiffs for an asset freezing order (*Mareva* injunction) against the defendants Gerard Lee, 2505805 Ontario Inc., Dominic Di Gironimo, Ultimate Golf Centres Inc. (c.o.b. Ultimate Developments), Urban Vista Developments, Tongfang (Cathy) Jiang, 1435501 Ontario Inc. and Masonic East Inc. (together the "Responding Defendants") arising out of alleged fraudulent activities by the said defendants against the plaintiffs in respect of some or all of six different development projects (the "Motion").

2 On the initial return of the Motion on March 7, 2019, on short notice, the plaintiffs and the Responding Defendants consented to an interim Order prohibiting the Responding Defendants along with their employees, servants, officers and directors from dealing with their assets in any way except as set out in the Order until further order of the court at the return of the Motion. The preamble to the Order notes that the consent was a compromise to give all parties time to respond to the Motion on a mutually acceptable timetable.

3 Since the March 7, 2019 Order, in addition to the four-volume motion record initially filed by the plaintiffs, in response, the Lee defendants have filed a 10-volume motion record, the DiGeronimo defendants a two-volume motion record and the Jiang defendants a single volume motion record. In total, there are 10 affidavits from the parties and non-parties, transcripts from seven cross-examinations and numerous documents.

4 At the end of the argument, I dismissed the Motion against the defendants Tongfang (Cathy) Jiang, 1435501 Ontario Inc. and Masonic East Inc. for reasons to follow.

5 For the following reasons, I also dismiss the plaintiffs' Motion against all of the remaining Responding Defendants. Simply put, I do not find, on the evidence before me, that the plaintiffs have met the test required for a *Mareva* injunction to issue.

Background

a) The Parties

6 The plaintiff HZC Capital Inc. ("HZC") is a *Canada Business Corporations Act* ("CBCA") company and serves as an investment vehicle for monies from China. HZC is owned and controlled by Lei (Eric) Guo ("Guo"), Yanfeng (Kevin) Fan ("Fan") and Cheng (Chenny) Ming ("Ming"), who have worked together in the investment business in China for years.

7 The plaintiff Lalu Canada Inc. ("Lalu") is also a CBCA company which is owned 75% by HZC. Lalu was incorporated by the principals of HZC to invest in the Canadian real estate development industry. The initial directors of Lalu were Guo, Fan, Ming and the defendant Tongfang (Cathy) Jiang ("Jiang"). Jiang was terminated as a director in February 2018.

8 At the outset of the relationship between HZC and Lee, Lee was granted a 50% interest in what became Lalu and a seat on the Board. Lee directed that the shareholding and director's position should be held by Jiang. In the end, Jiang, ended up owning 25% of Lalu.

9 The remaining plaintiffs are either subsidiaries or limited partnerships through which Lalu operates. They own the six real estate developments which the plaintiffs say were victims of the defendants' alleged fraud.

10 The defendant Gerard Lee ("Lee") has lived permanently in Canada since 1981 and is a Canadian citizen. He is married to Jiang and they live in Markham, Ontario with their young son. Lee has a BSC from Western University in London, Ontario, and spent six years with the Canadian Armed Forces after which he began a business career. For the past 10 years he has focused on real estate development in Canada.

11 Lee became involved with Lalu in or around July 2015. In November 2015, he was named CEO of Lalu and on or about February 16 2016, he and Lalu entered into a Consulting Services Agreement (the "Lee Consulting Agreement"). Lee was terminated from Lalu on February 26, 2018. The defendant 2505805 Ontario Inc. ("250") is owned and controlled by Lee and is a party to the Lee Consulting Agreement. Lee also owns and controls the defendant 2559037 Ontario Inc. ("255") which he says was incorporated to receive his acquisition fees.

12 Jiang, as noted, is Lee's wife. She is a 25% shareholder in Lalu and was a director of Lalu from 2015 to February 2018. She is also the sole shareholder of the defendant 1435501 Ontario Inc. ("143"), and a director along with her husband. 143 was founded by Lee in 2000. Since approximately 2012, 143's primary business has been seeking out real estate financing opportunities and then seeking investors for those deals. Jiang is also the sole shareholder and director of the defendant Masonic East Inc. ("Masonic East") which was originally involved in the apparel importing business.

13 The defendant Dominic Di Gironimo ("Gironimo") lives in Maple, Ontario and is a graduate of the Schulich School of Business at York University. He was in the land development business for 32 years prior to joining Lalu at Lee's request on April 3, 2017 as Chief Operating Officer (COO). Later in April 2017 he was named Acting Chief Financial Officer because Lalu's CFO had resigned. On June 26, 2017, Di Gironimo and Lalu entered into an Independent Contractor Agreement (the "Di Gironimo Agreement"). Di Gironimo resigned from Lalu on March 12, 2018.

14 The defendants Ultimate Golf Centers Inc. ("Ultimate Golf") and Urban Vista Developments Inc. ("Urban Vista") are owned and controlled by Di Gironimo. Urban Vista was incorporated on July 19, 2017 with the intention that it could provide project management and real estate development services to Lalu and others.

b) Other Individuals/Entities

15 Shoaib Khan ("Khan") was a Vice President and the General Manager of Lalu. He caused both 255 and 2560124 Ontario Inc. ("256") to be incorporated through his sister-in-law, Saira Malik on Lee's instructions. 256 is owned equally by Lee and Khan. Khan has settled with the plaintiffs and has agreed to cooperate.

16 Pradeep (Sunny) Matharoo ("Matharoo") is the owner, a director and the President of MSR Holdings Inc. ("MSR") which is engaged in the business of commercial real estate investment and development. Matharoo had previously worked with Lee on various real estate development projects before he joined Lalu. On the instructions of Lee, Matharoo was involved in the incorporation of 255. Matharoo has also settled with the plaintiffs and agreed to cooperate.

17 Crystal Skyline was a sole proprietorship owned by Luanxi Zhang whose father is a friend of Lee's. It has since been discontinued.

c) The Plaintiffs' Claims

18 The plaintiffs claim that they are the victims of a complex commercial fraud perpetrated by the Responding Defendants across six real estate development projects in which the plaintiffs have an ownership interest, specifically: the Lawrence Project; the Jackson's Point Project, the Yonge/Benson Project, the 16th Avenue Project, the Muskoka Project and the Vaughan Project. The plaintiffs submit that the defendants misappropriated funds from them by way of wrongly receiving illicit payments in the form of acquisition fees, project management fees and inflating the purchase price of properties.

19 The plaintiffs' claims are for breach of contract, breach of fiduciary duty and statutory duties, conspiracy and fraud.

d) The Projects

20 Although the plaintiffs' claims relate to the above six mentioned projects, before me they relied on only four: Jackson's Point, Yonge/Benson, 16th Avenue and Vaughan.

i. Jackson's Point

21 The Jackson Point project involved the purchase of property on Lake Simcoe in the Town of Georgina followed by the subsequent sale of part of the property to the municipality for a marine unit and the development of the remaining portion into a condominium and retail complex.

22 Lee, through 143, sourced the property and developed the concept before joining Lalu. He began working with MSR in early 2015. On October 14, 2016, 143, on behalf of Lalu, entered into an agreement for the purchase and sale for 20 Bonnie Blvd. at Jackson's Point for a purchase price of $4,350,000. The purchase closed on January 20, 2017. Lalu paid the acquisition costs, part of which included a $250,000 acquisition fee to MSR which was paid to MSR on January 31, 2017. On Lee's instructions, on March 2, 2017, MSR paid the $250,000 to 255.

23 On January 1, 2017, Lalu entered into a management agreement with MSR for Jackson's Point which provided, among other things, that MSR would receive a fee of $20,000 per month. Matharoo's evidence is that he had originally agreed with Lee on a fee of $10,000 per month but Lee subsequently told him to charge $20,000 and pay the extra amount back to Lee. From January 2017 to September 2017, MSR paid Lee personally a total of $85,000.

24 Lee denies that the monies he received were kickbacks. He says the monies were for a design build contract he assigned to MSR as well as a $10,000 commission. Matharoo disagrees.

ii. Yonge/Benson

25 The Yonge/Benson project involves two adjacent properties located at 26 Benson and 10366 Yonge Street in Toronto.

26 In early 2017, MSR, which owned 26 Benson through two subsidiaries, approached Lee about selling the property. MSR wanted $4.1 million. Lee's evidence is that his acquisition fee would be $235,000 which he would split 60/40 with MSR. He told MSR that it could either absorb his fee of $125,000 themselves or add it to the purchase price and pass it along to the purchaser. MSR did the latter.

27 On April 27, 2017, Lalu entered into an agreement of purchase and sale to purchase 26 Benson for $4.225 million. The increase in the purchase price of $125,000 from $4.1 to $4.225 million represented Lee's 60% portion of the agreed acquisition fee. The transaction closed on May 11, 2017. On May 17, 2017, MSR paid $141,250 ($125,000 plus HST) to 255.

28 On May 8, 2017, MSR entered into an agreement of purchase and sale to purchase 10366 Yonge Street for $11,900,000. On December 4, 2017, MSR assigned its agreement of purchase and sale to the plaintiff Lalu 10366 Yonge Street Holdings Inc. in exchange for an assignment fee of $500,000. Lee says the $500,000 was considered an acquisition fee and like 26 Benson, Lee was to receive 60% or $300,000 and MSR 40% or $300,000.

29 Lalu's acquisition of 10366 Yonge Street closed on December 20, 2017. On December 22, 2017, Lalu paid MSR the $500,000 assignment fee. Lee's evidence is he never received the $300,000 from MSR.

30 On April 1, 2017, Lalu engaged MSR to assist with the planning and development of the Yonge/Benson properties. Once again, Matharoo says that he and Lee had initially agreed on a fee of $10,000 a month, but Lee told him to raise the fee to $30,000 a month, which he did. After the first two months, Lee asked Matharoo to reduce the fee to $20,000 a month as Lalu was concerned about the amount. Matharoo agreed to reduce the fee as requested. Lee's evidence is that it was Khan who negotiated the management fee, not him.

31 MSR paid 256 the monies that it received from Lalu in excess of $10,000 per month. Lee denies having received any monies from 256. The evidence establishes that Khan received both directly and through his company Clearoute Ventures Inc. more than $180,000 from 256.

iii. 16th Avenue

32 The 16th Avenue project involved an extensive residential development on property located at 1053 16th Avenue in Richmond Hill, Ontario.

33 On March 16, 2017, Jack Zafrani, through his company 1482941 Ontario Inc. ("1482"), entered into an agreement of purchase and sale for the purchase of 16th Avenue for $31 million with a closing date of August 31, 2017.

34 In or around July 2017, shortly after Di Gironimo began working at Lalu, he met with Zafrani about the potential development of the 16th Avenue property. Subsequently, Lalu agreed to enter into a joint venture with Zafrani whereby 1482 would contribute the 16th Avenue property by assigning its agreement of purchase and sale to the joint venture company. The agreement provided for a $2,500,000 assignment fee of which 50% was to be paid on closing and the balance on obtaining construction financing.

35 Lee's evidence is that he negotiated with Zafrani that the assignment fee would be shared 50% for Zafrani and 50% for him, Di Gironimo and Khan. As between Lee, Di Gironimo and Khan, their portion of the acquisition fee was to be split 60% to Lee and 20% to each of Di Gironimo and Khan.

36 The initial term sheet provided that the $2.5 million assignment fee would be shared 50/50 between Zafrani and Lalu. The final Letter of Intent signed by the parties provided, among other things, that the $2.5 million assignment fee would be paid to Yeda Management Inc. (a Zafrani company) and Urban Vista, as directed by Yeda Management.

37 At the closing of the purchase of the 16th Avenue property in mid-October 2017, the joint venture company, the plaintiff 1053 16th Avenue Developments, paid Yeda Management an assignment fee of $1,250,000 to Yeda Management (the amount agreed to be paid on closing) and, in turn, Yeda Management paid Urban Vista $625,000 or one half of the amount it received.

38 Lee's evidence is that the monies paid to Urban Vista had at least two components: an acquisition fee of $500,000 and a broker fee and potentially a "financing fee". It was agreed that he would receive 60% of the acquisition fee paid to Urban Vista on closing and Khan and Urban Vista would split the remaining 40%. Lee's $300,000 share of the acquisition fee was subsequently paid by Urban Vista at his request to Crystal Skyline. Urban Vista retained $100,000 and Khan received $100,000.

iv. Vaughan

39 The Vaughan project involves the development of a mixed-use condominium and commercial property located at 3812 Major MacKenzie Drive in Vaughan, Ontario.

40 The Vaughan property was owned by Cicchino Holding Limited ("Cicchino"). Lee negotiated the purchase of the property with Cicchino which included the payment to him of an acquisition fee of $500,000 if he were to successfully present the opportunity to an investor.

41 On August 4, 2017, Lalu and Cicchino entered into an agreement of purchase and sale for the Vaughan property for a purchase price of $58,500,000. The agreement subsequently closed on November 30, 2017.

42 By agreement between Lee, Di Gironimo and Khan, the acquisition fee of $500,000 was paid to Urban Vista who retained $50,000 to pay actual expenses. The remaining $450,000 was split 60/20/20 between Lee, Di Gironimo and Khan.

43 As with the 16th Avenue acquisition fee, Lee directed that his $270,000 share be paid to Crystal Skyline.

Analysis

44 A *Mareva* injunction, operating as it does to freeze all the defendant's assets until judgment, is often referred to as an extraordinary remedy. That is because it is a form of execution before judgment which can have extreme negative consequences on the recipient.

45 The factors or guidelines which the court must consider in granting a *Mareva* order are well established. The moving party must establish:

a) A strong *prima facie* case against the defendants;

b) The defendants have assets in the jurisdiction;

c) There is a risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction or otherwise put beyond the reach of the court such that the plaintiff will be unable to realize on a judgment in its favour;

d) The moving party would suffer irreparable harm if the order is not made; and

e) The balance of convenience favours the granting of the order.

See: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.); *SFC Litigation Trust (Trustee of) v. Chan*, 2017 ONSC 1815 (Ont. Div. Ct.).

46 In considering the availability of the *Mareva* order in Canada, Estey J. stated in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), at para. 25:

> .... The overriding consideration qualifying the plaintiff to receive such an order as an exception to the *Lister* rule is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment.

I. Strong Prima Facie Case

47 The plaintiffs submit that the evidence on the Motion establishes a strong *prima facie* case in respect of each of the causes of action pleaded. They specifically rely on fraud, however, for reasons discussed shortly.

48 In response, the Responding Defendants submit that based on the evidence, the plaintiffs have failed to establish a *prima facie* case, let alone a strong *prima facie* case against any of them.

(a) Lee

49 The plaintiffs submit that Lee, as the CEO of Lalu, was governed by the terms of the Lee Consulting Agreement. As CEO his duties included sourcing and presenting real estate developments to Lalu. While the Lee Agreement provides for compensation, nothing in the Agreement entitles Lee to the acquisition fees which he received. Further, in receiving such fees, Lee took deliberate steps to conceal his receipt of them from Lalu to prevent it from discovering his actions.

50 The plaintiffs further submit that Lee's actions in arranging for "kickbacks" from the management agreements signed by MSR in respect of both Jackson's Point and Yonge/Benson were illegal and fraudulent.

51 In response, Lee submits that Lee Consulting Agreement entitled him to receive acquisition fees in respect of deals that he brought to Lalu that Lalu accepted. They formed part of his compensation which was otherwise below market. He also says that the Lalu Board, through Guo, was always aware that he was receiving acquisition fees in respect of projects he brought to Lalu.

52 The Lee Consulting Agreement provides in part:

> • Section 1.3 - Lee (defined as the Principal) will serve in the capacity of CEO of Lalu and its other companies mentioned and that the services will comprise "the overall responsibility and management of the day to day operations of each of the Companies and such other services typically provided by persons acting in the capacity of a Chief Executive Officer ...";
>
> • Section 1.5 — The Services of CEO cannot be delegated to anyone other than a senior employee of 250 (defined as the Consultant) with the same experience, knowledge and skills as Lee, without Lalu's consent;
>
> • Section 2.1 — Lee shall perform the Services in such manner as is in the best interests of each of the Companies and in compliance with all applicable laws;
>
> • Section 3.1 — Compensation, defined as a "Retainer Fee", for the Services in an aggregate amount of $120,000 per annum, paid monthly, in arrears, to 250;

53 The Lee Consulting Agreement contains eight recital paragraphs. Of importance is the last paragraph, (h) which provides:

> The parties acknowledge that the Retainer Fee payable under this Agreement are [sic] under market for the Services (as defined below) and the parties have entered into this Agreement acknowledging that the Consultant and/or the Principal have the opportunity to make an indirect gain through an equity holding in the Partnership independent of this Agreement and the Consultant and the Principal are relying on the Services of the Consultant to realize such other gains.

54 Finally, Article 6, Section 6.1, of the Lee Consulting Agreement headed Acknowledgement, provides that both 250 and Lee have informed them that they have interests in real property with others and have opportunities similar to or the same as

the business of Lalu and that neither 250 nor Lee have any duty or obligation to bring or refer any such real estate projects or opportunities to Lalu and they may compete with Lalu without it being a conflict of interest. The last two sentences of the Section provide:

> For greater certainty, the Consultant and/or Principal may engage in or hold an interest in any other business, venture, investment or activity whether similar to or competitive with the Business of the Companies, or provide services similar to or the same as the Services to any other person or entity and the same shall be deemed not to be a conflict of interest or breach of fiduciary duty or other duty. Each of the Companies hereby consent to any such activities and waive, relinquish, release and renounce any right or claim of participation or accounting or to seek any damages.

