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

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21	*Access Human Resources Inc. v. Earl*, 2018 BCSC 2347
22	*A.J. Lanzarotta Wholesale Fruits & Vegetables Ltd.*, 2022 ONSC 1147
23	*Woods v. Jahangiri,* 2020 ONSC 7404
24	*Vidcom Communications Ltd. v. Rattan,* 2022 BCSC 1379

TAB 1

2020 SCC 10, 2020 CSC 10
Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1 S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Rowe, Kasirer JJ.

Heard: January 23, 2020
Judgment: May 8, 2020
Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schrager J.C.A. (C.A. Que.)

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Wagner C.J.C., Moldaver J. **(Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):**

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated.

The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims"). [1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote. [2]

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter Century Services], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the

outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of CCAA Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R.

(3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. [3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in CCAA Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA*

proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with *greater* judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation .... If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4] . The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or

increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **Interim financing**
>
> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms. [5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

> **Priority — secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet

the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> (*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance. [6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the

debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature

or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . . . .
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).

2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite ltée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

TAB 2

2020 ONSC 7979
Ontario Superior Court of Justice [Commercial List]

Lydian International Limited

2020 CarswellOnt 18849, 2020 ONSC 7979, 326 A.C.W.S. (3d) 539

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED

G.B. Morawetz C.J. Ont. S.C.J.

Heard: December 18, 2020
Judgment: December 18, 2020
Docket: CV-19-00633392-00CL

Counsel: Elizabeth Pillon, Sanja Sopic, Nick Avis, for Applicant
Rachel Bengino, for Monitor, Alvarez & Marsal Canada Inc.
David Bish, for Orion Capital Management
I. Baykal, S. Bozkaya, S. Yuteri, for Shareholders

***G.B. Morawetz C.J. Ont. S.C.J.*:**

1 The Applicant, Lydian International Limited ("Lydian International"), brings this motion for an order that:

(a) extends the stay of proceedings (the "Stay Period") with respect to Lydian International until the earlier of (i) the filing of the Monitor's CCAA Termination Certificate and (ii) March 31, 2021; and

(b) approves the Eighth Report of the Monitor, dated December 15, 2020 (the "Eighth Report"), and the activities of the Monitor as set out in the Monitor's Eighth Report.

2 The facts with respect to this motion are set out in the Eighth Report. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Eighth Report.

3 The CCAA Plan was sanctioned on June 29, 2020. The Plan contemplated a Plan Implementation Date of June 30, 2020. No appeal was sought in respect of the Plan Sanction and Implementation Order.

4 The Plan Implementation Date was delayed to July 6, 2020. On that day, the Monitor served the Plan Implementation Certificate specifying that the Plan Implementation Date had occurred. The Plan Implementation Certificate had the effect of, among other things, terminating the CCAA proceedings as they related to Lydian U.K. and Lydian Canada. Lydian International is the only remaining Applicant in these CCAA proceedings.

5 The Plan provides that Lydian International is to undergo an orderly wind up in Jersey by means of the J&E Process. Lydian International commenced the process for the J&E Order following the Plan Implementation Date. The Initial Hearing before the Royal Court in Jersey was held on August 14, 2020. The Royal Court granted certain directions and set September 11, 2020 as the date for the Substantive Hearing. Creditors and shareholders of Lydian International were given notice of the Substantive Hearing. Following the Substantive Hearing, the Royal Court issued the J&E Order that, among other things, ordered the winding up of Lydian International.

6 The J&E Process was anticipated to have concluded well in advance of December 21, 2020; however, the Joint Liquidators advised the Monitor and Lydian International's Canadian counsel that there are certain remaining steps prior to the competition of the J&E Process. The Joint Liquidators must also arrange for a final hearing before the Royal Court to seek the issuance of an Act of Court concluding the J&E Process.

7 I am satisfied, having reviewed the Eighth Report, that the parties are working in good faith and with due diligence to complete outstanding matters. I am also satisfied that the Applicant has sufficient financial resources to fund these proceedings through the Stay Period. In my view, and in accordance with s. 11.02(2) and (3) of the CCAA, an extension of the Stay Period for the requested period is warranted and is granted.

8 Lydian International is also seeking an order approving the Eighth Report and the activities detailed therein. The Monitor has not received any adverse comment to its Report. I am satisfied that the Report and the activities of the Monitor should be approved.

9 Representations were made by certain shareholders, specifically Mr. Bozkaya. I recognize that shareholders have lost the value of their investment in Lydian International. However, this loss occurred prior to today and the relief being requested on this motion has no impact on the financial or legal position of the shareholders. The relief being sought in this motion does not alter the effect of the Plan Sanction and Implementation Order.

10 Finally, this court has no jurisdiction to address matters before the Royal Court in Jersey.

11 In the result, the motion is granted and the order has been signed in the form presented.

Motion granted.