55 Lee submits that the payment of acquisition fees is a standard industry practice and the Lee Consulting Agreement contemplates the receipt of acquisition fees in both Recital (h) by the words: "such other gains" and the above concluding part of Section 6.1.

56 The interpretation of a contract involves the determination of the intention of the parties to the contract based on the language of the contract. The principles guiding the interpretation of a contract have been summarized by the Supreme Court in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) and by the Court of Appeal, most recently in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007 (Ont. C.A.) at paras. 64 to 68.

57 Looking at the Lee Consulting Agreement as a whole and also considering the context in which it was executed, I do not agree that it provides for or contemplates the payment of acquisition fees to Lee or 250 in respect of real estate deals that Lee sources for Lalu.

58 Further, when Recital (h) is read by itself, in my view the words "such other gains" at the end of Recital (h) refer to the equity gains both HZC and Lee, through Jiang, were expecting to realize from the real estate transactions Lee was expected to bring to Lalu. That interpretation is also consistent with the context of the Agreement as Lee's compensation included not only the Retainer Fee but also any gain in Jiang's equity stake in Lalu. It did not include acquisition fees for those transactions.

59 Further, Section 6.1 clearly deals with and permits Lee to enter into any real estate transaction with a third party. It does not speak to the real estate transactions he was required to bring to Lalu or, more specifically, his compensation in respect of such deals. Further, nowhere in the compensation section of the Agreement is there any mention of acquisition fees.

60 As a result, I am of the view that Lee was not entitled to receive acquisition fees as part of his compensation for real estate transactions he brought to Lalu and which Lalu subsequently entered. His compensation was the Retainer Fee and the increase in Jiang's equity interest in Lalu, if any. I do not consider that to be unreasonable, given he was also entitled to deal in other real estate transactions with third parties.

61 Lee further states that Guo and through him the Lalu Board were aware that he was receiving acquisition fees in respect of the transactions that he brought to Lalu and specifically with respect to the four transactions relied upon by Lalu before me. Guo denies that he knew that Lee was receiving any acquisition fees for those transactions.

62 While I acknowledge that conflict in the evidence between Lee and Guo cannot be determined by me on this Motion, the strength of Lee's evidence is diminished, in my view, by the evidence of his steps to conceal his receipt of the acquisition fees from Lalu. In every case, Lee's acquisition fee was not paid to Lee or a company controlled by him directly, such that Lalu would have or could have been aware that the acquisition fee, which was part of the overall costs of each project, was being paid to Lee or a company controlled by him. If he told Guo about the acquisition fees, why cause them to be paid to him indirectly?

63 Specifically, the Jackson's Point acquisition fee and the Yonge/Benson acquisition fees were all paid to MSR who then paid them to 155. Similarly, both the 16th Avenue fee and the Vaughan fee were paid to Urban Vista initially.

64 Nor do I accept that the acquisition fees were being paid by the vendor and not Lalu thereby not damaging Lalu. In Jackson's Point, the acquisition fee was paid by Lalu. Further, as occurred with 26 Benson, any acquisition fee paid by the vendor is incorporated into the sale price resulting in Lalu paying it indirectly.

65 I am also concerned about the evidence regarding Lee's involvement in the alleged "kickbacks" in respect of the management agreements for both Jackson's Point and Yonge/Benson. Lee submits that he did not negotiate any such arrangements that he received no monies in respect of Yonge/Benson and that the $85,000 he got from MSR in respect of Jackson's Point was for a partial payment for a design-build contract he assigned to MSR and a $10,000 commission. MSR disagrees with Lee's characterization of the payments. Further, while there is no evidence he personally received monies from MSR concerning the Yonge/Benson management contract, 256, in which he was a co-owner, did.

66 My conclusion that Lee had no right under the Lee Consulting Agreement to acquisition fees together with the evidence of the concealment of the receipt of such fees from Lalu are sufficient, in my view, to establish a strong *prima facie* case of fraud against Lee. In other words, I consider that Lalu is likely to succeed at trial in respect of its claim against Lee concerning his receipt of acquisition fees.

(b) Jiang

67 As noted, Jiang is Lee's spouse and owns 25% of Lalu. The plaintiffs make sweeping allegations of fraud and conspiracy in their statement of claim against the defendants generally which includes Jiang, 143 and Masonic East. However, there is no evidence that Jiang or her companies were involved in any of the dealings concerning the payment of acquisition fees or kickbacks from management fees or that they received any money from those activities.

68 On the Motion, the plaintiffs' allegations against Jiang and her companies concern two transactions:

(1) The payment (which is yet to occur) of a financing fee of $105,000 for a $3 million bridge loan made by 143 to Lalu in 2017 for Yonge/Benson; and

(2) The payment (which is yet to occur) on a $4 million promissory note issued in 2016 by Lalu to Masonic East in connection with the Birchmount Lawrence project.

69 There is evidence before the court to support the finding that the above transactions were legitimate transactions that were known by Lalu and there was no concealment of the Jiang parties' involvement.

70 As a result, and as noted at the outset, I dismissed the Motion against Jiang, 143 and Masonic East at the end of the argument. In my view, the plaintiffs failed to establish a strong *prima facie* case against them.

(c) Di Gironimo

71 The claim against Di Gironimo and his companies, Urban Vista, and Ultimate Golf concerns only their involvement in the 16th Avenue and Vaughan projects. They were not involved in and had nothing to do with the Jackson's Point or Yonge/Benson projects.

72 The plaintiffs submit that Di Gironimo conspired with Lee to improperly obtain acquisition fees and other amounts in respect of both the 16th Avenue project and the Vaughan project and took steps to hide their activity from Lalu. In support of their allegations, the plaintiffs rely specifically on the formation of Urban Vista, changes to the 16th Avenue letter of intent to disguise payment to Urban Vista, Di Gironimo's failure to bring to the Board's attention a valuation of the Vaughan lands obtained a few days before closing, which placed the value of the Vaughan lands well below the agreed purchase price, and Di Gironimo's failure to tell Lalu's lawyer about his involvement in Urban Vista when asked.

73 Di Gironimo's evidence is that he was hired by Lee and at all times acted on the basis that Lee had told him the transactions were known to and approved by the Lalu Board. He submits that the Di Gironimo Agreement, which provides for his compensation in part by way of a "Finders Fee" in respect of business he brings forward to Lalu which results in an actual transaction for Lalu, entitles him to the acquisition fees he received.

74 Di Gironimo further submits there is nothing nefarious or secretive about the incorporation of Urban Vista. It was incorporated to provide project management fees to Lalu in circumstances where Lalu required such services but didn't want to hire the staff. Urban Vista subsequently hired two qualified employees who worked at Lalu's office carrying out project management services for Lalu. The employees were paid by Urban Vista who then billed Lalu. Lalu was aware of who Urban Vista was.

75 Di Gironimo denies that the changes made to the 16th Avenue letter of intent to remove Urban Vista were done to hide its involvement in the transaction. The changes were requested by Zafrani and his company Yeda Management to establish that it was the lead. Di Gironimo further says that he did not keep the Colliers valuation of the Vaughan property from Guo and the Board. Guo knew about it and provided the name of another appraiser, as he was not satisfied with it. Further, the Colliers valuation was received after Lalu had already entered into an agreement to purchase the Vaughan property and was just days away from closing.

76 Finally, Di Gironimo denies he failed to tell Lalu's lawyer about his involvement in Urban Vista. The lawyer's information about the discussion is in the form of his notes of the meeting. The lawyer did not file an affidavit or provide evidence on the Motion. In such circumstances, I am not prepared to draw any conclusion about the encounter.

77 There is no question that there is evidence concerning Di Gironimo and Urban Vista's roles in each of the 16th Avenue and Vaughan projects which raise credibility issues. In my view, the evidence concerning Di Gironimo and his companies is not sufficient, particularly given Di Gironimo's responses to Lalu's allegations, to convince me that the plaintiffs have a strong *prima facie* case against them. At best, in my view, it is a *prima facie* case.

II. Assets in the Jurisdiction

78 There is no issue that the Responding Defendants have assets in the jurisdiction.

III. Real Risk the Responding Defendants Will Dissipate Their Assets

79 The plaintiffs have provided no evidence that there is a real risk of the Responding Defendants' assets being removed from the jurisdiction or disposed of in the jurisdiction or otherwise put out of reach. At the hearing, the plaintiffs pointed to the fact that the monies which Lee received as an acquisition fee for both 16th Avenue and Vaughan and which he directed to Crystal Skyline, were no longer in Crystal Skyline. While that may be the subject of later tracing, it is not evidence of dissipation of assets by Lee.

80 The plaintiffs submit that based on this court's decision in *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, 106 O.R. (3d) 494 (Ont. S.C.J.), dissipation can be inferred from the circumstances and the course of conduct undertaken by the defendants.

81 In *Sibley*, the evidence established that the defendant, a former accounting employee of Sibley, had made payments from the company to his mother over a period of several years totaling in excess of $300,000. The motion judge, Strathy J. (as he then was) found that the evidence established "a very strong *prima facie* case" of fraud, but there was no direct evidence of either the former employee or his mother's financial circumstances or that they were dissipating their assets or proposing to remove them from the jurisdiction.

82 After reviewing the cases dealing with the granting of a *Mareva* injunction, Strathy J. concluded at paragraph 62 of the decision that where all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the

defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff, the court may infer dissipation and/or removal of assets.

83 I do not disagree with Strathy J.'s analysis or his conclusion that the court may infer dissipation of assets where fraud is established based on all of the circumstances. I do not consider, however, that the circumstances of this case, including the fraud, demonstrate a serious risk that the Responding Defendants will dissipate or dispose of their assets such that the requested inference should be drawn. I have reached that conclusion based on the following evidence:

(a) Both Lee and Di Gironimo have strong roots in the jurisdiction, They each were well established in the real estate development business in Ontario before becoming involved with Lalu. Lee for at least 10 years and Di Gironimo for approximately 32 years;

(b) Both the Lee defendants and the Di Gironimo defendants have commenced separate actions against Lalu in respect of monies allegedly owing to them. Lee's action for wrongful termination and withholding of payments was commenced on April 28, 2018 and Di Gironimo's on May 28, 2018. In addition, on May 15, 2018, Urban Vista commenced a lien claim against various Lalu entities;

(c) Lalu became aware of the alleged fraud in or around February 2018 and commenced this action by statement of claim dated December 20, 2018 but took no steps to commence this Motion until February 14, 2019, almost a year after it was aware of the fraud. Notwithstanding the allegations in the Lalu action, there is no evidence of dissipation or any attempt to dispose of any assets by the Responding Defendants because of it;

(d) Lalu submits that it only seeks to recover what it says the Responding Defendants wrongly took from it. In the case of Lee, the evidence establishes that he received $961,000 in total and Di Gironimo received $210,000 through Urban Vista. The claims by both Lee and Di Gironimo exceed the amounts alleged to have been improperly taken from Lalu.

84 As Estey J. stated in *Aetna*, the overriding consideration for a Mareva injunction is the defendants dealing with his or her assets to put them out of the reach of the plaintiff. There is no evidence here that that has or will occur.

IV. Irreparable Harm

85 The plaintiffs submit that, in the absence of the order sought, they will suffer irreparable harm in that there will be insufficient assets against which the plaintiffs can recover any judgment. In support of that submission, the plaintiffs rely on *Rana v. Malik*, 2014 ONSC 701 (Ont. S.C.J.).

86 In *Malik*, the evidence established that while the defendants had some assets in Ontario, they had significant family and business connections in Pakistan, travelled regularly to Pakistan and had transferred significant sums of money from their Ontario bank account to Pakistan. In such circumstances, the court concluded that the plaintiff would suffer irreparable harm in that it would be unable to recover its $2.7 million investment if the defendants' assets were transferred to Pakistan.

87 The facts here are significantly different than in *Malik*. There is no evidence of off shore assets or businesses or any indication the Responding Defendants may move their assets off shore to avoid judgment or that they will not be in a position to pay any judgment ordered. The plaintiffs' submission that there is a real risk the Responding Defendants will have insufficient assets to satisfy any judgment is not supported by any evidence. It is mere speculation and does not establish irreparable harm.

V. Balance of Convenience

88 In *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.), Penny J. at para. 39, described the balance of convenience as a consideration of whether the harm suffered by the applicant if the order is not made exceeds the harm that will be suffered by the respondent if it is.

89 The plaintiffs submit that the balance of convenience favours granting the order. They submit that if the order is not granted the Responding Defendants will be able to put their assets beyond their reach causing them harm. Further, such harm

outweighs any harm to the Responding Defendants arising from the granting of an order preventing them from dealing with their assets. Any "inconvenience" to the Responding Defendants from such order can be offset by the standard *Mareva* order which permits access to living expenses and legal expenses.

90 In my view, the balance of convenience does not favour granting the order. Rather, it favours not granting the order.

91 In the absence of any evidence of the Responding Defendants' assets, the dissipation or removal of assets or any inference in that regard, it cannot be concluded that the Responding Defendants will not have assets sufficient to satisfy any judgment in respect of the alleged wrongful conduct.

92 On the other hand, to freeze the assets of the defendants in respect of a claim against Lee for $961,000 and against Di Gironimo for $240,000 strikes me as being unfair and inappropriate given their longstanding connection and ties to the jurisdiction and the absence of any evidence of dissipation. Such an order could and likely would do irreparable damage to both Lee and Di Gironimo which could not be ameliorated by access to living expenses and legal fees.

VI. The Undertaking

93 The plaintiffs have provided the required undertaking as to damages from HZC. As I have determined that the Motion must be dismissed, I do not have to consider the sufficiency of the undertaking.

94 That said, the proffered undertaking causes me some concern. The undertaking should be of sufficient substance to ensure any damages found by the court to have resulted from the *Mareva* being wrongly issued will be honoured by the plaintiff. Here the evidence from HZC's 2017 tax return is that its liabilities outweigh its assets by several million dollars. Absent better financial information concerning HZC, its undertaking would not be sufficient.

Conclusion

95 For the above reasons, the Motion is dismissed in its entirety against all the Responding Defendants. The March 7, 2019 interim freezing Order is vacated.

96 In the absence of an agreement on costs, the Responding Defendants shall each submit brief written submissions (no more than three double spaced pages) together with a Cost Outline and any supporting material within two weeks of today. The plaintiffs shall reply with brief written submissions (same page length) within a further 10 days.

Motion dismissed.

End of Document

TAB 16

Neutral Citation Number: [2011] EWHC 2782 (Ch)

Case No: HC10C04556

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, London, EC4A INL

Date: 08/11/2011

Before :

THE HON MR JUSTICE FLOYD

- -

Between :

HER MAJESTY'S REVENUE & CUSTOMS	**Claimants**
- and -	
(1) JOHN PAUL COZENS	
(2) TOBY PRICE	
AND 35 OTHER DEFENDANTS	**Defendants**

- -
- -

Mr Stephen Davies QC and **Mr Jeremy Bamford** (instructed by **Howes Percival LLP**) for the **Claimant**
Mr Philip Moser and **Ms Julianne Stevenson** (instructed by **Day Sparkes**) for the **First Defendant**

Hearing date: 6th October 2011

- -

Judgment

Mr Justice Floyd:

1. On 21 December 2010, I granted, on the application of HMRC, and without notice to the first defendant and respondent Mr John Cozens, a worldwide freezing order. The order had a return date for early January 2011, but in the event the parties agreed to successive adjournments of that date, with the order continuing in the meantime. Mr Cozens has now issued an application to discharge the order of 21 December 2010, and the parties have exchanged several rounds of evidence. The matter came back before me on 6 October 2011. The sole issue is whether the freezing order should continue against Mr Cozens. Mr Philip Moser argued the case for Mr Cozens; Mr Stephen Davies QC argued the case for HMRC.

The without notice applications

2. The matter first came before me on 16th December 2010. Prior to the matter being called on in court, I was presented at very short notice with a draft affidavit from the HMRC investigating officer, Ms Susan Grimshaw, running to over 200 pages and supported by 27 volumes of documents. At that stage, HMRC sought freezing injunctions against both Mr Cozens, the first defendant, and Mr Price, the second defendant. The orders were sought in support of claims for unpaid excise duty for which HMRC claimed these defendants were liable. It is fair to say that the

documents at that stage were not arranged as conveniently as the court might be entitled to expect, having regard to the fact that the application had clearly been in gestation for many months. The matter had been placed before the court as a matter of urgency because HMRC had set itself 16th December as the deadline for making the application. The documents were not delivered to court in time for their contents to be adequately digested before the hearing. The timing of the application was prompted by the fact that a limitation period of one year for making the assessment under section 12(4)(b) of the Finance Act 1994 was said to be, in HMRC's view, rapidly approaching. Once the assessment was notified to the defendants, they would be on notice of the claims of wrongdoing against them, and it would be more difficult to justify the grant of a freezing injunction without giving notice to the defendants.