TAB 3

2017 ONSC 1967
Ontario Superior Court of Justice

U.S. Steel Canada Inc., Re

2017 CarswellOnt 5825, 2017 ONSC 1967, 278 A.C.W.S. (3d) 465

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

H. Wilton-Siegel J.

Heard: March 15, 2017
Judgment: April 19, 2017
Docket: CV-14-10695-00CL

Counsel: Heather Meredith, Sharon Kour, for Applicant, U.S. Steel Canada Inc.
Robert Staley, Kevin J. Zych, for Monitor, Ernst & Young Inc.
Gale Rubenstein, Melaney Wagner, for Superintendent of Financial Institutions and Province of Ontario
Lily Harmer, for United Steelworkers International Union and United Steelworkers International Union, Local 8782
Sharon L.C. White, for United Steelworkers International Union, Local 1005
James Harnum, for Non-unionized active employees and retirees
Michael Barrack, Mitch Grossell, Leanne Williams, for United States Steel Corporation
Michael Kovacevic, for City of Hamilton
Lou Brzezinski, for Robert and Sharon Milbourne
Patrick Riesterer, for Brookfield Capital Partners Ltd.
Mario Forte, for Bedrock Industries Canada LLC and Bedrock Industries L.P.
Vlad Calina, for Plan Advisor, USSCF

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

1 The applicant, U.S. Steel Canada Inc. ("USSC"), sought a number of orders in respect of a proposed plan of arrangement and compromise (the "Plan") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Plan contemplates the acquisition of substantially all of USSC's operating business and assets on a going-concern basis by Bedrock Industries Canada LLC ("Bedrock") through the acquisition of all of USSC's outstanding shares. At the conclusion of the hearing of the motions, I advised the parties that the motions were granted for written reasons to follow. This Endorsement sets out the reasons for such relief.

2 As a preliminary matter, it should be noted that the motions were supported by Her Majesty the Queen in Right of the Province of Ontario ("Ontario") and the United States Steel Corporation ("USS") and were not opposed by Representative Counsel for the current and former non-unionized employees of USSC or by the United Steelworkers International Union (the "USW"), USW Local 8782 or USW Local 1005. In addition, in its thirty-seventh report, dated March 13, 2017 (the "Monitor's Report"), the Monitor recommended approval of each of the motions for the reasons set out therein. Such level of support constituted an important consideration in the Court's approval of each of the motions, in addition to the specific considerations set out below.

The Supplementary Claims Process Order

3 USSC seeks approval of an order providing for a process to identify and determine claims not previously determined pursuant to the order dated November 13, 2014 (the "General Claims Process Order"). The General Claims Process Order excluded claims of current and former employees respecting outstanding wages, salaries and benefits, claims relating to USSC's retirement plans, claims relating to non-pension post-employment benefits ("OPEB"s), and claims against the directors and officers of USSC.

4 The purpose of the order sought is to crystallize the pool of claims that will be affected under the Plan. The proposed supplementary claims process would pertain to a subset of the creditors whose claims were excluded from the General Claims Process Order, being: (1) current and former non-unionized employees with pension claims, OPEB claims and supplemental pension claims; (2) former non-unionized employees with claims pertaining to the termination of their employment; (3) persons with claims against the directors and officers of USSC; and (4) persons who filed a claim after December 22, 2014 but before March 1, 2017.

5 The Court has the authority under s. 11 of the CCAA to make orders it considers appropriate in the circumstances, subject to restrictions set out in the CCAA. It is not disputed that such authority includes the authority to approve a process to solicit and determine claims against a debtor company and its directors and officers.

6 In this case, the claims process sought is necessary for the approval and implementation of the Plan, both for voting purposes and in order to determine the universe of claims subject to the releases contemplated by the Plan. There is no suggestion from the stakeholders appearing on this motion that the proposed claims process is not fair to the potential claimants in terms of notice or process. The timeline provided for the determination of the relevant claims is also expedient in as much as it is consistent with the timing of the proposed meetings of creditors dealt with below. In this regard, the Monitor has advised in the Monitor's Report that it believes the proposed claims process provides sufficient and timely notification to allow creditors to submit proofs of claim or dispute notices, as applicable, prior to the claims bar date under the proposed order, being April 20, 2017, particularly in view of the fact that non-unionized employees and retirees will not need to file individual proofs of claim in most circumstances. Further, the Monitor will have a supervisory role to ensure that claimants are dealt with reasonably and fairly. In respect of the late-filed claims in item (4) above, the Monitor does not believe their inclusion in the claims process will materially prejudice the other creditors in view of the *de minimus* amount of these claims and the current status of the Plan.

7 Based on the foregoing, including the support for the motion and the absence of any objections thereto as set out above, I am satisfied that the proposed supplementary claims process order should be approved.

The Meetings Order

8 USSC seeks an order accepting the filing of the Plan; authorizing USSC to convene creditors meetings to vote on the Plan; approving the classification of creditors as set out in the Plan for the purposes of the meetings and voting on the Plan; approving the distribution of the notice of meeting and materials pertaining to the Plan; approving the procedures to be followed at the meetings; and setting May 9, 2017 as the date for the hearing of USSC's motion for an order of the Court sanctioning the Plan.

9 The Plan is the outcome of an initial sales and restructuring/recapitalization process and a subsequent sale and investment solicitation process. These activities have been addressed fully in other endorsements of the Court, and are summarized in the affidavit of the chief restructuring officer of USSC, William Aziz, sworn March 10, 2017, and therefore need not be repeated here.

10 There are two classes of "affected creditors" pursuant to the Plan:

> (1) General unsecured creditors, which for this purpose do not include Ontario and USS, who would receive a cash distribution in respect of their claims which would be released, discharged and barred; and
>
> (2) Creditors having claims for non-unionized pension benefits and OPEBs, which would be replaced by new non-unionized pension benefits and OPEBs, with these creditors' existing claims to be released, discharged and barred.

11 USSC proposes that the meetings of these two classes of creditors be held on April 27, 2017.

12 In determining whether the Court should approve the filing of the Plan under paragraph 3 of the initial order in these proceedings under the CCAA (the "Initial Order") and order the convening of a meeting of creditors to vote upon the Plan, the Court must be satisfied that the Plan is not doomed to failure. This standard is amply satisfied in the present circumstances, given the level of support for the motion and the absence of any objections as described above. The Court is not to determine the fairness and reasonableness of the Plan at this stage, such issues being reserved for the sanction hearing after the creditors meetings.