3. The proceedings involve an allegation of what is sometimes referred to as "inward diversion fraud". Duty-suspended alcohol leaves a bonded warehouse in Bordeaux by lorry, ostensibly destined entirely lawfully to a bonded destination warehouse in the UK. However the lorry-load of alcohol never arrives at the UK bonded warehouse, but is "slaughtered", to use the colloquial term, somewhere in the UK. In practice what this means is that the load is diverted, possibly with the connivance of the lorry driver to a destination other than the designated bonded warehouse. The alcohol is then sold on the black market in the UK without payment of any duty.

4. HMRC have been alerted to the alleged fraud in the present case by the French national customs intelligence investigations directorate, Direction Nationale du Renseignement et des Enquêtes Douanières ("DNRED"). I will refer to the alleged fraud as "the Scheme". HMRC say that pursuant to the Scheme, loads were despatched from the premises of a company called STTM Ziegler ("STTM") in Bordeaux. Despatch of the loads is recorded on the Accompanying Administrative Document ("AAD"). The loads were ostensibly held by STTM to the account of three companies: Recette, Overseas Trading and Robbie Hughes.

5. HMRC's case, as presented in their skeleton on 16th December, was that Recette, Overseas Trading and Robbie Hughes were either fronts for Mr Cozens and Mr Price or had had their identities hijacked by them. They drew attention to the fact that Mr Price provided despatch instructions on behalf of Recette to STTM. They were not able to link Mr Cozens with any such despatch instructions, nor were they able to link either Mr Cozens or Mr Price with instructions given by Overseas Trading or Robbie Hughes.

6. HMRC relied in support of its case that this was an inward diversion fraud on the fact that the assessed loads despatched from Bordeaux consisted in the majority of cases of alcohol manufactured in the UK. There was accordingly no obvious commercial reason for the re-importation of that alcohol into the UK.

7. The AADs stated that the destinations of the loads were three bonded warehouses in England and one in Italy, called Magazzini SPA. Magazzini has particular relevance so far as the present allegations against Mr Cozens are concerned. In the case of Magazzini it is alleged that the goods originally set out with an AAD identifying the warehouse in Italy as the destination, but that this AAD was then substituted, whilst the vehicle was *en route* in France, by an AAD identifying Magazzini as the warehouse from which the goods were despatched, with a UK destination warehouse.

8. HMRC alleged in their skeleton argument that Mr Cozens was orchestrating the movement of the loads of alcohol on the ground. They pointed out that the evidence against Mr Cozens showed amongst other things that:

    i) he was present when the lorries were being loaded at STTM;

    ii) he was seen to liaise with drivers prior to their departure from France and to hand them paperwork;

    iii) he was seen to post documentation to a Mr Warner at 63 Yeoman Gardens, which was Mr Cozens' address;

    iv) lorry drivers had envelopes addressed to a business called "Pussy Cats" with which Mr Cozens was or is connected and where he had his office, at 27 Risborough Lane, Folkestone;

    v) he had in his possession (left behind at a hotel in France for its collection) a briefcase containing fake Magazzini stamps and blank AADs such as could be used to make fake AADs identifying Magazzini as the warehouse of despatch.

9. Accordingly HMRC asserted that Mr Cozens had a "central role" in the Scheme. They said that they intended to raise assessments against him in the total sum of £6,128,138.68.

10. So far as Mr Price is concerned HMRC contended that the evidence showed amongst other things that:

    i) he was a director of and directing mind of Recette, one of the consignors and had represented himself as acting on behalf of Recette;

    ii) he may also have acted on behalf of Robbie Hughes;

    iii) he had direct communications with transport providers to organise the importation of loads;

    iv) he corresponded with HMRC about certain intercepted loads;

    v) transport providers had confirmed that Mr Price contacted them to organise transportation of the loads;

    vi) he corresponded with STTM about loads which were purportedly coming from Magazzini;

    vii) he apparently did not care what goods were loaded at STTM.

11. Accordingly HMRC submitted that Mr Price was responsible for organising transport on a day to day basis and could be seen to have had considerable correspondence with the transport providers. At the hearing on the 21st December 2010 Counsel submitted that Mr Cozens was "at the top of the tree as far as we know what the tree is" and that there was "no evidence that there is anybody above Mr Cozens". Ms Grimshaw's affidavit stated that HMRC contended that Mr Cozens and Mr Price were the

directing minds behind the scheme. She pointed in particular to the fact that Mr Price was a director of Recette. At paragraph 8.1 and 8.2 she said that

> "Mr John Cozens is the directing mind behind the Scheme, who is involved in the movement of loads in France from STTM Ziegler, liaising with the drivers, obtaining copy AADs from the drivers, falsifying the AAD3s obtained form the drivers and returning them to STTM Ziegler. In the case of the Magazzini loads Mr Cozens also supplied falsified AADs to the drivers".

> "Mr Toby Price has acted or purported to act on behalf of Recette Limited, as a consignor of duty suspended goods, and was involved in the setting up of an account on behalf of Recette Limited with STTM Ziegler, the giving of instructions to STTM Ziegler to receive duty suspended loads into the Bordeaux warehouse and to release duty suspended loads from the Bordeaux warehouse to particular lorries. He has also been involved in entering into contracts with the transport providers and the giving of instructions to drivers as regards the movement of duty suspended loads from Bordeaux into the UK as part of the Scheme."

12. Such reading as I had been able to do prior to the initial hearing on 16th December 2010 indicated to me that, so far as Mr Cozens was concerned, there was little by way of evidence of significant assets beyond a property said to be worth £146,000 at 33 Burley Hill, Church Langley, Essex ("the Burley Hill property"). The evidence showed that HMRC knew of bank accounts in the name of Mr Cozens but not about what they contained. Ms Grimshaw deposed to the relatively modest income disclosed to HMRC up to 2007, as income earned by Mr Cozens as a taxi driver. As to Mr Price, I pointed out that the evidence did not show he owned any assets at all. Paragraph 283 of Ms Grimshaw's affidavit merely asserted that

> "HMRC believe that he must have some assets, whether in a bank account or otherwise. In particular I note that a Toby (whom I believe to be Toby Price) made various payments to STTM Ziegler."

13. I adjourned the matter to give myself further reading time and to enable HMRC to put the documents in better order.

14. When the matter returned before me on 21 December 2010 HMRC were only seeking relief against Mr Cozens. The application for a freezing order against Mr Price had been abandoned for reasons which I was not given, but which I infer had to do with the fact that HMRC had no evidence that Mr Price had any assets. I asked about the delay in making the application from the time when DNRED provided information in 2009, to the making of the application at the end of 2010. It was said that this delay had been largely caused because HMRC had taken the decision to target the drivers of the lorries, who make up some of the 35 other defendants to this action. Investigation of this had proved a considerable exercise. I was informed that it had originally been the intention to seek freezing orders against all the drivers as well, although that

particular plan had been abandoned, on advice, by the time the application came before me.

15. Counsel submitted that HMRC had no indication or hint whatsoever that anyone else was involved in the Scheme. In the end I was persuaded to grant the order asked for against Mr Cozens. When granting the order I expressed reservations about the proportionality of the approach being adopted by HMRC, particularly having regard to the fact that it might turn out that Mr Cozens' role in all this was a minor one. The existence of the Burley Hill property was plainly a factor I had in mind in granting the order, as there was no evidence of any other significant assets which would justify it. The order contained the usual provision requiring the respondent to disclose the whereabouts of his assets.

The Burley Hill property

16. The evidence that Mr Cozens owned the Burley Hill property came from a proprietorship search at the Land Registry which revealed that *a* John Paul Cozens was the proprietor. Having obtained the freezing order, HMRC entered a restriction against the title to the Burley Hill property. This provoked a response on 4th January 2011 from the John Paul Cozens who owned the property who, as it turned out, was wholly unrelated to the first defendant. At this stage HMRC had not completed service of the voluminous documents in support of the freezing order on Mr Cozens. HMRC sought photographic confirmation of the identity of the owner of the Burley Hill property. They were provided with this confirmation on 6th January, after the evidence had been supplied to Mr Cozens. HMRC then took steps on that day to cancel the restriction against the title of the Burley Hill Property, but did not tell Mr Cozens or the court that they now accepted that the Burley Hill property did not belong to him. They did not in fact acknowledge this fact until July 2011, some six months after the order was obtained and an equal period after they discovered that Ms Grimshaw's affidavit was misleading on this point.

17. The fact that HMRC did not immediately acknowledge their mistake meant that Mr Cozens and his solicitors had to spend time and effort gathering information to make it plain that he did not own this property. However the main significance for the purposes of this judgment of the fact that Mr Cozens does not own the Burley Hill property is that I have to reconsider whether there is sufficient evidence of assets under Mr Cozens' control to justify the making of the order.

HMRC's attitude to Mr Price

18. At some point between December 2010 and July 2011 HMRC's attitude to the involvement of Mr Price appears to have softened. In their skeleton for the hearing in July 2011 HMRC drew attention to the fact that they had been informed orally in the course of a telephone conversation by Mr Price that he and Recette have nothing to do with any of the circumstances to which these proceedings relate, and that Mr Price believed that his and Recette's identities had been hijacked. In the course of that conversation Mr Price stated that Recette dealt in electrical goods and had never dealt in alcohol or with the UK. This denial was put forward as one of a series of reasons for supposing that Mr Cozens was high up the chain of command. In the conversation Mr Price gave an address in Mallorca, Spain and a telephone number in Spain. The evidence contained large numbers of communications between Toby Price, purporting

to act for Recette, and STTM. One of the communications gives a fax number in Spain.

19. The conversation with Mr Price took place on 10th January 2011. However, it plainly did not convince HMRC that Mr Price had no involvement, as the next day they sent Mr Price an email saying that proceedings would shortly be served on him.

20. In fact HMRC had been in touch with Mr Price in 2009 in connection with a mixed load of spirits travelling from the account of Recette at STTM. HMRC had been informed by the driver that the load was from Toby Price of Recette giving an address in Mallorca, Spain (although a different one from that which he gave in 2011). In the course of an exchange of faxes, Mr Price complained about loads of alcohol being detained by HMRC, in sharp distinction with his 2011 denial. Mr Price gave some responses to a questionnaire from HMRC which Ms Grimshaw described as extremely vague and lacking in supporting documentation.

21. The evidence which HMRC obtained from DNRED asserted that it was Mr Price who set up the account with STTM, on the recommendation of an Englishman, a Mr Sandbach. Payments going through STTM's bank accounts are marked as "Toby", Mr Price's first name. In addition Ms Grimshaw asserted that Mr Price had contact with drivers and was also connected in some way with Magazzini.

22. In his third witness statement, Mr Wright, who is the solicitor having the conduct of the matter on behalf of HMRC, says that evidence linking Mr Price to the fraudulent Scheme is not as strong as that against Mr Cozens. He makes no reference to the fact that the evidence showed Mr Price to be connected with the payments being made to STTM.

Mr Cozens' evidence

23. Mr Cozens, in his evidence served since the without notice hearing, contends that he was at all times acting on the instructions of Mr Price. He says that he met Mr Price as a customer of his taxi business and started to act as a courier for Mr Price. He denies that he knew of the fraud or that he was the controlling mind. He points to a reference in one of Mr Price's emails to a "courier, John", and suggests that this was his real role.

24. I have no hesitation in saying that the evidence as a whole persuades me that there is a good arguable case that Mr Cozens knew that he was being used as an operative in a scheme for the illegal importation of duty-suspended alcohol. Despite the fact that Mr Cozens has an explanation for his possession of the brief case which I have considered, his explanation will need to be tested in cross-examination. When one considers the complexity of the Scheme, and in particular the Magazzini variation of it with which Mr Cozens appears to be connected, there is a very serious case for Mr Cozens to answer. It is impossible to say that HMRC have not established to a sufficiently high degree for present purposes, that Mr Cozens was knowingly involved, and Mr Moser did not submit to the contrary. It is not necessary, therefore, for me to rehearse the details of this evidence much further.

25. Mr Moser submitted, however, that it was not established to an appropriate standard that Mr Cozens was "the controlling mind". Such evidence as there was suggested

that he was acting under the orders of Mr Price. It was Mr Price who was connected to Recette, not Mr Cozens. Mr Price controlled the money. When Mr Cozens came under suspicion he was not used any more for the purposes of the Scheme. Mr Moser did not suggest, however that this was a consideration which defeated the application for a freezing order, without more, on the basis that the evidence failed to satisfy the "good arguable case" test. He deployed it differently, saying that a consideration of Mr Cozens' likely role was relevant to other questions. I will return to it in context.

Evidence of assets

26. In addition to the Burley Hill property, Ms Grimshaw's affidavit relied on other assets which HMRC alleged were owned by Mr Cozens. These were:

    i) At paragraph 278 a hint – and no more than that – that Mr Cozens had some interest in 27 Risborough Lane, Folkestone. In HMRC's skeleton it had been suggested that the owner, Valerie Amos, was believed to be the wife of the first defendant. This incorrect suggestion appears to have been made because Mr Cozens' sister was called Valerie. HMRC apparently made the double deduction that Valerie Cozens and Valerie Amos were the same person, and also that Valerie Cozens was Mr Cozens' wife. HMRC's evidence also stated that this address was the last known address of Mr Cozens. In fact he was living at rental accommodation in Yeoman's Gardens, where HMRC officers had visited him.

    ii) At paragraph 279 a reference to his declared earnings as a taxi driver, and to a dividend of some £15,000 in the 06/07 tax year.

    iii) At paragraph 280 a reference to three motor vehicles. One, a Nissan Almeira was owned by Mr Cozens' father. A second, a Vauxhall Omega, was sold by Mr Cozens in the autumn of 2010 for £600. A third, a black Mercedes, was owned by JJ Taxis Folkestone Limited.

    iv) At paragraph 281 a reference to the fact that Mr Cozens was registered at Companies House as a director of the Irish company PMP Cash & Carry Limited. Mr Cozens claims that he is the victim of identity fraud in relation to this company, and that the company registration documents, insofar as they refer to him, have been forged. There is no reference to any shareholding in the company.

    v) At paragraph 282, a reference to a number of bank accounts, although, as I have said, nothing about their contents.

27. Absent the Burley Hill property, there was little in this list which could amount to a substantial asset on which the injunction might bite, unless it turned out that there were substantial sums in the bank accounts. In his affidavit of disclosure, made pursuant to the freezing injunction, Mr Cozens disclosed the balances of three bank accounts with the Halifax amounting in total to some £5000. He also disclosed the fact that he was a 50% shareholder in two companies: firstly, Globel Travel Limited, a booking agent for chauffeur driven cars and luxury coaches in Europe and, secondly JJ Taxis Folkestone Limited.

28. I should pause for a moment to consider the position of Globel Travel. It is common ground that the freezing injunction bites on Mr Cozens' interest in this company. Equally it is common ground that the freezing injunction does not bite on the bank accounts of Globel Travel. However, according to Mr Cozens, Globel's bank account was indeed frozen by the bank. In consequence Mr Cozens' solicitors asked HMRC to confirm that they did not object to payments being made. Lengthy correspondence and repeated requests for specific payments ensued. On 23rd September Mr Cozens' solicitors wrote asking HMRC to confirm unequivocally to the bank that they did not need HMRC's permission to make payments. This they resolutely refused to do.

29. Mr Davies sought to justify this refusal on the basis that it was not for HMRC to bless any specific payment made by the bank. I think this misses the point. The bank regarded the account as effectively frozen. That was wrong. The misconception was affecting the company's ability to trade, and therefore the value of Mr Cozens' shareholding in satisfying any judgment that HMRC might ultimately obtain. The bank did not require HMRC's blessing: only a clear statement that it would not be in contempt of court if it allowed payments out of the account. Mr Davies also drew attention to the fact that some of the requested payments were going to Procars (see below). But once it is accepted that the bank account is not frozen by the order, I do not see how that point can justify HMRC's position.

30. So far as JJ Taxis Folkestone Limited is concerned, Mr Cozens says that he had a falling out with his partner Mr Sackett, and was effectively excluded from the running of the company. He consulted solicitors but was unable to afford to pursue Mr Sackett. Accordingly he doubts whether his interest in JJ Taxis is worth anything.

31. HMRC challenge Mr Cozens' evidence that he has made a full disclosure of his assets. In general terms, they rely on:

    i) the evidence that Mr Cozens has, on their case, been involved in an inward diversion fraud on a substantial scale;

    ii) failure by Mr Cozens to disclose details of his income supported by a suggested reluctance by Mr Cozens to pursue a "hardship application" before the First Tier Tribunal, the tribunal in which Mr Cozens will challenge the assessment;

    iii) the failure to provide requested information about a property in New Zealand;

    iv) failure to disclose an alleged interest in Procars;

    v) failure to disclose an additional Halifax account.

32. The first of these points is one to which I will return, as it formed the basis of what Mr Davies QC described as the issue of principle on this application. The second point is met to some degree by the fact that Mr Cozens has now disclosed a significant quantity of bank statements, obtained from his bank. I do not think that Mr Cozens' desire not to fight on two fronts at the same time, in this court and the tribunal, is much evidence of a desire to conceal anything. The bank statements have, however, given rise to a further suggestion by HMRC that the sums passing through these

accounts are far greater than can be accounted for by Mr Cozens' account of his employment.

33. As to the New Zealand property, Mr Cozens explained that his family emigrated to New Zealand where he lived between 1972 and 1979. At the age of 17 he returned to the UK where he remained until 1993 when, having had two unsuccessful marriages, he returned to New Zealand. He returned to the UK in 2003 and started working as manager of Pussy Cats. According to Mr Cozens, he did assist his sister Susan and her husband, over ten years ago, to purchase a property in New Zealand by taking out a joint mortgage with them. It is clear that he was also registered as an owner. He says that he did not benefit in any way when the property was sold in 2006. HMRC complain that all this is unsupported by documentation.