13 Section 22 of the CCAA requires approval by the Court of the division of creditors into the classes contemplated by the Plan. The two classes of creditors contemplated by the Plan have been described above. For clarity, the Plan leaves the treatment of the claims of other creditors to be addressed pursuant to contractual arrangements to be negotiated between those creditors and USSC.

14 I am satisfied that the creditors in each of the classes contemplated have the necessary commonality of interest required by s. 22(2) of the CCAA. The creditors in class (1) will receive a cash distribution in respect of their claims. The creditors in class (2) will not receive a cash distribution but will instead receive replacement benefits. Accordingly, the two classes of creditors receive different treatment under the Plan while each of the creditors within each class is an unsecured creditor who receives similar treatment under the Plan and would have similar remedies if the Plan is not accepted. I note as well that the Monitor supports the proposed classification of creditors as being appropriate based on the fact that the two classes have different interests and are treated differently under the Plan.

15 Further, I am satisfied that it is appropriate that Representative Counsel act as the deemed proxy for the administrator for the non-unionized pension plans and for the current and former non-unionized employees having OPEB claims, given the active involvement of Representative Counsel in these proceedings to date on behalf of, and the commonality of interest of, the current and former non-unionized employees. I note as well that a procedure exists for individuals who have opted to represent themselves, and for individuals who have been represented by Representative Counsel but who choose to participate directly at the creditors meetings, to appoint an alternative proxy or to attend and vote in person at the creditors meetings.

16 The other terms of the proposed meetings order regarding the notice of the meetings, the conduct of the meetings, and voting at the meetings do not otherwise raise any substantive issues of fairness and reasonableness.

17 Based on the foregoing, the proposed meetings order is approved.

Amendment of the Plan Support Agreement

18 USSC also seeks an order authorizing USSC to enter into:

> (1) An agreement (the "PSA Amending Agreement") amending the "CCAA Acquisition and Plan Sponsor Agreement" dated December 9, 2016 between USSC, Bedrock and Bedrock Industries L.P. (the "PSA"); and
>
> (2) An agreement (the "Support Amending Agreement") amending the "Support Agreement" made December 9, 2016 between USSC and Ontario.

19 The Court has the authority under ss. 11 and 11.02(2) to approve a debtor company entering into an agreement to facilitate a restructuring. The Court has previously authorized the PSA and the Support Agreement pursuant to such powers.

20 The PSA Amending Agreement and the Support Amending Agreement, among other things, amend the timetable for various milestones to reflect the timetable contemplated by the meetings order. They also amend the existing agreements to reflect the term sheets as finalized to date respecting various aspects of the Plan arrangements.

21 I am satisfied that the PSA Amending Agreement and the Support Amending Agreement should be approved as necessary for, and as furthering the purposes of, the proposed restructuring of USSC pursuant to the Plan.

Extension of the Stay Period

22 Lastly, USSC seeks an order extending the stay of proceedings under the Initial Order in these proceedings to May 31, 2017.

23 Section 11.02(2) of the CCAA gives the Court the discretion to extend the stay of proceedings if the requirements of s. 11.02(3) are satisfied.

24 In this case, USSC has established that it has acted, and is acting, in good faith and with due diligence to implement a plan of restructuring and compromise. The proposed stay extension provides USSC with the time required to allow the creditors to vote on the Plan at the creditors meetings and, if approved, to seek the Court's approval at the sanction hearing. It also grants USSC sufficient time to negotiate the necessary agreements and to finalize the necessary arrangements that are conditions to implementation of the Plan. The Monitor advises in the Monitor's Report that the revised cash flow forecast of USSC contemplates that USSC will have sufficient liquidity to continue to operate throughout the proposed stay extension period.

25 Accordingly, I am satisfied that it is appropriate to approve the extension of the stay of proceedings under the Initial Order to May 31, 2017.

Motions granted.

TAB 4

2015 ONSC 622
Ontario Superior Court of Justice

Cline Mining Corp., Re

2015 CarswellOnt 3285, 2015 ONSC 622, 23 C.B.R. (6th) 194, 252 A.C.W.S. (3d) 8

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise and Arrangement of Cline Mining Corporation, New ELK Coal Company LLC and North Central Energy Company

G.B. Morawetz R.S.J.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: CV-14-10781-00CL

Counsel: Robert J. Chadwick, Logan Willis for Applicants, Cline Mining Corporation et al.
Michael DeLellis, David Rosenblatt for FTI Consulting Canada Inc., Monitor of the Applicants
Jay Swartz for Secured Noteholders

***G.B. Morawetz R.S.J.*:**

1 Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

> a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and
>
> b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

2 Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

3 Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

4 The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

5 The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

6 The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v)

the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corp., Re*, 2014 ONSC 6998 (Ont. S.C.J.) and need not be repeated.

7 The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

8 As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

9 The Applicants served the Amended Plan on the Service List on January 20, 2015.

10 The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

11 Equity claimants will not receive any consideration or distributions under the Plan.

12 The Plan provides for the release of certain parties (the "Released Parties"), including:

> (i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and
>
> (ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

13 The Plan does not release:

> (i) the right to enforce the Applicants' obligations under the Plan;
>
> (ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or
>
> (iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

14 The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

15 The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

16 The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

17 None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

18 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

19 The general requirements for court approval of the CCAA Plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]))

20 Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

21 In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

22 The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) ("*ATB Financial*"); *SkyLink*, *supra;* and *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), leave to appeal denied, 2013 ONCA 456 (Ont. C.A.)).