34. Mr Cozens denies that he has any interest in Procars, although he accepts processing payments for drivers through his accounts. The additional Halifax account was one he had with one of his former wives, which he inadvertently failed to disclose.

35. The overall picture which emerges of Mr Cozens' financial affairs is an unsatisfactory one. It is fair to point out that many of the explanations he gives are unsupported by documentary evidence. Many of his explanations rely on failures by an accountancy adviser to carry out instructions correctly, but are not supported by any evidence from the adviser. Other explanations involve processing of other people's money through his accounts. Yet others involve explaining payments as coming from a money lender, whom he does not identify. His tax affairs are, as he has accepted, in complete disarray.

Relevant principles applicable to freezing orders

36. It is not in dispute that a freezing order is an order that lies at the extremity of this court's jurisdiction. The normal rule where a claimant sues for debt or damages is that he takes the defendant as he finds it. The claimant has to decide whether it is worth pursuing a claim where the defendant may not be able to pay. The freezing order jurisdiction has grown up to deal with a class of cases where the defendant has, on the face of it, assets which could be used to satisfy a judgment, but there is evidence of a risk that those assets may be dissipated so as to place them beyond the reach of the successful claimant. Nevertheless, it is still the case that such orders are regarded as a serious interference with the *prima facie* right of a person to deal with his assets as he wishes, and accordingly the basis for their grant needs to be treated with extreme care: see for example *per* Neuberger J (as he then was) in *Flightwise Travel Service v Gill* [2003] EWHC 3082 (Ch).

37. It is not in dispute that it is necessary for the applicant for a freezing order to show a good arguable case for the substantive relief he is seeking in the action. Mr Davies submitted that, in the context of HMRC's claim in debt based on an assessment for excise duty, this criterion was satisfied by the existence of the assessment. The validity of that assessment could only be challenged by an appeal to the First Tier Tribunal (Tax & Chancery).

38. In *Commissioners for Her Majesty's Revenue & Customs v Ali* [2011] EWHC 880 (Ch), HMRC alleged that A had received sums from a company knowing that the company had wilfully failed to deduct PAYE and that he was liable for it under the

PAYE regulations. A freezing order was granted without notice to A in anticipation of service of assessments on him. A question arose on the return date whether the court had had the power to make the order prior to the accrual of the cause of action by the service of the assessments. After a review of the authorities, Warren J concluded that there had been jurisdiction to make the order and went on to consider the effect of the exclusive jurisdiction of the Tribunal on the question whether the freezing order should be continued:

> "In the present case, assuming I am right about jurisdiction, there exists a clear cause of action. Unless and until a successful appeal is concluded, the assessment is conclusive. If I thought the appeal had a very high chance of success, that might influence the exercise of my discretion."

39. I do not think that Warren J was saying that, in the special case of freezing orders in support of tax assessments, the court is relieved from the obligation of testing the strength of HMRC's case. Supposing the court on the application for the freezing injunction could see plainly that the assessment did not cross the threshold of a good arguable case: I cannot accept that it would be right for the court to grant a remedy which is at the extremity of its jurisdiction in support of a cause of action it thought to be so weak. However Mr Moser was content to accept that it did not matter for present purposes whether the point which he seeks to run on good arguable case is treated as one going to good arguable case, or as one solely affecting my discretion. So I need say no more about this point.

40. One aspect of the basis for the grant of a freezing order which needs to be scrutinised with care is the question of whether the defendant in fact has assets on which the order will bite. That this is a principle which underlies the freezing order jurisdiction is reflected in a number of the cases, and was not the subject of challenge. Indeed, as Mr Moser submitted, it is inherent in the requirement to show that there is a risk of dissipation of assets that the cases in which freezing injunctions are granted are cases in which there is evidence that the defendant has some assets to dissipate. Thus in the *Mareva* case itself, *Mareva Compania Naviera v International Bulk Carriers* [1980] 1 All ER 213, Lord Denning MR said at 215:

> "If it appears that the debt is due and owing, and there is a danger that the debtor will 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*. There is *money in a bank in London* which stands in the name of these charterers. They charterers have control of it. They may at any time to dispose of it or move it out of this country." (emphasis added)

41. The evidence of the existence of assets need not be specific: indeed it may in some cases be unreasonable to expect a party seeking such an injunction to have evidence of precisely what assets his adversary in litigation has. But there must be some material from which it is reasonable to infer or deduce that there are assets on which the injunction will bite. Otherwise the court will run the risk of acting in vain.

42. Mr Davies QC submitted that there are cases where, as a matter of principle, the court should infer the existence of assets and a risk of their dissipation from the dishonesty of the defendant coupled with his denial of the existence of assets. He drew my attention to the case of *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC and ors* [2011] EWCA Civ 761. That was a security for costs case in which the question was whether the specific condition set out in CPR 25.12(2)(g) was satisfied, that is to say "*whether the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him*". The significance of the authority from Mr Davies' point of view can be seen, firstly, from an extract from the judgment of Langley J in the *Noga v Abacha* litigation [2004], cited by Tomlinson LJ at [24]

> "117. There is also little authority on the application of this rule [by which he meant rule 25.13 2(g)] which first appeared with the CPR. However, in *Chandler v Brown* 20th July 2001, Park J considered the rule in a case in which the individual claimant had "a record of dishonesty and creditors (had) been victims of it". Park J held that was not enough to satisfy the rule which required by its terms that it be shown that the claimant had taken steps in relation to his assets which would make a costs order difficult to enforce. It was not enough to show propensity that he might take such steps in the future. Actual "steps" already taken were required. I respectfully agree. The rule is not aimed at the impecunious or the dishonest as such but at the illegitimate hiding of assets.
>
> 118. The difficulty which faces the defendants is that they know nothing about Mr Gaon's assets and so cannot show that he has taken any steps in relation to them which would make enforcement of a costs order against him difficult or indeed at all. Both Mr Stanley and Mr Bright submitted that if it was a reasonable inference on all the evidence that Mr Gaon did have undisclosed assets then his failure to disclose them could itself lead to the inference that he had put them out of reach of his creditors including a potential creditor for costs. There are worrying features about the evidence which arouse suspicion: see paragraphs 72 to 81. But on balance I do not feel able to conclude that the double inference of the existence of assets and relevant steps taken in relation to them has been established by the defendants. It remains, I think, sufficiently possible that such assets as Mr Gaon has remain where they have in effect always been. It follows that there is also no jurisdiction to order him to provide security under this rule."

43. Tomlinson LJ continued:

> "30. … Where a party seeks to suggest that he is devoid of assets and yet able to maintain an expensive lifestyle and to fund litigation on the basis of loans from his family or other third parties, it is incumbent upon him in my judgment to provide details of the nature of those loans, the terms upon

> which they are granted and in particular to condescend to some further detail in relation to the efforts he has made in order to obtain further funds from the same sources.
>
> 31. When no such details are given and when the evidence is at such a high level of generality as to say that the source of living expenses and legal expenses is mostly loans from family and family affiliated companies and third parties without any further details volunteered, it is in my judgment possible and in many cases appropriate for the court to draw the double inference on which Langley J spoke in the *Noga* case, which is to the effect both that there are undisclosed assets and also that the failure to disclose them leads to the inference that they have been put out of reach of creditors including of course a potential creditor for costs."

44. Thus the "double inference" discussed in these extracts arises if there is material before the court from which it is possible to infer that there are undisclosed assets, and the defendant's failure to disclose them could give rise to an inference that he had already placed them beyond the reach of his creditors. I can see nothing in these passages to suggest that the court can dispense with the need for there to be some material from which to infer the existence of assets. Indeed in *Dubai* at [33] Tomlinson LJ described the evidence in that case as "overwhelming" that the defendant had assets which had been dealt with in a way to make enforcement of an order against him difficult.

45. I think one also has to be careful about applying the sort of double inference being discussed in the *Dubai* case in the context of an application for a freezing injunction. In the security for costs context the court is concluding from the twin facts that the defendant had assets at one time and that he deposed to the fact that he now has none, that he has placed his assets out of the reach of his creditors. That is an entirely logical conclusion. The court is accepting the defendant's evidence of no assets, not rejecting it, and using it to confirm the criterion in the rule. In the context of a freezing order where there is no evidence from which it can be inferred that the defendant has any assets in fact, and the defendant says that he has no assets, the position is entirely different. It would not be right to infer that the defendant has assets at all.

46. A further principle is that the court will not grant a freezing injunction simply because there is no evidence of immediate or obvious prejudice to the defendant. In *Flightwise Travel Service v Gill*, Neuberger J made this plain at [32]:

> "Finally, because the point has been raised, it really should go without saying that it is for the applicant to make out his case to support a freezing order, namely an appropriately strong case against the respondent concerned, and that there is a real risk of dissipation by the respondent. It is not for the respondent to show that a freezing order ought not be granted. A freezing order should not be granted simply because the respondent cannot show any immediate and obvious prejudice. Whether in relation to this type of injunction … the court does not simply

> grant the order because it does not appear that it would cause any harm to the respondent. Of course, once the court considers that there is a real case for granting an injunction, the fact that it will cause or appear that it will cause no, or little, harm to the respondent is a fact that the applicant can pray in aid. But, of itself, it cannot begin to be a primary reason for granting an injunction."

Good arguable case

47. Mr Moser took only one point on good arguable case. This was that HMRC's cause of action was barred by limitation. Section 12(4)(b) of the Finance Act 1994 provides for a limitation period of one year "*beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, comes to an end*".

48. Mr Moser took me to material which showed that HMRC was already taking advice in October 2009 and that solicitors for HMRC received the evidence from HMRC in December 2009. As the assessments were not issued until 17th December 2010, he submitted that the assessments were out of time.

49. Although this defence was pleaded out in considerable detail in Mr Cozens' defence, it was not met at all in the evidence filed on behalf of HMRC, presumably relying on the exclusive jurisdiction of the Tribunal. Mr Davies' skeleton did not adopt such a robust attitude. In his skeleton on behalf of HMRC, Mr Davies submitted that there was no reasonable prospect of this defence being successful on four grounds:

    i) that it was unclear why 27 October 2009 should be picked as the start date for the limitation period;

    ii) as at that date HMRC had not obtained any advice;

    iii) as at 27 October 2009 *HMRC's legal advisers* had not received the evidence which HMRC had at that stage;

    iv) the Scheme was factually complicated with substantial volumes of evidence to be gathered and analysed before advice could be given as to what assessments could be raised against which individuals and companies.

50. These points, as I think Mr Davies recognised, did not even begin to suggest that HMRC had any defence to the suggestion that HMRC had the relevant evidence by December 2009. Mr Davies told me on instructions, however, that HMRC did not receive the AADs from DNRED until January 2010. I required this information to be confirmed by witness statement. In his witness statement served after the hearing Mr Duxbury explains that HMRC did not receive the AADs from DNRED until January 2010. These documents are, according to Mr Duxbury, a necessary basis for quantifying the assessment to duty.

51. It is extremely unfortunate that this evidence was not served in time for the hearing. It would be open to me to exclude it, but I nevertheless think it would be wrong to do so. Firstly, Mr Moser on behalf of Mr Cozens had an opportunity of dealing with the

evidence in principle, even though he did not see the confirmatory witness statement. He suggested that HMRC had sufficient evidence when they intercepted the loads. They did not need the AADs to make an assessment. Secondly, because of the partially subjective nature of the test, it is difficult to see what further evidence Mr Cozens could have adduced in answer to that of Mr Duxbury.

52. The limitation point remains an arguable one, and will need to investigated in the Tribunal. But for present purposes, once Mr Duxbury's evidence is admitted, I consider that HMRC can show a good arguable case.

Material non-disclosure

53. Mr Moser ran a variety of non-disclosure points, as justifying the discharge of the freezing injunction. He reminded me of the five duties summarised by Bingham J (as he then was) in *Siporex Trade SA v Comdel Commodities* [1986] 2 Lloyd's Rep 428 at 437. I need not set them out here.

54. Mr Moser made a number of complaints of the way in which matters had been disclosed by HMRC. The following is not an exhaustive list of the points he took:

    i) There was no disclosure by HMRC until late in the day of the assessment against STTM. Mr Moser was preparing to submit that this prevented HMRC having a cause of action at all. I express no view of the correctness of that proposition as a matter of law. However HMRC were asked directly in June 2011 whether such an assessment had been raised and they replied that it had, although they declined to produce any documents.

    ii) The error in identifying Mr Cozens as the owner of the Burley Hill property. Mr Cozens explains that relatively simple checks on public sources could have confirmed that he was not the owner. Mr Moser relies on this as a failure to investigate the facts properly.

    iii) The evidence of Ms Grimshaw might have led the reader to believe that Mr Cozens was living at Pussy Cats in Risborough Lane, from which a sauna and massage business was being run. This was despite the fact that two HMRC officers had visited Mr Cozens at his Yeoman Gardens address, where he told them he lived.

55. I have already referred above to the late disclosure of any compelling answer to the limitation point, although this development itself came too late for Mr Moser to rely on it in his skeleton argument.

56. I have not referred to all the occasions on which Mr Moser suggests that HMRC have not complied with their duties in respect of a freezing order application. Dealing with them globally, I do not think that any of them alone or together amount to a sufficient ground for discharging the order, in the exercise of what one might call the court's disciplinary jurisdiction over freezing orders. What the points taken by Mr Moser, or at least some of them, demonstrate is that it is necessary to re-appraise the grant of the freezing injunction in the light of the asset position now revealed by the evidence as a whole. The real question is whether this is a case for a freezing injunction to be granted at all.

Risk of dissipation of assets

57. HMRC have made plain that this is not a case where they are seeking to freeze the proceeds of the inward diversion fraud themselves. Their contention is that Mr Cozens has, by his activities in organising the inward diversion fraud, "caused an excise point to arise" and so rendered himself liable under the relevant legislation to the duty identified in the assessment. They say that a freezing order is justified, otherwise Mr Cozens will place his assets beyond the reach of the claimants and thereby defeat any judgment HMRC may obtain.

58. HMRC rely of course on the alleged dishonesty of Mr Cozens. The whole nature of the inward diversion fraud is an exercise in making transactions, including financial transactions, appear to be something other than what they are. If HMRC are right, then it would appear that Mr Cozens has been concerned in operations whose objective is to give a semblance of legitimacy to unlawful activities. If, say HMRC, Mr Cozens has been so involved, then it is reasonable to assume that, unless restrained, he will take steps to protect himself against any judgment that HMRC may obtain.

59. HMRC also submit that it is far from plain that Mr Cozens is without significant assets. They are able to point to the following:

    i) Despite Mr Cozens' professed lack of substantial assets and income, the sums passing through his bank account are quite substantial. For example in 2010 his main disclosed account received some £141,000 in cash deposits and bank transfers. Mr Cozens has sought to explain these payments by reference to a number of matters. Firstly, it is to be expected that, as a taxi driver, he will not receive only his net pay through his account. Secondly he says that he collected rent on behalf of the owner of Procars, as a favour to him. Thirdly he says he made some income as a driver for Procars. Fourthly he says he processed payments on behalf of friends, such as Ms Lisa Joy the new owner of Pussy Cats, who he says did not have a bank account. Most importantly he says he received payments of between £36,000 and £50,000 from an unidentified money lender.

    ii) A number of items of expenditure which are at odds with his statement that he is in a parlous financial state. Examples are a payment to a ski school in France (567 Euros); West End theatre tickets (£250); Tiffany & Co (£325). Mr Cozens has explanations for these: broadly speaking that they were not for his benefit.

    iii) Substantial expenditure on travel and hotels. Examples are established by ATM withdrawals in Brussels, Belgium; Brescia Salo in Italy and Galway, Ireland; hotels and restaurants in the Medoc, Belgium and the Netherlands; flights to Ireland; a recent long holiday in New Zealand and so on. Mr Cozens says that some of this expenditure was by a friend to whom he gave his bank card. Other parts he accepts that he incurred himself, partly in connection with the business of Globel Travel. HMRC also draw attention to the fact that there is a marked similarity between the destinations to which Mr Cozens has been travelling and the countries involved in the Scheme.

iv) Mr Cozens accepts that he has an interest in Globel Travel, but says he has no interest in Procars or Pussy Cats. He says that he transferred his interest in Pussy Cats to Ms Joy and his interest in Procars to Mr Kenny-Levick. Not surprisingly HMRC do not accept that is an accurate statement of the position. They point to a number of factors, including the fact that Mr Cozens continued to process payments for these businesses through his bank accounts. They say that Mr Cozens' explanation in the case of Ms Joy and Pussy Cats has been shown to be false because HMRC have demonstrated that Ms Joy does have a bank account of her own. The position with Procars is equally unclear, having regard to the fact that Mr Cozens is shown as a shareholder of Procars in the annual return.

60. Mr Moser submits that such assets as are revealed by the evidence are insignificant. The true position is that Mr Cozens is in financial difficulties. He has lost his interest in JJ Taxis as a result of the dispute with his partner, and he has acquired very significant debts to a money lender. He points to the fact that there is nothing to connect Mr Cozens to what must have been the very large proceeds of the inward diversion fraud.

61. I accept that the picture which emerges from all this is not of someone surviving only on his earnings as a taxi driver. Moreover, whilst I am plainly not in a position to reject them out of hand, some of Mr Cozens' explanations about his involvement in the businesses of Procars and Pussy Cats seem, to put it at its lowest, open to challenge. There is very little in the way of documentary evidence to corroborate Mr Cozens' account of events, and where there are documents, such as documents filed at Companies House, they appear to contradict his account of things.

62. I think that the evidence against Mr Cozens as a whole means that, to the extent that he has any assets, there is a real danger that he will put them out of the reach of HMRC if not restrained.

63. The position would obviously be straightforward if HMRC could link Mr Cozens with the proceeds of the inward diversion fraud. However, the evidence does not in my view go this far. Despite Mr Davies' able submissions to the contrary, the evidence falls far short of establishing that Mr Cozens was the man behind the scheme as a whole. There is nothing of substance linking him with Recette or with the money involved in purchasing the loads.

64. The fact remains, however, that Mr Cozens does have assets. He has his admitted interest in Globel Travel, and it appears more than plausible that he retains an interest in other businesses. Moreover unless one accepts without question all Mr Cozens' explanations for the sums of money passing through his bank accounts, he does appear to have sources of income which go well beyond those of an average taxi driver. The successive explanations put forward by Mr Cozens as to the monies passing through his bank accounts themselves raise further unexplained questions.

65. Accordingly, whilst I have entertained doubts in the course of the hearing and subsequently, it seems to me that this is not a case where one can say that there is no material from which it is possible to infer the existence of assets. There is actual evidence of assets, such as the interest in Globel Travel, and a reasonable inference of further assets, either in the form of an interest in Procars and Pussy Cats, or in other

undisclosed assets which are producing the levels of income seen in Mr Cozens' bank accounts.

Just and convenient

66. A recurrent theme in HMRC's evidence and submissions was that, if Mr Cozens is telling the truth when he says he has no assets, then he will suffer no prejudice by continuation of the injunction. For reasons I have explained by reference to *Flightwise*, I do not regard that as a good point if it is intended to provide positive grounds for the grant of an injunction where none otherwise existed. But once it is established that there are some assets which will be caught by the injunction, and that there is evidence of a risk of dissipation, then, as the passage from *Flightwise* indicates, the absence of serious prejudice to the respondent is a factor I can take into account.

67. Beyond the difficulties caused by reference to Globel Travel, I think HMRC are right that there is no evidence of serious prejudice to Mr Cozens if the injunction continues. The bank has now unfrozen the account of Globel. HMRC also stressed the fact that they were prepared to give a cross-undertaking. I have taken this into account in the conclusion which I have reached.

68. I make no secret of the fact that a number of factors did trouble me about the continuation of the injunction in the present case.

69. Firstly I have already mentioned the delay in taking proceedings against Mr Cozens. Delay in itself is seldom a bar to relief. Its relevance in the context of applications for freezing orders is that it casts doubt on whether there is really any perceived danger of dissipation of assets. In the present case, however, HMRC have given an explanation of why they took so long. Whilst I think they have made their investigation unnecessarily complicated, I do not think that it would be fair to attribute to them a lack of concern about the risk of dissipation.

70. Secondly there was the attitude of HMRC to Mr Price. If HMRC's approach in the present case of inferring significant assets in the hands of Mr Cozens were correct, then it would follow at least as strongly that it would be right to infer that Mr Price has significant assets which he would dissipate if not restrained. But HMRC abandoned their application for a freezing order against Mr Price, and apparently now place reliance on Mr Price's unsworn denial of involvement. However, I must consider the application against Mr Cozens on its own merits. If I come to the conclusion that a freezing order is justified against Mr Cozens, I should not refuse it on the basis of a disparity of treatment of Mr Price.

71. Thirdly there is HMRC's approach to Mr Cozens' admitted interest in Globel Travel, which I have explained above. Whilst I regard their reluctance to reassure the bank about the ambit of the order as unreasonable, the impact of this point is not sufficient to undermine the basis for continuing the order.

72. Finally, there is the question of proportionality. If it were correct to say that Mr Cozens was entirely devoid of assets, it would not be right to continue the order as to do so would be disproportionate. But the fact that the freezing injunction will not secure the whole of HMRC's claim, or indeed the likelihood that it will only secure a

small part of the claim, is not a ground for refusing it altogether. Once it is established that there is a good arguable case of involvement in what is on the face of it a dishonest scheme, a clear risk of dissipation, evidence of actual assets and a reasonable inference of more, then it is difficult to say that the relief is disproportionate.

73. Overall it seems to me that I should continue the freezing injunction against Mr Cozens. I will hear counsel as to the precise form of the injunction.

TAB 17

2011 BCSC 1675
British Columbia Supreme Court

Taseko Mines Ltd. v. Phillips

2011 CarswellBC 3478, 2011 BCSC 1675, [2011] B.C.J. No. 2350, [2012] 3 C.N.L.R. 298, [2012] B.C.W.L.D. 1018, [2012] B.C.W.L.D. 1026, [2012] B.C.W.L.D. 1129, [2012] B.C.W.L.D. 1155, [2012] B.C.W.L.D. 1156, [2012] B.C.W.L.D. 1157, [2012] B.C.W.L.D. 1158, 212 A.C.W.S. (3d) 1025, 64 C.E.L.R. (3d) 84

Taseko Mines Limited (Plaintiff) and Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste, John Doe #1, John Doe #2 and John Doe #3 (Defendants)

Marilyn Baptiste, on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation (Petitioner) and Her Majesty the Queen in Right of the Province of British Columbia, the Chief Inspector of Mines, the District Manager Resource Operations, Cariboo-Chilcotin, and Taseko Mines Limited (Respondents)

Grauer J.

Heard: November 28, 2011 - December 1, 2011
Judgment: December 2, 2011
Docket: Vancouver S117685, 114556

Counsel: Joan Young, Melanie Harmer for Taseko Mines Limited
Jay Nelson, Dominique Nouvet, M. Boulton (A/S) for Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation
Erin Christie for Her Majesty the Queen in Right of the Province of British Columbia, Chief Inspector of Mines and the District Manager Resource Operations, Cariboo-Chilcotin

Subject: Civil Practice and Procedure; Public; Property; Natural Resources; Constitutional
Related Abridgment Classifications
Aboriginal and Indigenous law
II Land
  II.4 Rights and title
Civil practice and procedure
XXIV Costs
  XXIV.6 Effect of success of proceedings
    XXIV.6.b Successful party deprived of costs
      XXIV.6.b.ii Grounds
        XXIV.6.b.ii.K Misconduct of parties
Natural resources
II Mines and minerals
  II.4 Mining operations
    II.4.e Miscellaneous
Remedies
II Injunctions
  II.2 Prohibitive injunctions
    II.2.c Interim and interlocutory injunctions
      II.2.c.i Threshold test
        II.2.c.i.A Serious issue to be tried
Remedies

II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.B Irreparable harm
Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.C Balance of convenience
Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.D Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Strength of applicant's case

Mining company T Ltd. proposed development of mine located in area claimed by First Nation — Aboriginal rights had been established, but appeal from decision denying aboriginal title had not been decided — T Ltd. obtained two provincial permits that allowed it to carry out exploration program — First Nation sought judicial review of decisions to issue permits — First Nation blocked T Ltd. from entering territory — T Ltd. brought application for injunction preventing First Nation from blocking its access to area for exploration project — First Nation brought application for injunction preventing T Ltd. from proceeding with exploration program until application for judicial review was determined — T Ltd.'s application dismissed — First Nation's application granted — First Nation was entitled to interim injunction against T Ltd. — First Nation established that there was fair question to be tried — Question was whether, in its conduct of process leading to granting permits to T Ltd., Crown breached its duties of consultation owed to First Nation — Questions regarding Crown's focus on work to be done and scope of consultation required were to be determined at hearing of petition for judicial review — There was serious case to be tried.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Balance of convenience

Mining company T Ltd. proposed development of mine located in area claimed by First Nation — Aboriginal rights had been established, but appeal from decision denying aboriginal title had not been decided — T Ltd. obtained two provincial permits that allowed it to carry out exploration program — First Nation sought judicial review of decisions to issue permits — First Nation blocked T Ltd. from entering territory — T Ltd. brought application for injunction preventing First Nation from blocking its access to area for exploration project — First Nation brought application for injunction preventing T Ltd. from proceeding with exploration program until application for judicial review was determined — T Ltd.'s application dismissed — First Nation's application granted — First Nation was entitled to interim injunction against T Ltd. — Balance of convenience favoured First Nation — Delay in proceeding with exploration project while waiting for judicial review application to be determined weighed less heavily in balance, as T Ltd. had spent 20 years working on mine project — Granting injunction would not deprive T Ltd. of opportunity to obtain geological information — T Ltd. being several months behind was relatively minor inconvenience — If First Nation did not obtain injunction, they would lose right to be consulted at deep level in relation to exploration program and petition would be moot.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Irreparable harm

Mining company T Ltd. proposed development of mine located in area claimed by First Nation — Aboriginal rights had been established, but appeal from decision denying aboriginal title had not been decided — T Ltd. obtained two provincial permits that allowed it to carry out exploration program — First Nation sought judicial review of decisions to issue permits — First

Nation blocked T Ltd. from entering territory — T Ltd. brought application for injunction preventing First Nation from blocking its access to area for exploration project — First Nation brought application for injunction preventing T Ltd. from proceeding with exploration program until application for judicial review was determined — T Ltd.'s application dismissed — First Nation's application granted — First Nation was entitled to interim injunction against T Ltd. — Balance of convenience favoured First Nation — There would be significant irreparable harm to First Nation's substantive rights if exploration program continued before petition was determined — If First Nation did not obtain injunction, they would lose right to be consulted at deep level in relation to exploration program and petition would be moot — Once habitat was disturbed and lost, exercise of First Nation's aboriginal rights would be diminished — T Ltd.'s financial loss in releasing contractors and equipment constituted irreparable harm, but was small in context of overall cost of project — First Nation would suffer greater harm from refusal of their injunction than would T Ltd. from granting of it.

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Miscellaneous

Public interest — Mining company T Ltd. proposed development of mine located in area claimed by First Nation — Aboriginal rights had been established, but appeal from decision denying aboriginal title had not been decided — T Ltd. obtained two provincial permits that allowed it to carry out exploration program — First Nation sought judicial review of decisions to issue permits — First Nation blocked T Ltd. from entering territory — T Ltd. brought application for injunction preventing First Nation from blocking its access to area for exploration project — First Nation brought application for injunction preventing T Ltd. from proceeding with exploration program until application for judicial review was determined — T Ltd.'s application dismissed — First Nation's application granted — First Nation was entitled to interim injunction against T Ltd. — Balance of convenience favoured First Nation — It was in public interest for T Ltd. to obtain best available information for purpose of informing environmental assessment, but that interest was not significantly at risk if First Nation's injunction were granted — It was in public interest to ensure that appropriate consultation and accommodation was used to reconcile competing interests — Such interest was at risk should injunction be denied and weighed heavily in balance of convenience.

Civil practice and procedure --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — Misconduct of parties

Unsuccessful party awarded costs — Mining company T Ltd. proposed development of mine located in area claimed by First Nation — Aboriginal rights had been established, but appeal from decision denying aboriginal title had not been decided — T Ltd. obtained two provincial permits that allowed it to carry out exploration program — First Nation sought judicial review of decisions to issue permits — First Nation blocked T Ltd. from entering territory — T Ltd. brought application for injunction preventing First Nation from blocking its access to area for exploration project — First Nation brought application for injunction preventing T Ltd. from proceeding with exploration program until application for judicial review was determined — T Ltd.'s application dismissed — First Nation's application granted — Costs of its application were awarded to T Ltd. — First Nation was entitled to interim injunction against T Ltd. — Given that T Ltd. was to be enjoined from proceeding with exploration program, there was no need for injunctive relief for T Ltd. — T Ltd. acted lawfully throughout conflict and ought not to have been put in position where it had to seek its injunctive relief — Because of unlawful conduct of First Nation, discretion was exercised to award T Ltd. costs of its application payable forthwith in any event of the cause.

Aboriginal law --- Reserves and real property — Rights and title — Miscellaneous

Interaction with mining exploration project — Interlocutory injunctions.

Natural resources --- Mines and minerals — Mining operations — Miscellaneous

Interaction with aboriginal rights and title — Interlocutory injunctions.

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Canadian Broadcasting Corp. v. CKPG Television Ltd. (1992), 64 B.C.L.R. (2d) 96, 10 B.C.A.C. 211, 21 W.A.C. 211, 4 C.P.C. (3d) 134, [1992] 3 W.W.R. 279, 42 C.P.R. (3d) 526, 1992 CarswellBC 31 (B.C. C.A.) — followed

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Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 325 D.L.R. (4th) 1, 406 N.R. 333, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* [2010] 4 C.N.L.R. 250, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council))* [2010] 2 S.C.R. 650, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council)* 225 C.R.R. (2d) 75, 11 Admin. L.R. (5th) 246, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 9 B.C.L.R. (5th) 205, 54 C.E.L.R. (3d) 1, 293 B.C.A.C. 175, 496 W.A.C. 175 (S.C.C.) — followed

Delta (Municipality) v. Nationwide Auctions Inc. (1979), 11 B.C.L.R. 346, 11 C.P.C. 37, 100 D.L.R. (3d) 272, [1979] 4 W.W.R. 49, 1979 CarswellBC 96 (B.C. S.C.) — considered

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Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

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West Moberly First Nations v. British Columbia (Chief Inspector of Mines) (2011), 18 B.C.L.R. (5th) 234, 333 D.L.R. (4th) 31, [2011] 9 W.W.R. 34, [2011] 3 C.N.L.R. 343, (sub nom. *Willson v. British Columbia)* 306 B.C.A.C. 212, (sub nom. *Willson v. British Columbia)* 316 W.A.C. 212, 2011 BCCA 247, 2011 CarswellBC 1238, 26 Admin. L.R. (5th) 283 (B.C. C.A.) — referred to

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Statutes considered:

Mineral Tenure Act, R.S.B.C. 1996, c. 292

Generally — referred to

Mines Act, R.S.B.C. 1996, c. 293

Generally — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 10-4(5) — considered

APPLICATION by mining company for injunction preventing First Nation from blocking its access to area for exploration project; APPLICATION by First Nation for injunction preventing mining company from continuing with exploration project until application for judicial review was determined.

Grauer J. **(orally):**

Introduction

1 Taseko Mines Limited, the plaintiff in Vancouver Action No. S117685, and Marilyn Baptiste, a defendant in that action and petitioner in Victoria Action No. 114556, apply for competing interim injunctions, each restraining the other in relation to a program of exploration work in an area of the traditional territory of the Tsilhqot'in Nation.

2 For a period approaching 20 years, Taseko has pursued the development of a major open pit gold and copper mine in the Cariboo-Chilcotin area of British Columbia, known as the Prosperity Project. The resource is said to be one of Canada's largest known undeveloped gold and copper deposits. To this end, Taseko has acquired various mineral claims and a mining lease, all lawfully granted under the *Mineral Tenure Act*, R.S.B.C., 1996, c. 292.

3 The proposed Prosperity mine is potentially a billion-dollar project. Should it proceed, its impact on both the economy and the environment will be unquestionably substantial.

4 This proceeding is not about whether the project should or will proceed.

5 The location of the proposed mine is in an area over which the Tsilhqot'in Nation assert aboriginal title, and within which they claim aboriginal rights. In *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.), the appeal from which has been heard but not decided, the area is described as the "Eastern Trapline Territory". Mr. Justice Vickers concluded that the Tsilhqot'in had failed to prove aboriginal title to the Eastern Trapline Territory, but had established aboriginal rights throughout the area. Among that territory's distinguishing features are Fish Lake (Teztan Biny), Little Fish Lake (Y'anah Biny), and their surrounding area, the Nabas.

6 In its initial iteration, the Prosperity Project failed to satisfy a Review Panel established by the Federal Minister of the Environment. Among its perceived flaws were the required sacrifice of Fish Lake, Little Fish Lake and the Nabas.

7 The review process included public hearings in the Cariboo-Chilcotin area in the spring of 2010, in which the Tsilhqot'in Nation participated. The Panel's Report, described by some as "scathing", was issued on July 2, 2010. The Federal Government's response came on November 2, 2010:

> Taking into consideration the Report of the Panel and the implementation of any mitigation measures that the RAs consider appropriate, and in weighing the socio-economic benefits and potential significant adverse environmental effects, the Government of Canada has determined that the significant adverse environmental effects cannot be justified in the circumstances.
>
> The Government of Canada wishes to see resource projects developed, however, it must balance the economic benefits of projects with responsible resource development. The Government is not opposed to the mining of the Prosperity ore body, however, it cannot justify providing the authorizations that would enable the Project to be carried out as proposed. The Government notes that this decision does not preclude the proponent from submitting a project proposal that includes addressing the factors considered by the panel.

8 Taseko Mines did just that. The rise in the prices for gold and copper, and the economic outlook, allowed Taseko to develop a viable proposal that eliminated the most significant adverse environmental effects of the original project; in particular, the destruction of Fish Lake. This redesigned proposal, named the "New Prosperity Project", would add $300 million to the projected development cost, but this was justified by the increase in commodity prices. Accordingly, in August of 2011, Taseko submitted a revised comprehensive project description for the New Prosperity Project to the Canadian Environmental Assessment Agency.