23 The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the

overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

24 I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

25 Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

26 The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

27 The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

28 I am satisfied that in these circumstances, it is appropriate to grant the releases.

29 The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

30 The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

31 The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

32 Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

33 For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

Motion granted.

TAB 5

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > . . . . .
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
> >
> > . . . . .
> >
> > 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

TAB 6

CITATION: Laurentian University of Sudbury, 2022 ONSC 2927
COURT FILE NO.: CV-21-656040-00CL
DATE: 2022-05-18

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Ashley Taylor, Elizabeth Pillon and Ben Muller*, for the Monitor

D.J. Miller and Andrew Hanrahan, for Laurentian University of Sudbury

David T. Ullmann, for The Art Gallery of Sudbury

André Claude, for University of Sudbury

Dylan Chochla, for Toronto-Dominion Bank

Pamela L.J. Huff, for Royal Bank of Canada

Andrew J. Hatnay, for Thorneloe University

Danielle Stampley, for Laurentian University Staff Union

Charlotte Chien, for Northern Ontario School of Medicine

Mark Mandelker, for Canadian Universities Reciprocal Insurance Exchange

Heather Fisher, for the Auditor General of Ontario

HEARD AND DETERMINED: May 11, 2022

REASONS: May 18, 2022

ENDORSEMENT

[1] Ernst & Young Inc., the Monitor (the "Monitor") of Laurentian University of Sudbury ("LU"), brought this motion for approval of: (a) the Monitor's First through Ninth Reports and the Supplementary Fifth Report ("the Reports") and the Twelfth Report, and the activities of the

Monitor described therein; and (b) the fees and disbursements of (i) the Monitor; (ii) Ernst & Young LLP ("EY FAAS"); and (iii) Stikeman Elliot LLP ("Stikeman") for the period from February 1, 2021 to December 31, 2021.

[2] The motion was not opposed.

[3] The Monitor submits that as a result of the complexity of the issues involved and the lack of internal resources at LU, the Monitor was required to engage in far more aspects of the restructuring than in most CCAA proceedings. As described in the Twelfth Report, the activities of the Monitor and its counsel during this proceeding included participating in a multi-party mediation process to implement certain critical restructuring actions, significant claims administration, assisting and supporting LU in connection with a real estate review, operational and governance review and various extensive regulatory investigations.

[4] As referenced in the factum, the work performed by the Monitor and its counsel has been reported to the Court and stakeholders in numerous reports filed over the course of the CCAA proceedings.

[5] Affidavits have been filed by lead professionals of the Monitor and Stikeman and provide a comprehensive listing of the accounts sought to be approved, including summaries of each account, individual professionals who have worked on the matter, each of their positions, average hourly billing rates, total number of hours worked and total associated professional fees. Stikeman's accounts have been redacted to remove privileged, confidential, and sensitive information.

[6] The Monitor, EY FAAS and Stikeman state that the accounts have been billed at each firm's standard/regular hourly rates, which they submit are consistent with the hourly rates charged by other firms in the Toronto market for the provision of similar services.

[7] Counsel to the Monitor made specific reference to the accounts submitted by EY FAAS and noted that due to the limited resources within LU's finance team and numerous competing demands, LU requested EY FAAS's assistance with the preparation of LU's annual financial statements. In my view, the engagement of EY FAAS was reasonable in the circumstances.

[8] Counsel to the Monitor submits that it is not necessary or desirable for the Court to engage in a review of each individual entry in the accounts, as there has been considerable disclosure of the activities of the Monitor and Stikeman in the Reports and the Twelfth Report and through the proceedings that took place before the Court.

[9] The role of the Court on a motion to pass accounts is to evaluate them based on the "overriding principle of reasonableness". The overall value contributed by the Monitor and its counsel is the predominant consideration in assessing the reasonableness of the accounts. (See *Nortel Networks Corp. (Re)*, 2017 ONSC 673 ("*Nortel*")). The Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation. As the Court of Appeal has stated: "The focus of the fair and reasonable assessment should be on what was accomplished,

and not on how much time it took". (See *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at paragraph 45).

[10] The following factors set out in *Confectionately Yours Inc., Re* 2002 CanLII 45059 and referenced in *Nortel* at paragraph [14] provide guidance as to how to evaluate the quantum of requested fees:

(a) the nature, extent and value of the assets being handled;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the company, its officers or its employees;

(d) the time spent;

(e) the Monitor's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

(g) the responsibilities assumed;

(h) the results achieved; and

(i) the cost of comparable services when performed in a prudent and economical manner.

[11] Commencing at paragraph 30 of the Monitor's factum and continuing through to paragraph 47, a comprehensive summary of this CCAA proceeding is provided with respect to the foregoing nine factors.

[12] Having reviewed the Reports, including the accounts, I am satisfied that the remuneration sought by the Monitor, EY FAAS and Stikeman is fair and reasonable. In arriving at this conclusion, I have taken into account that no party has opposed the requested relief.

[13] With respect to the request to approve the Reports and the activities of the Monitor, I repeat what I stated in *Re Target Canada Co*., 2015 ONSC 7574, at para. 2 ("*Target*"), that a request to approve a Monitor's report "is not unusual" and that:

> "there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process…"

[14] Specifically, Court approval:

(a) allows the Monitor to move forward with next steps in the CCAA proceeding;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in a prudent and diligent manner;

(e) provides protection for the Monitor not otherwise provided by the CCAA;

(f) protects the creditors from the delay and distribution that would be caused by:

i. re-litigation of steps taken to date, and

ii. potential indemnity claims by the Monitor.

(See *Target* at para 22).

[15] The Monitor submits that the Reports and the activities of the Monitor described therein should be approved. The Monitor further submits that it has acted responsibly and carried out its activities in a manner consistent with the provisions of the CCAA and in compliance with the Initial Order and no party has put forward evidence to the contrary.

[16] In the circumstances and again noting there is no opposition to the requested relief, I am satisfied that (a) the Reports and the Twelfth Report, and the activities of the Monitor described therein, and (b) the fees and disbursements incurred during the period February 1, 2021 through to and including December 31, 2021, being:

(a) for the Monitor, $4,917,795.07 and disbursements of $54,754.33 (plus applicable taxes);

(b) for EY FAAS, $947,000 and disbursements of $119.89 (plus applicable taxes); and

(c) for Stikeman, $2,762,526.55 and disbursements of $12,425.19 (plus applicable taxes).

should be approved.

[17] The motion is granted and an Order reflecting the foregoing has been signed.

Chief Justice G.B. Morawetz

Date: May 18, 2022

TAB 7

[269] CASES ARGUED AND DETERMINED IN THE COURTS OF COMMON PLEAS, AND EXCHEQUER-CHAMBER, IN MICHAELMAS TERM; AND IN THE HOUSE OF LORDS; IN THE FORTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

(IN THE HOUSE OF LORDS.)

LUCENA *v.* CRAUFURD AND OTHERS in Error (*a*).

[S. C. on new trial, 1 Taunt. 325. See *Wilson* v. *Jones*, 1867, L. R. 2 Ex. 150; *Lloyd* v. *Fleming*, 1872, L. R. 7 Q. B. 302; *Ebbsworth* v. *Alliance Marine Insurance Company*, 1873, L. R. 8 C. P. 613, 617; *Anderson* v. *Morice*, 1876, 1 App. Cas. 723; *Mackenzie* v. *Whitworth*, 1875, 1 Ex. D. 43; *Allkins* v. *Jupe*, 1877, 2 C. P. D. 384; *Moran* v. *Uzielli*, [1905] 2 K. B. 564.]

This was a writ of error, brought to revise the judgments of the Courts of King's Bench and Exchequer-chamber, given for the Defendants in error upon a bill of exceptions.

For an abstract of the record in this case, see 3 Bos. & Pull. 75. In addition to what is there to be found, it is now material to state (what was not supposed to be of any consequence at the time of the argument in the Exchequer-chamber), that the first count of the declaration **[270]** particularized the periods at which the several ships therein mentioned were lost. It averred that the "Houghley," with part of her cargo, was lost by perils of the seas on the 1st of September 1795; that the "Surchéance" and her cargo were lost by perils of the sea on the 5th of September 1795; that the "Dordrecht" was disabled by perils of the sea on the 13th of September 1795, but was carried into Ireland and there sold, and the cargo brought to London; and that the "Zeeleiye" was lost by perils of the sea on the 20th of September 1795. That the second count upon which a verdict was found for the Defendant below, averred the interest in the property insured to be in his majesty; that the policy was made on his majesty's account, and that the commissioners had given directions to the agents to negotiate policies on his majesty's account. And that the third count, upon which a verdict was also found for the Defendant below, averred that the ships and cargoes were the property of foreigners.

The Plaintiff in error having assigned the same errors as in the Exchequer-chamber, prayed that the judgment of that Court might be reversed; for that following among other reasons:

1st, Because a policy of insurance being both in form and in substance a contract of indemnity, the party who claims the benefit of indemnification under it must show that a loss has been sustained by him upon the subject insured, and for that purpose must necessarily prove that he had at the time some right of property in that subject susceptible of loss or damnification.

2nd, Because there is a material distinction between a contract of wager and a contract of insurance; the first may have for its subject any speculative chance or expectation, however vague or uncertain, and may be claimed without proof of loss or damage having accrued to the party for whose benefit it is demanded; but a contract of insurance cannot have such chance or expectation for its object, because bare chance or expectation, **[271]** though liable to failure and disappointment, are not susceptible of loss or damnification, and therefore cannot be made the objects of an indemnity, which presupposes the loss of some right of property, either in possession or in action.

3rd, Because in the first count of the declaration it is alleged by the Defendants in error, that they, as commissioners under and by virtue of the said act of parliament, and the said commission at the time of the sailing of the said ships from St. Helena, and from thence until the time of the losses, were interested in the said ships and goods to the amount of the money insured, and that the insurance was made for their use, benefit, and account, as such commissioners: this is a material allegation, importing

(*a*) S. C. 1 Taunt. 325, and vide *Knox* v. *Wood*, 1 Campb. 543. *Stirling* v. *Vaughan*, 2 Campb. 225. S. C. 11 East, 618. *Puller* v. *Staniforth*, 11 East, 231, 237. *Routh* v. *Thompson*, 13 East, 274. *Robertson* v. *Hamilton*, 14 East, 522. *Taylor* v. *Wilson*, 15 East, 324, 332. *Hagedorn* v. *Oliverson*, 2 M. & S. 485. *Hull* v. *Pickersgill*, 1 B. & B. 282.

that the object of the insurance was an interest which the Defendants in error themselves had, and disavowing its having been effected for the use, benefit, or account of any other persons. In maintenance of such averment the Defendants in error are bound to prove an interest in themselves, which will support an insurance made on their own account, and proof of an interest in other persons for whose benefit they might have made an insurance, cannot upon this record avail them.