9 Since then, Taseko has obtained two provincial permits that allow it to carry out a program of exploration designed principally to obtain geological information of relevance to the engineering of the new project. Taseko expects that this information will assist in the environmental assessment of the New Prosperity Project, particularly in relation to the environmental impact of the changes that were made to preserve Fish Lake. These two permits were a Notice of Work (NOW) approved by the Senior Inspector of Mines, and an Occupant Licence to Cut and Remove Timber (OLC) approved by the District Manager Resource Operations, Cariboo-Chilcotin.

10 Taseko's attempts to embark on the program covered by these permits were stymied by the refusal of Marilyn Baptiste to recognize their authority to proceed into what she described as Tsilhqot'in territory. In a blockade that appeared to me to be more moral than physical, but was nonetheless effective, she declined to let Taseko's convoy of trucks and equipment pass. To its credit, Taseko turned its convoy around and left, avoiding any action that might escalate the confrontation.

11 Marilyn Baptiste is the elected Chief of the Xeni Gwet'in, one of the six bands that constitute the Tsilhqot'in Nation. Within the Tsilhqot'in Nation, the Xeni Gwet'in have a particular responsibility for the stewardship of that portion of Tsilhqot'in traditional territory that includes Fish Lake, Little Fish Lake and the Nabas.

12 In the circumstances, Taseko applies for an injunction preventing Chief Baptiste and any others with notice of the order from obstructing, impeding or restricting its access to the area where its program of exploration is to be carried out.

13 The Xeni Gwet'in and the Tsilhqot'in, meanwhile, through Chief Baptiste, had filed a petition seeking judicial review of the decisions to issue the permits required by Taseko to carry out this program. I will refer to them collectively as the petitioners. They seek an injunction preventing Taseko from proceeding with its exploration program until they have had an opportunity to have their application for judicial review heard and determined.

14 When the Taseko injunction application came before me on November 18, 2011, I adjourned it to this week, and ordered that it be heard together with the petitioners' injunction application. That has now taken place.

15 For the reasons that follow, I have decided that the petitioners are entitled to the interim injunction they seek, subject to terms to be discussed. In these circumstances, I can find no basis to support the granting of the injunctive relief sought by Taseko Mines.

Background

16 The bands of the Tsilhqot'in Nation vigorously opposed the original Prosperity Project, and put a great deal of blood, sweat and tears into educating the Federal Review Panel about their concerns, and how the project would impact them. This was an exhausting exercise, and they were dismayed by the project's resurrection as the New Prosperity mine. From their perspective, the revised project did not adequately address the factors considered by the Federal Review Panel, but continued to represent significant adverse environmental effects that remained unjustifiable.

17 In the circumstances, the Tsilhqot'in National Government, through Chief Baptiste and others, entered into a process of consultation with the Federal Government in the hope of persuading it to reject the New Prosperity Project without the need for holding another environmental assessment with all the expense and effort that that would entail. It was their position that the revised proposal was based on an alternate mine plan that the previous Federal Review Panel had already considered and rejected.

18 On August 30, 2011, the Canadian Environmental Assessment Agency wrote to the Tsilhqot'in National Government to advise that it had accepted the Project Description for the New Prosperity Gold-Copper Mine Project Proposal. The agency indicated that it had 90 days from August 9, when the proposal was received, within which to determine whether to commence a comprehensive study of the proposed project. That determination was to be made by November 7, 2011. The Agency then discussed meeting with the Tsilhqot'in National Government for information gathering and further discussion of their views.

19 The parties appear to have had a materially different appreciation of the significance of this process. Taseko, it seems, assumed that all that remained to be determined was by which route the Agency's environmental assessment would proceed. The Tsilhqot'in National Government, on the other hand, understood that the agency would be determining whether to proceed with an environmental assessment at all, and if so, by what route. In short, unlike Taseko, the Tsilhqot'in understood that the possibility remained that the project would be rejected at that point, without further assessment.

20 I accept the parties' assertions as to their respective states of mind. The affidavit evidence before me supports the conclusion that the understanding of the Tsilhqot'in was likely the correct one.

21 In anticipation of this process, Taseko wrote to the BC Ministry of Energy and Mines on May 11, 2011, stating as follows:

> Please find enclosed a Notice of Work (NOW) application for Taseko's proposed 2011 exploration drilling and test pitting for the Prosperity Gold-Copper Project.
>
> In 2011, we intend to conduct exploration activities to provide information supporting the detailed engineering of the project. The program includes:
>
> • Approximately 59 test pits to inform detailed engineering of new tailings storage facility (TSF) and ore stockpile foundations;
>
> • 10 geophysical lines along the proposed main, west and south embankments of the TSF;
>
> • Approximately 8 geotechnical drill holes of approximately 50 to 75 m in depth to inform detailed engineering of the new TSF embankments;
>
> • Approximately 10 diamond drill holes of up to roughly 250 m in depth within the pit area to collect samples for confirmatory metallurgical work to be performed this winter; and,
>
> • Approximately 23.5 km of exploration trail required to access exploration sites.

22 The letter went on to indicate that the total disturbance of the 2011 program was expected to be 13.1 ha, including 12 ha due to clearing timber and brush for exploration trails and geophysical lines. The timber volume was estimated at 1,048 m^3, most of which was attributed to trail clearing. Reclamation of the trails would be accomplished by pulling wood waste back over them to discourage recreational and ATV use, and breaks in the debris would be provided to allow for cattle and horse travel. It was expected that the work would begin August 1, 2011 and would require three months to complete.

23 On June 23, 2011, Ms. Bev Wassenaar, Land and Resource Specialist, Resource Authorizations, First Nation Consultation Coordination, Ministry of Forests, Lands and Natural Resource Operations, wrote to Chief Baptiste to advise of the notice of work application, attaching a copy. Ms. Wassenaar acknowledged that the proposed work was within an area of proven aboriginal rights, and advised that she would be the consultation contact for the NOW application, and the related occupant licence to cut. She went on to say:

> To support the consultation process for this distinct and separate exploration phase of the overall revised Project proposal, the province has begun to conduct an initial analysis of the potential impacts of this exploration on known Aboriginal rights and Aboriginal Interests of the Tsilhqot'in Nation in the area of the proposed work. In doing that the province has also proposed some preliminary mitigations in relation to the identified potential impacts from exploration.... The attached initial assessment of potential impacts to known Aboriginal Rights and Interests relates only to the specific activities presented in the NOW application and its related Occupant License to Cut and outlines draft mitigation options and proposed permit conditions for you to consider. Your contribution to the development and refinement of this draft table is being requested.

24 Ms. Wassenaar went on to request comments in the next 30 days, and indicated a desire to set up a meeting with appropriate representatives from the province, Xeni Gwet'in and Taseko.

25 A response to this letter came from counsel representing the petitioners addressed to the Minister of Forests, Lands and Natural Resource Operations and copied to Ms. Wassenaar. This letter outlined their opposition to the project as a whole, to the notice of work, and to any other steps being taken to further the development of the mine in an area of "profound cultural importance for the Tsilhqot'in people".

26 The letter also raised particular objections to proceeding with the consideration of the notice of work at that time. This was said to be premature given that the Federal Government had yet to decide whether to proceed further in the regulatory process. Consequently, it was suggested,

- the NOW's extensive drilling and roadwork with its impact upon Tsilhqot'in established rights, culture and traditional use, should be avoided pending that decision;

- the Tsilhqot'in ought not to be put to the further effort and expense of dealing with the application until it was decided that the project would proceed to further stages of review; and

- the Tsilhqot'in were already involved in a federal consultation process, and had neither the manpower nor the economic resources to deal with a provincial consultation process that may prove to be unnecessary.

27 In this letter, and the exchanges of correspondence that succeeded it, three significant areas of disagreement emerged. The first was the issue of prematurity as just discussed. Ms. Wassenaar's response was that the relevant decision-makers were by statute required to consider applications such as this and to make decisions.

28 The second was the assessment of both the required degree of consultation and the potential impact of the proposed NOW activities on proven aboriginal rights. Ms. Wassenaar assessed the former at the middle range, and the latter as low. The Tsilhqot'in position was that they were entitled to a deep level of consultation in the circumstances, and that the impact upon their aboriginal rights was high.

29 This dispute arose in part from the third area: Ms. Wassenaar limited her assessment to the specific activities presented in the NOW and the OLC, contrary to the Tsilhqot'in position that the assessment should take into account the cumulative effect of this exploration program on top of previous programs, together with the potential impact of the full mining operation towards which this program was a step. Both positions find some support in the case law.

30 On September 22, 2011, Ms. Wassenaar wrote to the Tsilhqot'in National Government:

> As stated, Statutory Decision-Makers are required to consider all relevant information provided to them including points you made requesting deferral of the NOW decision until after the CEAA (Canadian Environmental Assessment Agency) decision. In addition to the timing of the CEAA decision, the decision-maker will also need to balance factors such as the restrictive timing window Taseko Mines Limited (TML) will have with regard to their ability to be able to conduct exploration activity in the fall of 2011. As I indicated previously, my summary and recommendations on this will be provided to the decision makers September 29, 2011. A decision by each of the Statutory Decision-Makers will follow. The decision-makers can choose to approve or refuse to issue the authorizations based in part on the information included in my report. If the Decision-Maker concludes that further consultation or information is needed prior to making a decision, then these further steps would occur.

31 Ms. Wassenaar went on to reiterate an offer to meet, and advised that any additional comments received prior to September 29, 2011, would be reflected in her recommendations to the decision-makers.

32 At 5:43 PM on September 29, 2011, Mr. J. P. Laplante, Mining, Oil and Gas Manager for the Tsilhqot'in National Government, sent an e-mail in response to Ms. Wassenaar's letter and a subsequent voicemail requesting a meeting. The e-mail reiterated its opposition to "the continued fragmentation and impacts to this sensitive area from the proposed exploration program", and confirmed the Tsilhqot'in's interest in meeting with the statutory decision-makers prior to any permits being

issued. The position was restated that no permits should be issued until meaningful consultation and accommodation occurs, including a meeting with the Minister, and responses to various requests that were previously made.

33 On September 29, 2011, the Inspector of Mines issued a *Mines Act*, R.S.B.C. 1996, c. 293, permit authorizing the activities detailed in the notice of work. The Tsilhqot'in were advised of this on October 4, 2011.

34 On October 7, 2011, Chief Baptiste and other representatives of the Tsilhqot'in National Government and its bands met with Mike Pedersen, the Ministry of Forests decision-maker with respect to the Occupant Licence to Cut Timber. Mr. Pedersen had not yet rendered his decision. Mr. Pedersen had not reviewed the relevant documentation, in order to keep an open mind. As a result, he was unable to answer questions concerning what support there was for the need to do some or all of the work at that time. He noted that his responsibility was limited to the cutting permit; the justification for the trails would be dealt with through the Ministry of Mines.

35 The Occupant Licence to Cut Timber was approved and issued on October 12, 2011.

36 On October 13, 2011, the Tsilhqot'in National Government wrote to Taseko concerning the proposed 2011 exploration program and the approval of the NOW application, stating:

> TNG has still not received any rationale for the decision. At this stage, TNG considers the authorization to be in breach of the Crown's duties of consultation, and an unjustified infringement of its aboriginal rights, and accordingly unconstitutional and unlawful. We advise you not commence any activities on the basis of such an authorization. We further advise that any reliance placed by [Taseko] on such an authorization is at the company's risk, as TNG is presently reviewing its options for response, including legal challenge.

37 On November 7, 2011, the Canadian Environmental Assessment Agency issued its decision that the New Prosperity Project would be referred to a Review Panel for assessment. The project accordingly remained alive.

38 The Ministry of Energy, Mines and Petroleum Resources' reasons for its September 29 decision approving the exploration program (the rationale referred to in the Tsilhqot'in letter of October 13) were set out in a letter dated October 10, 2011. On the evidence, however, that letter was signed on November 4, mailed on November 7, and reviewed at the Tsilhqot'in office following the long weekend on November 14, 2011, after the events on the ground that led to Taseko's application had begun to unfold.

39 In the meantime, the petition for judicial review had been filed on November 10, 2011, and the petitioners' application for an interim injunction was filed on November 14, the same date as the filing of Taseko's Notice of Civil Claim.

Discussion

1. The Petitioners' Application

40 I propose to assess the petitioners' application for an injunction first. This is because if they are entitled to the relief they seek, being an order restraining Taseko from proceeding with the program covered by the permits at issue in the application for judicial review, then the basis for Taseko's application arguably disappears. Conversely, if they are not entitled to injunctive relief, then Taseko's application could be considered in a more discrete context.

a. The Test

41 In British Columbia, the test for interlocutory injunctions is the two-part test established in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), at 345, aff'd [1991] 1 S.C.R. 62 (S.C.C.), and described in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), at 101:

> The two-pronged test is this: "first, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

See also *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 (B.C. C.A.) and *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676 (B.C. S.C.).

42 The threshold for the first part, whether there is a fair question to be tried, is relatively low and does not require the applicant to prove a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 49.

43 Weighing the balance of convenience as required by the second part will, of course, include a consideration of irreparable harm, and the question of who will suffer the greater harm from the granting or refusal of the interlocutory injunction pending a determination on the merits: *RJR-MacDonald Inc.* at para. 62.

b. Is there a fair question to be tried?

44 The question to be tried is whether, in its conduct of the process that led to granting the NOW and OLC approvals, the Crown breached its duties of consultation owed to the Xeni Gwet'in and Tsilhqot'in Nation.

45 That such duties were owed is beyond doubt. That the Crown in fact engaged in a process of consultation and accommodation is also beyond doubt. The question is whether it did so sufficiently in the circumstances.

46 The petitioners point out that this is a case in which both the entitlement to aboriginal rights and the importance of the lands in question to the Xeni Gwet'in and Tsilhqot'in Nation have been established and recognized, through both the *Tsilhqot'in Nation* decision and the previous environmental assessment process. They argue that, in all of the circumstances, the scope of the duty required here was deep consultation, as discussed in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.). They assert further that the Crown fell short of its consultation obligations in a number of ways including: rushing to approval without any need to do so and imposing arbitrary deadlines; limiting its consideration of potential impacts to the 2011 program in isolation from the cumulative impact of years of exploration work, and the future impact of a full mining operation; failing to consider cultural impacts including impact on the exercise of aboriginal rights, as opposed to the environment alone; carrying out its perceived duties of consultation on the basis of an erroneous assessment of the scope of those duties; failure to provide necessary information; and failure to provide timely notice of its reasons.

47 The Crown and Taseko submit that even though the threshold for this test is low, the petitioners fail to cross it. They argue that the Crown was correct to focus on the effect of the work to be performed in this particular program, relying on *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.). They contend that given the limited nature of this work, the required scope of consultation fell at the lower end of the *Haida* spectrum. They assert that the permits, having validly issued, must be assumed lawful until proven otherwise, relying on *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311, 20 B.C.L.R. (5th) 35 (B.C. C.A.). They maintain that the petitioners could have started their challenge much sooner, and, most importantly, failed in their own obligation to participate in the consultation process in a meaningful way. Instead, they held fast to their opposition to anything that might advance the mine, and waited until Taseko had vested rights before raising their challenge.

48 I am satisfied that the petitioners have established that there is a fair question to be tried. I am unable to conclude on the evidence before me (which was not the entire consultation record) that the Xeni Gwet'in and Tsilhqot'in Nation failed in their own consultation obligations, particularly given their limited resources and all with which they were having to contend. Moreover, this is not the place to determine whether the Crown's focus on the work to be performed was appropriate, as suggested in *Rio Tinto*, or whether the circumstances are such that *Rio Tinto* should be distinguished, as our Court of Appeal concluded was the case in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (B.C. C.A.). Questions such as the appropriate focus, and the scope of consultation required, must be determined at the hearing of the petition for

judicial review. For my part, I have no difficulty in concluding that the petitioners have established a serious case to be tried. The first part of the test, then, has been met.

c. Does the balance of convenience favour an injunction?

49 Taseko and the Crown argue that the balance of convenience strongly favours the denial of the petitioners' application for injunctive relief, and, it follows, the granting of an injunction to Taseko.

50 They point to a number of factors. These include the following submissions:

a) the status quo favours Taseko: it is the holder of permits which must be presumed valid until proven otherwise, and therefore is entitled to go about its lawful business;

b) preventing Taseko from going about its lawful business of itself constitutes irreparable harm;

c) delaying the process of gathering information for the environmental assessment constitutes irreparable harm to Taseko; time is an asset, and the redesign of the project, which would involve an additional expenditure of $300 million, is based on time-sensitive conditions;

d) even if the petitioners can successfully establish that the Crown had breached its duties of consultation, it does not follow that the permits would be quashed.

e) Taseko continues to incur ongoing expense as a result of the delay, and has lost the availability of expertise it had lined up but has been obliged to let go because of this proceeding;

f) there is no prospect of recovering any losses from the Xeni Gwet'in and Tsilhqot'in Nation, thereby once again giving rise to irreparable harm;

g) the petitioners have given no undertaking in damages, disentitling them to an injunction in the circumstances, or at least constituting a significant factor in weighing the balance of convenience;

h) the potential loss of the procedural right of consultation at the appropriate level that might flow from the failure to grant an injunction to the Xeni Gwet'in and Tsilhqot'in Nation does not in law constitute irreparable harm. That harm must arise in relation to their substantive rights;

i) the Xeni Gwet'in and Tsilhqot'in Nation have been unable to demonstrate satisfactorily any harm to their substantive rights (that is, their aboriginal rights) from this particular scope of work, and the ultimate development of the mine itself remains far too speculative to be taken into account;

j) the actual harm flowing from the permitted program is minimal, consisting of small drill holes and shallow test pits that will be refilled and recovered, the cutting of timber that is largely pine beetle kill, and the clearing of trails that will be subject to reclamation, all in an area that is no longer pristine, having been subjected to various mining related activities in the past;

k) it is in the public interest that Taseko have available to it all of the best information to submit to the environmental assessment process; and

l) having illegally prevented Taseko from exercising its lawful rights, the petitioners do not come to court with the clean hands required of a party seeking the equitable remedy of injunctive relief, and this should at least be taken into account in assessing the balance of convenience.

51 I do not propose to deal with each of these points individually. Rather, I will endeavour to explain as best I can why, in my view, the balance of convenience favours the petitioners. I turn first to the question of delay.

52 I think it clear on the evidence that Taseko indeed pursued its permits with dispatch. It began the application process before it even submitted the New Prosperity Project to the Canadian Environmental Assessment Agency, initially proposing to carry out the work between the beginning of August and the end of October, 2011.

53 That target could not be achieved. The "timing window" referred to by Ms. Wassenaar in her letter of September 22, 2011, evaporated for reasons that had little to do with the petitioners, who remained mystified as to why there could not be a further delay at least to determine from the environmental assessment agency's pending decision whether there was any point to the exercise. Taseko never took the position that it wanted to proceed with the program regardless of whether the project would be accepted for environmental assessment. Yet no reason was ever given by either Taseko or the Crown for proceeding with the timetable the Crown imposed, other than the fact of Taseko's application

54 Taseko originally took the position that the Federal Government established a 12-month window for the environmental assessment process so that any delay irreparably harmed its ability to fulfill its obligations within that mandated time. On the evidence, however, this position proved to be incorrect; the 12-month period does not include the time it would take Taseko to respond to information requests, or the time that it would take Taseko to prepare and submit its environmental impact studies.

55 Taseko then took the position that time is still an asset, and as it is in the business of developing mines, delay in this process constitutes irreparable harm. Yet Taseko has pointed to its efforts over 20 years to bring the Prosperity Project to fruition. One wonders how irreparable a few more months would be? Its new project is based upon long-term forecasts, not short-term market fluctuations. That does not mean that delay is not harmful, and I accept that delay is contrary to Taseko's interests. What does follow is that the delay weighs less heavily in the balance.

56 I next turn to the question of what harm alleged by the petitioners is relevant. Taseko and the Crown rely on *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044 (B.C. S.C.), for the proposition that "the loss of the constitutional right ... to be consulted does not itself amount to irreparable harm" (para.30). Mr. Justice Willcock went on, however, to reflect at paragraph 34 that "it ought not to be said that irreparable harm arises in every case where there is a failure to consult". What he makes clear in paragraph 32 is that while a failure to consult need not without more signify irreparable harm, it nevertheless remains to be weighed in determining the balance of convenience.

57 In my view, it follows from that case and many others that in weighing the balance of convenience, it is proper to take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot. Granting the injunction, on the other hand, will not deprive Taseko of the opportunity to obtain the geological and engineering information it requires, except to the extent that their proposed program is properly curtailed by the process of appropriate consultation. If the petitioners are ultimately unsuccessful, and the permits upheld, then Taseko will be behind by a few months, but in the overall scheme of its billion-dollar project, I consider that to be a real but relatively minor inconvenience.

58 Like Dillon J. in the *Canada Forest Products* case at para. 75, I consider the words of MacPherson J.A. in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (Ont. C.A.), to be apropos the issue we are considering here:

> [46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
>
> . . .
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the

> Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101.

59 This leads me to the public interest aspect of the balance of convenience. I fully accept Taseko's submission that it is in the public interest for Taseko to obtain the best available information for the purpose of informing the environmental assessment process. I do not, however, see that interest as being significantly at risk should the petitioners obtain their injunction, for the reasons just discussed.

60 On the other hand, it is also very much in the public interest to ensure that, in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.

61 I observe that the importance of that interest in this case is magnified by the reality that the petitioners and Taseko will be involved for the foreseeable future in an ongoing relationship with the Crown in the middle. In these circumstances, it seems to me that the public interest in ensuring that the process of consultation and accommodation is set on a proper footing is particularly high.

62 I turn next to the question of actual damage. Beside the fact of delay, Taseko points to the expense to which it has been put in marshalling its contractors and equipment only to have to release them all, without any assurance of ongoing availability, when its access to the work area was denied. We are speaking of thousands, and perhaps tens of thousands of dollars, and I accept that there is little chance of recovering such losses from the petitioners should the petition for judicial review ultimately fail. I further accept that this constitutes irreparable harm. At the same time, it must be viewed in the context of the hundreds of millions of dollars that Taseko is prepared to spend on this project, and by my comments above as to the cost of doing business. Moreover, there is no evidence here of widespread unemployment or damage to the community that would result from the injunction as there was in cases such as *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 392 (B.C. C.A.).

63 Turning to the potential effect of the program on the aboriginal rights of the petitioners, I bear in mind that the result of a successful challenge by the petitioners is on balance unlikely to eliminate the work altogether, though it may reduce it or effect an improved program of mitigation, or both.

64 Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:

> [61] ...The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

65 It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

66 The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.

67 In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the *status quo*.

68 Next, I consider the point that the petitioners are unable to offer any undertaking as to damages. They request relief from the requirement of Rule 10-4(5) of the *Supreme Court Civil Rules*, which provides:

> (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

69 That relief is to be provided only under special circumstances, which circumstances include the strength of the respective cases and the balance of convenience: *Delta (Municipality) v. Nationwide Auctions Inc.* (1979), 100 D.L.R. (3d) 272, [1979] 4 W.W.R. 49 (B.C. S.C.). There is no general exemption to the obligation for aboriginal litigants asserting aboriginal rights and title: *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (B.C. S.C.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 345 (B.C. S.C.).

70 I conclude that the circumstances of this case justify an order relieving the petitioners of the obligation to give an undertaking as to damages. Those circumstances are: my assessment of the balance of convenience as outlined above; the importance of ensuring that matters proceed on an appropriate basis between these parties for the foreseeable future; and the relative economic strength of the parties and the relative harm each is likely to suffer. I also take into account the petitioners' letter to Taseko of October 13, 2011, in which they notified Taseko of their position, and advised Taseko not commence any activities under the permits while the Tsilhqot'in National Government considered its options for response.

71 Finally, I turn to the question of whether the conduct of Chief Baptiste and others in effectively blocking Taseko from exercising its rights under the permits in question should disentitle the petitioners from injunctive relief, or otherwise weigh into the balance of convenience.

72 The conduct in question is not irrelevant, but on the state of the evidence, I question whether it is appropriate to conclude that the Xeni Gwet'in and the Tsilhqot'in Nation have come to court with unclean hands because of the unlawful action of Chief Baptiste and those who assisted her. In my view, this conduct is more properly to be taken into account in considering Taseko's application, which I do below.

73 Taking all these matters into consideration, I conclude that petitioners will suffer greater harm from the refusal of the injunction then will Taseko from the granting of it. Accordingly, the balance of convenience weighs in favour of granting the injunction requested by the petitioners.

d. Conclusion

74 The petitioners have satisfied the test for an interim injunction, and the order will go subject to terms that I will discuss with counsel. The costs of the petitioners' application for an interim injunction will be at the discretion of the judge who hears the judicial review application.

2. Taseko's Application

75 Given that Taseko is to be enjoined, for the time being, from proceeding with the exploration program that is covered by the two permits that are at issue, I am unable to see any need for injunctive relief for Taseko.

76 Taseko submitted that it has other reasons for going into the area in question in the ordinary course of its business, and therefore should be protected from any further interference. Taseko has been exercising its rights under its permits, claims and lease over many years. Never before has it encountered difficulty of the sort it encountered here. The evidence does not establish any risk that Taseko will again be impeded in the circumstances that now exist. I therefore see no basis to support the granting of injunctive relief to Taseko at this time. Taseko will of course have leave to renew its application should events justify it doing so.

77 I am also mindful of the fact that Taseko has acted lawfully throughout and ought not to have been put in a position where it had to seek the injunctive relief set out in its application. In the circumstances, because of the unlawful conduct of Chief Baptiste and the other defendants to Taseko's action, I exercise my discretion in relation to costs to award Taseko the costs of

its application payable forthwith in any event of the cause of either proceeding. The hearing of these applications took 3 $^{1}/_{2}$ days. I would attribute 1 $^{1}/_{2}$ days to Taseko's application, and the other 2 days to the petitioners' application.

3. Terms

78 I will now hear from counsel as to appropriate terms for the interim injunction awarded to the petitioners.

[DISCUSSION WITH COUNSEL]

79 The terms the order in Victoria Action No. 114556 will be these:

- Taseko Mines Limited and its agents, employees and contractors, are hereby enjoined from undertaking any of the activities authorized by the permit granted by the Inspector of Mines on September 29, 2011, pursuant to Taseko's Notice of Work application, and/or the Occupant Licence to Cut permit granted on October 12, 2011;

- This order will remain in effect for 90 days from the date hereof unless extended upon application by the petitioners upon notice to the respondents, and in any event for no longer than is required for the petitioners' application for judicial review to be heard and determined;

- Upon any application to extend the term of this order beyond 90 days, the petitioners will be required to establish that they are proceeding with the petition in a timely manner and in good faith, but will not otherwise have to re-establish their entitlement to an injunction as outlined in these reasons;

- The Victoria Registry of this Court is directed to schedule the hearing of this petition to take place within 90 days or as soon thereafter as is practicable.

80 Finally, as discussed, the parties are encouraged to re-engage in consultation immediately with a view to resolving the differences and competing interests that have been so capably articulated over the last week.

Order accordingly.

End of Document

TAB 18

2006 CarswellOnt 1887
Ontario Superior Court of Justice

Benjamin v. Toronto Dominion Bank

2006 CarswellOnt 1887, [2006] O.J. No. 1253, [2006] O.T.C. 310,
146 A.C.W.S. (3d) 1061, 23 E.T.R. (3d) 149, 80 O.R. (3d) 424

Sheldon Benjamin (Plaintiff) and The Toronto-Dominion Bank (Defendant)

Perell J.

Heard: March 30, 2006
Judgment: April 3, 2006
Docket: 06-CV-307565PD3

Counsel: Martin Sclisizzi, Elissa Goodman for Plaintiff
Thomas N.T. Sutton for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts

Related Abridgment Classifications

Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.i Strength of applicant's case

Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.ii Irreparable harm

Remedies
II Injunctions
II.4 Mandatory injunctions
II.4.a Threshold test
II.4.a.iii Balance of convenience

Remedies
II Injunctions
II.8 Practice and procedure
II.8.f Undertaking regarding damages
II.8.f.v Miscellaneous

Headnote

Injunctions --- Availability of injunctions — Mandatory injunctions — Threshold test — Strength of applicant's case

Plaintiff solicitor had "no hold" accounts with defendant bank — Services agreement provided that bank may charge accounts with amount of any instrument negotiated by it for which payment is not received — Plaintiff deposited to trust account two forged cheques drawn on other branch of bank — Defendant made electronic transfer of funds and plaintiff withdrew amounts that day — When defendant learned of forgery, it refused to allow plaintiff to withdraw amount from monies later deposited to account on behalf of clients — Plaintiff applied for interlocutory injunction requiring defendant to release funds — Application granted — Plaintiff showed clear and strong case — Drawee bank bore risk of payment as it was deemed to know signature of

its customer — Agreement did not protect defendant because it received payment from other branch — To interpret "payment" provisionally would violate policy behind rule — Defendant had means to verify signature before debiting customer's account.

Injunctions --- Availability of injunctions — Mandatory injunctions — Threshold test — Irreparable harm

Plaintiff solicitor had "no hold" accounts with defendant bank — Plaintiff deposited to trust account two forged cheques drawn on other branch of bank — Defendant made electronic transfer of funds and plaintiff withdrew amounts that day — When defendant learned of forgery, it refused to allow plaintiff to withdraw amount from monies later deposited to account on behalf of clients — Real estate transaction was as result in jeopardy of not closing — Plaintiff applied for interlocutory injunction requiring defendant to release funds — Application granted — Plaintiff would suffer irreparable harm if injunction was not granted — Plaintiff faced claim of professional negligence if transaction failed — Damage to plaintiff's reputation could not be compensated by damages.

Injunctions --- Availability of injunctions — Mandatory injunctions — Threshold test — Balance of convenience

Plaintiff solicitor had "no hold" accounts with defendant bank — Plaintiff deposited to trust account two forged cheques drawn on other branch of bank — Defendant made electronic transfer of funds and plaintiff withdrew amounts that day — When defendant learned of forgery, it refused to allow plaintiff to withdraw amount from monies later deposited to account on behalf of clients — Real estate transaction was as result in jeopardy of not closing — Plaintiff applied for interlocutory injunction requiring defendant to release funds — Application granted — Balance of convenience favoured plaintiff — Inconvenience to defendant was loss of security for its claim — Freezing account in effect gave defendant Mareva injunction it was not entitled to — Defendant's self-help was especially offensive because it seized trust funds — Inconvenience to plaintiff was necessity of raising funds to close transaction or having to defend professional liability claim — Inconvenience to third parties also clearly favoured granting injunction.

Injunctions --- Procedure on application — Undertaking regarding damages — General

Plaintiff solicitor had "no hold" accounts with defendant bank — Plaintiff deposited to trust account two forged cheques drawn on other branch of bank — Defendant made electronic transfer of funds and plaintiff withdrew amounts that day — When defendant learned of forgery, it refused to allow plaintiff to withdraw amount from monies later deposited to account on behalf of clients — Plaintiff applied for interlocutory injunction requiring defendant to release funds — Application granted — Plaintiff's undertaking was sufficient despite lack of assets — Plaintiff's licence to practise law was adequate security — It was disingenuous of defendant to question plaintiff's credit given their relationship.

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s. 48 — referred to

APPLICATION by plaintiff for interlocutory mandatory injunction requiring defendant bank to release funds from his account.

***Perell J.*:**

Introduction

1 The plaintiff, Sheldon Benjamin, who is a lawyer, moves for an interlocutory mandatory injunction to require the defendant, The Toronto Dominion Bank, to release $190,000 being held by the Bank at its branch at 312 Sheppard Avenue East, Toronto.

2 The money is being held — or "frozen" as the parties would have it — in the trust account that the Bank provides for Mr. Benjamin's law practice.

3 The $190,000 being held by the Bank does not belong to Mr. Benjamin. The money belongs to Mr. Benjamin's client, Mr. Acheampong, who is a purchaser that requires it to close a real estate transaction.

4 The Bank, however, refuses to release Mr. Acheampong's money. The Bank relies on the banking agreement it has with Mr. Benjamin, "the TD Canada Trust Business Banking and Services Agreement." The Bank says that under that agreement, if a credit to Mr. Benjamin's trust account is reversed by reason of an unpaid instrument having been credited to the account, then the Bank may freeze or claim a subsequent deposit to the account.

5 In particular, the Bank submits that pursuant to its banking agreement with Mr. Benjamin, it may reverse a $190,000 credit to Mr. Benjamin's trust account that was based on two uncertified cheques drawn on the account of a Mr. Moon and it may freeze the money deposited from two cheques drawn by Mr. Acheampong. The Bank says it may do all this because it has now discovered that the Moon cheques were forged.

6 For the reasons set out below, it is my conclusion that Mr. Benjamin, who — like the Bank — was not aware that the Moon cheques he was depositing were forgeries, has a strong case that the Bank cannot rely on its banking agreement to claim the monies that it knows do not belong to Mr. Benjamin. The Bank cannot force Mr. Benjamin to suffer the loss caused by the forger.

7 It is further my conclusion that Mr. Benjamin will suffer irreparable harm if the relief he seeks is not granted and that the balance of convenience favours granting this relief. Finally, it is my conclusion that Mr. Benjamin has satisfied the requirement of giving an undertaking as to damages. Based on these conclusions, Mr. Benjamin is entitled to the order he seeks, and I grant his motion.

8 To explain my conclusions, I will set out the factual background and I will consider the law that governs the granting of an interlocutory mandatory injunction and apply it to the circumstances of the immediate case. I will also discuss several issues

of law associated with negotiable instruments, the *Bills of Exchange Act*, R.S.C. 1985, C. B-4, the interpretation of the banking agreement, and briefly the law of trusts. During the discussion, I will address the arguments of both parties.

Factual Background

9 Mr. Benjamin, who was called to the bar in September 2004, began to practice law in August 2005, when he opened his office on Sheppard Avenue East to practice as a sole practitioner focusing on residential and commercial real estate.

10 Mr. Benjamin does his banking with the defendant Bank, primarily at its Sheppard Avenue East branch and he has five accounts, including the trust account that is relevant to the matter before the court.

11 The trust account (and Mr. Benjamin's other accounts) have a "no hold status". This means that Mr. Benjamin may withdraw funds from the accounts before deposits have been processed and cleared.

12 The Bank submits that no hold status is a provisional credit, in effect, a loan that may yield an overdraft if the credit is subsequently reversed, which is what it submits happened in the circumstances summarized above and described in more detail below.