4th, Because in legal language "to be interested in" or "to have an interest in," any given property, does not merely denote an anxiety or solicitude for, or even an expected benefit from, its preservation. But it imports a right of property in it, either general or special, in possession or in action, defeasible or indefeasible. No other interest is capable of being vindicated either in law, or in equity, or is susceptible of loss or damnification, and therefore no other can be made the subject of a contract of indemnity.

5th, Because the authority, power, and interest of the Defendants in error, as commissioners, is founded upon [272] and circumscribed by the act of 35 Geo. 3, c. 80, s. 21; and the commissioners granted by his majesty neither did nor could exceed the powers given by that act. The Defendants in error are thereby authorized to take into their possession and under their care, all ships and cargoes belonging to the inhabitants of the United Provinces, which had then been, or might thereafter be detained in or brought into the ports of this kingdom. The power, authority, and interest of the Defendants in error, is confined to ships and cargoes, "detained in or brought into the ports of this kingdom:" beyond that description of property they had neither power, authority, or interest. As agents they had no other ships or cargoes to take care of, and as commissioners they could not have property or interest in any, except those which the statute and their commission, had actually attached upon. When the ships in question sailed from St. Helena they had not been detained in or brought into the ports of this kingdom, and did not come within the description of property in or over which the Defendants in error, had any sort of interest, power, or authority. It is not therefore true, as they have alleged, that they as commissioners were interested in the said ships and goods, at the time of their sailing from St. Helena, though they might possibly be anxious and solicitous for, and expect a benefit from, their being brought into the ports of this kingdom, and thereby placed under their power and authority. As commissioners they could not possibly have any other description of interest in these ships or cargoes before their arrival in England.

6th, It is stipulated by the policy, that the adventure on the goods to be insured by it, should begin from their being loaded on board the ships at St. Helena. The loading of the goods at St. Helena is therefore a condition precedent to the inception of the risk upon them, and it not appearing upon the record that this condition [273] has been complied with, but on the contrary, it being stated in the declaration, by the Defendants in error, that the goods were not loaded at St. Helena, the Plaintiffs in error cannot be compelled to perform their part of the contract.

T. ERSKINE.
D. GILES.

The Defendants in error prayed that the said judgment might be affirmed, for the following among other reasons:

1st, Because the ships and goods whereon the assurance was made were ships and goods belonging to the inhabitants of the United Provinces, intended and directed by his majesty to be brought into the ports of this kingdom, and under the circumstances in which they stood, when they were insured, would, if they had arrived in this kingdom, have come to the possession, and been under and subject to the management, sale, and disposition of the Defendants in error, as commissioners by virtue of the before-mentioned commission and act of parliament, which in express terms authorized them to take into their possession, and under their care, and to manage, sell, or otherwise dispose of, ships, goods, and effects belonging to the inhabitants of the United Provinces, which had been, or might be detained in, or brought into the ports of this kingdom; and although those ships and goods were (after making the insurance, upon the breaking out of hostilities between this kingdom and the United Provinces) condemned in the High Court of Admiralty as prize, yet that did not vary the destination or disposition of those ships and goods, especially as his majesty, in his instructions to the Court of Admiralty for the adjudication of such ships and goods

as prize, has expressly reserved to the Defendants in error the care, sale, and management thereof, as well **[274]** before as after final adjudication, according to the provisions of the said act.

2nd, Because the Defendants in error (in the event of the ships and goods insured coming into this kingdom) were by the act of parliament and commission constituted trustees or consignees thereof, and would have had a power to take them into their custody, and to manage, sell, or otherwise dispose of them for the benefit of his majesty, or such others as might be beneficially entitled thereto; and nothing but the perils and dangers insured against by the policy could prevent those ships and goods from actually coming to the custody, possession, and power of the Defendants in error under the act of parliament and commission. Such a contingent interest, it is submitted, is an interest upon which a legal and valid assurance may attach, the object of it not being gaming or wagering, but really and bonâ fide to secure to the Defendants in error, as trustees or consignees for others, the benefits which would accrue if the insured property arrived, and which would be lost if that property were lost.

V. GIBBS.
J. A. PARK.
G. WOOD.

The case was argued during Trinity term 1804, at the Bar of the House, by Erskine and Giles for the Plaintiff in error, and by Gibbs and Park for the Defendants in error.

On the motion of the Lord Chancellor (Eldon) the following questions were proposed to the learned Judges on the 4th of February 1805.

1st, Whether regard being had to the true meaning and legal effect of the act of the 35th year of his majesty's reign, in the first count of the declaration mentioned, and the royal commission in the said count mentioned, **[275]** bearing date the 13th day of June 1795, it was or was not in law competent to his majesty to order the several ships, goods, and merchandizes in the said first count mentioned as belonging to subjects or inhabitants of the United Provinces, and therein mentioned to have been taken and seized at sea by the commander of one of his majesty's ships of war, to the intent that the same might be brought into the ports of Great Britain to be restored (after the same had been so taken and seized) to the subjects and inhabitants of the said United Provinces to whom they respectively belonged, either whilst such ships and goods were upon the voyage in the said count mentioned, and before they were brought into the ports of Great Britain, or upon their arrival in such ports, or to order and direct such ships and goods to be carried into any ports of Great Britain?

2nd, Whether, according to the true intent, meaning, and legal effect of the said act of parliament and commission, and regard being had to his majesty's legal right and interest in the property of enemies taken and seized before hostilities, but remaining at the time when hostilities take place in possession of those who by his orders had previously taken and seized the same, the Plaintiffs in this case, as such commissioners, as in the first count of the declaration mentioned, had any and what legal interest in or authority to take into their possession and under their care, and to manage, sell, and dispose of, according to the said act of parliament and commission, and such commission as aforesaid, all or any of the ships mentioned in the said count, or their cargoes, which arrived in the ports of Great Britain after the issuing of his majesty's proclamation of the 15th day of September 1795, proved and given in evidence to the jury in this cause, or after hostilities were commenced by his majesty against the United Provinces in the declaration mentioned?

[276] 3rd, Whether upon the matters appearing to have been produced and given in evidence in this cause, if true, the Plaintiffs, notwithstanding such act and commission as aforesaid, were duly and effectually constituted agents on behalf of his majesty, for the care and management of such of the several Dutch ships mentioned in the order of council of the 26th of November 1795 (given in evidence in this cause), to have been sent into the kingdom of Ireland, as are mentioned in the 1st count of the said declaration, and in the said order, and the sole interest in which ships so sent in is by the said order alleged to be vested in his majesty. And whether after such order, and after the Plaintiffs took possession in Ireland, and after such declaration of hostilities as aforesaid, the authority of the Plaintiffs to continue such ships under their care and management in Ireland, or in Great Britain, was an authority to be

considered in law as vested in them as such commissioners, as in the declaration mentioned by virtue of the said act of parliament and commission aforesaid, or as agents appointed by the said orders in council, regard being had to the effect of the said proclamation of the said 15th September 1795, and the proceedings and sentences of the High Court of Admiralty given in evidence in this cause.

4th, Whether upon the several matters produced and given in evidence to the jury in this cause, if true, the said ships and goods in the declaration mentioned to have been lost, as to each of the said ships respectively, and the goods laden on board each of them respectively, regard being had to the respective times of the losses thereof, as stated in the first count of the declaration, and the date of such proclamation as aforesaid, and all the matters produced in evidence, and to such orders and directions, if any, as his majesty might lawfully give respecting the restoration thereof to the subjects and inhabitants of the United Provinces, to whom they had be-[277]-longed, or respecting their destination to other ports than those of Great Britain, were ships and goods which according to the legal meaning of the averment in the said first count in the said declaration, if they had arrived at the port of London from the voyage in the declaration mentioned, the Plaintiffs as such commissioners as in the declaration mentioned, were and would upon such arrival have been authorized to take into their possession and under their care, and to manage, sell, and dispose of, according to the effect and form of the said commission and act of parliament, as the Plaintiffs have in the first count of their declaration alleged?

5th, Whether upon the several matters so produced and given in evidence, if true, and such regard being had as aforesaid, the Plaintiffs, as such commissioners as aforesaid, under and by virtue of the said act of parliament and commission, were at the time of the sailing of the ships in the said count of the declaration mentioned respectively from St. Helena, as in the said count is mentioned, and from thence, and until, and at the time of the several losses herein mentioned, interested in the said ships and goods in any and what manner, and according to the legal meaning of the said word "interested," as used in the first count of the declaration; so that a legal and valid assurance could be effected on the said goods, and on the bodies of the said ships, by the Plaintiffs as such commissioners for their use, benefit, and account as such commissioners?

6th, Whether if the said several averments, or either of them according to the legal import thereof, are or is not made good by the several matters produced and given in evidence in this cause on the part of the Plaintiffs, the Plaintiffs can in point of law be considered as having maintained the issue on their parts? And whether such averments, or either of them, are unnecessary to be made good in this case, or can be rejected as surplusage? Whether after the passing of the 19 Geo. 2, c. 37, it was [278] necessary in the law in a declaration in an action brought upon a policy of assurance effected upon a British ship for the Plaintiff in such action, to make any averment touching his interest therein, which was not necessary to be made in such declaration previous to the passing of that act of parliament?

7th, Whether the said Plaintiffs, as such commissioners as in the said first count of the said declaration mentioned, had in law any such interest in the bodies of the said ships respectively, and goods laden therein respectively and assured, as was capable of being abandoned by them in any circumstances as such commissioners or otherwise to the assurers, and more especially after the issuing of the said proclamation of the 15th September 1795; and if not, whether their incapacity to make such abandonment does in law in any manner affect the validity of the assurance stated by the said first count to have been made as therein is mentioned?

8th, Whether assuming that the Plaintiffs, as such commissioners as aforesaid, would be entitled to a reasonable recompence or profit for service to be performed in respect to the ships and goods in the first count mentioned, in case the same should arrive in a British port, their title to such recompence or profit was by law insurable against marine risks happening antecedent to their arrival, and consequently previous to the period of such service? And in case the same was by law insurable, was it necessary that the assurance should be made conformable to the enactment in the first section of the act 19 Geo. 2, c. 37? And can the policy of assurance in the first count of the declaration in this case stated, be considered as a policy effected on such interest of the commissioners, if such they had, and the same is an insurable interest?

The learned Judges not being agreed upon all the answers to be given to the above

questions, delivered their [279] opinions in the following order, on several days, in the months of June and July 1806.

GRAHAM Baron (*a*), CHAMBRE J., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON Baron, HEATH J., M'DONALD Ch. Baron, and SIR JAMES MANSFIELD Ch. J. of the Common Pleas.