13 The Bank relies on section 7(b) of the TD Canada Trust Business Banking and Services Agreement. It is the crucial provision, and I have underlined the most critical part. Section 7(b) states:

> [The Bank] may charge any of your accounts, even if that creates an overdraft, with the amount of the following:
>
> (b) any Instrument cashed or negotiated by us for you to any of your accounts for which payment is not received by us [the Bank] or which is returned to us [the Bank] by reason of a forged, unauthorized or missing endorsement, plus any expenses incurred by us in that connection. You agree that the charging of any unpaid Instrument will not be considered to be payment of it and that our rights against all parties liable are preserved;

14 On Friday, February 3, 2006, Mr. Benjamin attended at the Sheppard branch of the Bank to make a deposit into his trust account of two uncertified cheques in the amounts of $102,000.00 and $88,000.000. The cheques had been drawn on the account of on one Jong Yeol Moon, a customer at another branch of the Bank, the Yonge and Finch branch.

15 Mr. Benjamin had received the two cheques from a client who held himself to be one Jong Yeol Moon. Unfortunately, Mr. Benjamin did not know that the client was impersonating the Mr. Moon who had an account at the Yonge and Finch branch.

16 The impostor Mr. Moon had retained Mr. Benjamin in December 2005 to act on a purchase and sale of a condominium unit in London, Ontario for the price of $189,000.00. The imposter Mr. Moon was the purchaser, and Mr. Benjamin was also retained to act for the vendors, Mehboob Ali Khan and Tazeem Afsahn Khan. Mr. Moon and the Khans represented themselves as being friends engaged in a private transaction. Mr. Moon and the Khans provided Mr. Benjamin with copies of their drivers' licenses and social insurance cards.

17 On February 3 rd , while waiting in line to make his deposit of the Moon cheques, Mr. Benjamin met Mr. Rahim Mamdani, a Financial Services Representative at the Sheppard branch, who volunteered to make the deposit for Mr. Benjamin.

18 In making this deposit for Mr. Benjamin, Mr. Mamdani first did a computer inquiry to determine whether there were sufficient funds in the Moon account at the Yonge and Finch branch, and being satisfied that there were sufficient funds, Mr. Mamdani electronically credited the Benjamin Trust account and he electronically debited the Moon Trust account.

19 Mr. Benjamin obviously was aware that his own trust account had been credited. He was not aware that Mr. Moon's account had been debited electronically. There is now a very substantial contest between the parties to the case at bar about the legal significance of what Mr. Mamdani did, but I will postpone the discussion of this controversy.

20 After the deposit had been made, Mr. Benjamin left the Sheppard branch, but he returned later in the day, and he withdrew $185,132.87 from his trust account. Of this sum, $2,500 was withdrawn in cash, $1,138.65 was transferred to Mr. Benjamin's general account at the Bank, and $181,494.22 was a bank draft payable to Finmark Financials.

21 Mr. Benjamin then proceeded to close the condominium transaction, and in the course of doing so, he gave Mr. Khan the bank draft and the $2,500 cash.

22 On February 14, 2006, Mr. Benjamin was contacted by an employee of the Bank's Yonge and Finch branch, and the employee advised Mr. Benjamin that the Moon cheques might have been forged. Mr. Benjamin was not advised that the Bank might freeze funds in his trust account.

23 Early on February 28, 2006, Mr. Benjamin deposited into his trust account two cheques drawn by Mr. Kingsley Acheampong totaling $337,944.46. These funds had been provided to Mr. Benjamin in order to close a real estate transaction in which Mr. Acheampong was purchasing a home from a Mr. Rojas.

24 Later on February 28, 2006, Mr. Benjamin attempted to withdraw the funds from his trust account in order to close the Acheampong/Rojas transaction, and he was then advised for the first time that the Bank had frozen all of the funds of the account. Later the freeze was adjusted to apply only to $190,000 in the trust account.

25 As noted at the outset, the Bank refuses to release the frozen money, and Mr. Benjamin now sues the Bank and seeks an interlocutory mandatory injunction compelling it to release the $190,000 so that he can close the Acheampong/Rojas transaction.

The Test for an Interlocutory Mandatory Injunction

26 In order to obtain interlocutory injunctive relief, Mr. Benjamin must demonstrate: (a) that there is a serious question to be tried; (b) that he will suffer irreparable harm if the injunction is not granted; and (c) that the balance of convenience favours granting the injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). He must also give a meaningful undertaking as to damages.

27 Because of its more intrusive nature, where the interlocutory relief is a mandatory injunction, Mr. Benjamin must show a strong and clear case with a high degree of assurance that an injunction would be rightly granted: *Ticketnet Corp. v. Air Canada*, [1987] O.J. No. 782 (Ont. H.C.); *Canadian Tire Corp. v. Dufrat* (1993), 108 D.L.R. (4th) 363 (Ont. Gen. Div.); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.).

The Risk of Payment on a Forged Cheque

28 The Bank submits that pursuant to the terms of the banking agreement, the *Bills of Exchange Act*, and the common law, it is entitled to recover the $190,000 from Mr. Benjamin's trust account. Before, addressing the Bank's argument, it is necessary to consider several general principles of the law of negotiable instruments and the law's treatment of who bears the risk of forgery of a cheque. It is also necessary to consider the steps in the progress of making a payment by a cheque. The consideration of these matters is required because they provide the context for interpreting the underlined words in paragraph 7 (b) of the banking agreement between Mr. Benjamin and the Bank that governed his trust account. It is also necessary to have this background information in order to determine whether Mr. Benjamin has shown a clear and strong case.

29 Typically, there are three parties to a bill of exchange. The person who writes a bill of exchange, including a cheque, is known as the "drawer". In writing a bill of exchange, the drawer requests a person known as the "drawee" to pay a sum of money to a third person, who is known as the "payee." Translated into everyday affairs, a customer of a bank (the drawer) writes a cheque to withdraw money from his or her bank account (the drawee) to pay a creditor (the payee).

30 The law is that the drawee bank, which is deemed to know the signature of its customer, and not the payee, bears the risk of payment on a forged cheque. The venerable text, J.D. Falconbridge, *The Law of Negotiable Instruments in Canada* (12th ed). (Toronto: The Ryerson Press, 1960) states at p. 141:

> The drawee of a cheque is bound to know the signature of its customer. If, therefore, in the ordinary course of dealing there comes through one bank to another a cheque purporting to bear the signature of a customer of the latter, which pays the cheque and charges the amount to the customer, the implication from the transaction is that the drawee bank pays the cheque in reliance upon its knowledge of the customer's signature, and not any supposed representation or warranty of its genuineness by the bank that presents it. Accordingly, the general rule is that the drawee bank which pays upon a forged or unauthorized signature of its customer is not entitled to recover back the amount from the presenting bank, unless the latter is a mere agent for collection and has not yet paid the money out.

See also: *Bills of Exchange Act*, s. 48; *Arrow Transfer Co. v. Royal Bank*, [1972] S.C.R. 845 (S.C.C.); *Productions Mark Blandford inc. c. Caisse populaire St-Louis de France*, [2000] J.Q. No. 1877 (Que. C.A.); *R. v. Bank of Montreal* (1907), 38 S.C.R. 258 (S.C.C.); *Royal Bank v. Concrete Column Clamps (1961) Ltd.* (1976), [1977] 2 S.C.R. 456 (S.C.C.); *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, [2005] B.C.J. No. 1662 (B.C. S.C.).

31 In the case at bar, the drawer was Mr. Moon, the payee was Mr. Benjamin, and the drawee bank was the Yonge and Finch branch of the Bank. The Sheppard branch of the defendant Bank was the presenting or collecting bank. Here it may be noted that under the law of negotiable instruments, generally speaking, the branches of a bank are treated as separate entities.

32 In the case at bar, the presenting bank and the drawee bank are both branches of the defendant Bank, and as a result of sharing the same computer system, there was an electronic debit made to Mr. Moon's account without the drawee bank taking the opportunity of validating the signature of its customer. The evidence was that this was an internal decision of the Bank. Its policy for internal electronic transactions of this type was not to submit the cheques to the clearing system; instead, the Bank sent the cheques to its own storage location, unless a specific request was made to confirm the validity of the signatures, which verification is apparently done by the collecting bank obtaining and reviewing a copy of the other branch's customer signature card. (See Chan transcript: pp.32-39, Qs. 166-194.)

33 With this background, it is now possible to address what is a pivotal dispute between the parties. The Bank says that it may rely on paragraph 7(b) to freeze $190,000 in Mr. Benjamin's trust account. Mr. Benjamin responds that the normal law of negotiable instruments about the drawee bank bearing the risk of forgery applies and that the Bank has not succeeded in contracting out of that law.

34 Mr. Sclisizzi, Mr. Benjamin's counsel, argues that paragraph 7(b) does not apply because neither of its two legs is available to the Bank. The second leg is not available because the case at bar does not involve any endorsements. The critical first leg does not apply because it applies only where *"payment is not received by us [the Bank]"* and in the case at bar payment was received when an electronic debit was made to Mr. Moon's account.

35 Put somewhat differently, on the facts of this case, by reason of the defendant Bank's policy of allowing debits to be made electronically, it caused payment to be made and the drawee bank missed the opportunity to verify its customer's signature. While the banking agreement would have protected the Bank if there was no payment, this is not the situation in the case at bar, and thus Mr. Sclisizzi submits that the Bank and not Mr. Benjamin must bear the loss from the forgery.

36 Relying, in part, on an article by R.M. Goode, "When is a Cheque Paid?" [1983] J. Bus. L. 164, Mr. Sutton, the Bank's counsel, makes a counterargument that the payment was not "complete" because it was provisional under the Bank's internal arrangements and, accordingly, the Bank can rely on paragraph 7(b).

37 I do not need to decide this dispute; all I need do is decide whether there is a substantial likelihood of success for Mr. Sclisizzi's argument. Since my own view is that his argument is correct, I find that it has a substantial likelihood of success and that Mr. Benjamin has satisfied the first stage of the test for a for an interlocutory mandatory injunction.

38 I prefer Mr. Sclisizzi's argument because it provides a common sense and operative meaning to the word payment. There is no denying that a debit was electronically made to Mr. Moon's account, viz., he had to take steps to satisfy the Bank that his signature had been forged to regain his money. In my view, there was a payment made on a forged cheque, and unfortunately

the payment was made to an innocent party, Mr. Benjamin, for the ultimate benefit of forgers, Mr. Moon and the Khans, who at the moment it seems, cannot be found.

39 I see no reason to interpret the word payment provisionally and qualified by a contractual arrangement with the presenting bank and their customer, especially when to do so would be inconsistent with the sound policy behind the rule that the drawee bank bears the risk of forgeries. In the immediate case, the Bank's policy and its computer system permitted a presenting Bank to make a debit to the account of a customer of the drawee bank and then left it for the defrauded customer to complain that an unlawful debit had been made to his account. The rationale behind the rule that makes the drawee bank bear the risk, however, is that the drawee bank is best placed to prevent frauds because it has knowledge of the signature of its customers. The idea is that before debiting the customer's account, that is, before completing payment, the drawee bank can verify the customer's signature. Mr. Sutton's argument would extend the completion of payment to something that rests in the will of the Bank and makes the notion of payment uncertain.

40 In the immediate case, the Bank might have avoided there being a payment and it might have been in a position to rely on paragraph 7 (b), if Mr. Mamdani had *not* taken the step of electronically debiting Mr. Moon's account. Thus, before a payment was made, the Bank could still have granted the no hold privileges to Mr. Benjamin but sent the cheque to the drawee bank for verification or it could have called on the drawee bank to send the signature card so that verification of the signature could have been made.

The Law of Trusts

41 There is a second argument based on the law of trusts that supports Mr. Benjamin's request for an interlocutory mandatory injunction. The funds in the Benjamin trust account were known, ought to have been known, and are now undoubtedly known by the Bank to be the property of Mr. Acheampong. The bank knows that by freezing these funds it may be placing Mr. Benjamin in a position where as the trustee of those funds for his client he is breaching his trust. The argument is that the Bank cannot knowingly use its banking agreement with Mr. Benjamin to have him breach a trust with a client. In this regard, in their factum, Mr. Sclisizzi and Ms. Goodman quote Underhill and Hayton, *Law Relating to Trust and Trustees* (London: Butterworths, 1995) at p. 919.

> Where a trustee has overdrawn his banking account, his bankers have a first and paramount legal lien on all moneys paid in by him, unless they have notice, not only that they are trust moneys, but also that payment to them constitutes a breach of trust.

42 The trust argument advanced on behalf of Mr. Benjamin will take this action into some very complicated legal and factual territory. See *Glenko Enterprises Ltd. v. Ernie Keller Contractors Ltd.*, [1996] 5 W.W.R. 135 (Man. C.A.); *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), leave to appeal to S.C.C. refused, (1994), 19 O.R. (3d) xvi (S.C.C.); *Cypress-Batt Enterprises Ltd. v. Bank of British Columbia*, [1994] 9 W.W.R. 438 (B.C. S.C.); *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.); *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.).

43 Having regard to my conclusion that Mr. Benjamin has a substantial likelihood of success on his first argument, it is not necessary for me to make a ruling on whether he has an alternative argument that also has a substantial likelihood of success. I will say, however, that based on the oral argument, he certainly has gone well beyond the standard of showing that there is a serious issue to be tried and has demonstrated a likelihood of success on his trust argument.

Irreparable Harm

44 I turn now to the other elements of the test for an interlocutory injunction. I conclude that Mr. Benjamin will suffer irreparable harm if the mandatory injunction is not granted. There is a substantial risk that the Acheampong/Rojas transaction, which is at the day to day sufferance and indulgence of Mr. Rojas will fail and that Mr. Benjamin will be exposed, if he is not already so exposed, to claims of professional negligence, breach of trust, and, more remotely, professional misconduct.

45 Mr. Sutton, counsel for the Bank, argues that there is no irreparable harm because any adverse consequences of the Bank's freezing the funds can be quantified in money and that the Bank, being a bank, is good for it. Thus, he submits that Mr. Benjamin is not entitled to the extraordinary equitable remedy of a mandatory injunction because the common law remedy of damages is adequate.

46 However, as Publilius Syrus remarked in the First Century B.C.E., "A good reputation is more valuable than money." For a lawyer, young or old, the loss of a good reputation is not reparable by money. In a sense, a lawyer's reputation is his or her claim to a share of the marketplace for legal services. In my opinion, the present circumstances that confront Mr. Benjamin do threaten his reputation and his early efforts to build a law practice. There is irreparable harm to Mr. Benjamin if the present state of affairs continues.

Balance of Convenience

47 I conclude that the balance of convenience favours granting the mandatory injunction. From the Bank's perspective, the imposition of the mandatory injunction would be inconvenient because it forgoes what amounts to security for its claim that Mr. Benjamin is responsible for the overdraft in his trust account caused by the deposit of a forged cheque.

48 For the Bank to have this security would no doubt be convenient, but for the reasons expressed above, I rather doubt that the Bank is entitled to this convenience. In effect, the Bank has obtained by self-help something akin to a *Mareva* injunction against Mr. Benjamin by freezing his trust account. This is objectionable not only because the law in Ontario stands against pre-judgment execution (except in the extraordinary circumstances of where a *Mareva* injunction is genuinely available) but also because the Bank has seized somebody else's money, which is something that it could not do even under a properly granted *Mareva* injunction.

49 From Mr. Benjamin's perspective, the refusal of his request for a mandatory injunction confronts him with the inconvenience of finding a way to close the Acheampong/Rojas transaction with his own or somebody else's money. This may be possible, but it is inconvenient. If it proves not possible for Mr. Benjamin to finance the pending transaction, then there is the inconvenience to Mr. Benjamin having to defend the professional liability claims that must inevitably come, because, one way or the other, Mr. Acheampong is entitled to his money and Mr. Rojas may be entitled to the closing proceeds or compensation for breach of contract.

50 In assessing the balance of convenience, there is also the factor of considering the effect of granting or not granting the injunction on third parties. This factor clearly favours granting the injunction and facilitating the closing of the Acheampong/Rojas transaction.

Undertaking as to Damages

51 Mr. Benjamin has given an undertaking as to damages, and Lawpro, his professional liability insurer, has indicated that it will stand behind him if he is found liable to the Bank as a result of professional negligence. It is not clear to me, however, whether Lawpro's assurances would cover the circumstances of the case at bar.

52 The Bank challenges the adequacy of Mr. Benjamin's undertaking as to damages because he has no assets to speak of other than his license to practice law. In my opinion, in the circumstances of this case that is good enough to constitute a meaningful undertaking as to damages.

53 I find it ironic and somewhat disingenuous that the Bank challenges Mr. Benjamin's undertaken as to damages when it gave him no hold privileges precisely because he had established a credible relationship with the Bank and it felt it could rely on him to honour his obligations. (See Chan transcript: pp. 18-19, Qs. 86-90.) If it was necessary, which it is not, I would exercise the court's discretion to forgo the undertaking as to damages in the circumstances of this case.

Conclusion

54 For the above reasons, I grant the request for an interlocutory mandatory injunction. If the parties cannot agree as to the matter of costs of this motion, then they may make submissions in writing within 30 days of the release of these reasons for decision.

Application granted.

End of Document

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ORIGINAL TRADERS ENERGY LTD. AND 2496750 ONTARIO INC.
Court File No. CV-23-00693758-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

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