Upon the first question the learned Judges were unanimously of opinion that it was in law competent to his majesty to order the several ships, goods, and merchandizes in the first count of the declaration mentioned to be restored to the subjects and inhabitants of the United Provinces, to whom they respectively belonged, either while such ships and goods were upon the voyage, and before they were brought into the ports of Great Britain, or upon their arrival in such ports, or to order such ships and goods to be carried into any ports other than the ports of Great Britain. They thought that the words of the 35 Geo. 3, c. 80, s. 21, empowering his majesty to authorize the commissioners to take such ships and cargoes into their possession and under their care, and to manage, sell, or otherwise dispose of the same to the best advantage, must be confined to a disposition of such ships and cargoes of a similar nature to what is expressed by the accompanying words, namely, a disposition, the object of which should be to prevent the ships and goods from perishing, and that as there was nothing in the act of parliament restraining the king's prerogative, his right to restore the ships and cargoes to the Dutch owners could not be taken away; though with regard to such ships and cargoes as had actually arrived in the ports of Great Britain, and been taken possession of by the commissioners, some of the learned Judges observed that a [280] further order of council might perhaps be necessary to authorize the commissioners to restore them.

To the second question, GRAHAM Baron, ROOKE J., GROSE J., HEATH J., and SIR JAMES MANSFIELD Ch. J., answered in the affirmative, and argued in substance as follows:—It is clear that the declaration of hostilities gave to the king an inchoate exclusive right to whatever of these ships and goods was liable to be condemned as prize, and that the king had the sole right, if he had been pleased to exercise it, of taking all these ships on their arrival in Great Britain or elsewhere into his own possession, and under his own care, and of appointing agents and disposing of them as he might think fit. But at the date of the act of parliament and commission, and when the order for the seizure of these ships was issued, the event of a commencement of hostilities was undoubtedly in contemplation. It might almost be said to have been impending, and foreseen as unavoidable. It could not, therefore, have been the intention of the legislature or of the king to appoint a commission at great expence, and with great preparation, which an event so probable and imminent was ipso facto to annul. Nothing can be more general than the words of the commission; they refer to ships which were seized, or ordered to be seized, without any limitation of the time when the power of the commission should cease. Nor is there any reason why the event of hostilities should make any difference. Though the king was put in the place of the Dutch proprietors, the objects of the commission remained essentially the same. It was not an ordinary case of prize. Many of the Dutch proprietors were known to be well affected to this country; many might be expected to take refuge here. It was a principal object of the commissioners to inquire how they stood affected, and to dispose of the property accordingly. Powers in [281] amity with this country, neutrals, and British subjects on the faith of the neutrality of Holland, had embarked large property on board these vessels, and these interests could only be provided for by a special commission. The power of these commissioners was much more extensive than that of prize agents; for the power of a prize agent extends only to the taking care of a ship and managing it during the existence of a suit in the Admiralty Court. No person could possibly suffer from the continuance of this power in the commissioners: they were to take possession and manage for the benefit of those who might be ultimately entitled, whether the Dutch owners or the king. The king might certainly have revoked this power if he had thought fit; but he has not done so by any public act or declaration. The crown appointed them prize agents for the purpose of giving them as much power over the ships in question in the ports of

(*a*) Mr. Baron Sutton not having been upon the bench at the time when the case was argued, gave no opinion.

Ireland as they had under the original commission in the ports of this kingdom, and to enable them to bring the ships within their jurisdiction as commissioners. This interpretation is warranted by the king's instructions to the Court of Admiralty, dated the 10th day of October, which were given almost a month after the declaration of hostilities (15th of September), and which suppose that the commissioners may take possession of ships after that time to be brought into Great Britain. They direct the Admiralty to proceed to the adjudication of such ships, &c. "of which possession had been taken, or should be taken by the said commissioners," and reserved to the commissioners the care, sale, and management thereof, as well before as after final adjudication. In the ordinary course of proceedings prize agents would be appointed for the management of these ships; but by these instructions, the king, without conferring any new power on the commissioners, reserves to them the care, sale, and management of the ships. According to the [282] argument, therefore, of the Plaintiff in error, the king encourages the commissioners unlawfully to take possession of these ships, and then directs the ordinary course of the Admiralty Court to be suspended in their favour that they may exercise a power which they illegally assumed to themselves. The special pleader who drew the case of the Plaintiff in error seems to have been aware of the importance of those words of the instruction (*a*), which refer to a future taking possession of ships and goods, and has omitted them; this omission can hardly be supposed to have arisen from mistake: it was indeed a singular omission, when so much had been said about the supposed contingency of the power of the commissioners: for the ships in question had not arrived, and never could arrive before the declaration of hostilities. It seems, therefore, to have been the intention of the crown that these persons should act as commissioners within, and as prize agents without the realm. There can be no implied revocation contrary to the manifest intention of the crown. Nor can a grant of the crown enure to a double intent, as the grant of a subject may. If a subject grant lands to his villein, it shall operate not only as a conveyance of the lands, but as an enfranchisement; it is not so in the case of the crown: this was laid down in Plowd. Com. 502. In the case of *Sir Walter Raleigh* it is well known that when under sentence of death he consulted Sir Francis Bacon, then Solicitor-General, whether he should sue out his pardon; who advised him not to do it, and told him that the granting a commission would operate as a pardon, and recommended him to apply for one, which he did; but his [283] expedition having failed, he was taken up under his former sentence; he produced his commission, and urged his right to a pardon; but found, to the cost of his life, that he had been ill advised. It has been insisted that a state of war divests the commissioners of all the powers granted by the commission. To this it may be answered, that a change of circumstances alone will not operate as a revocation. There must be an absolute repugnance and inconsistency. But here the letters of reprisals, if a revocation, would operate against the declared intention of the crown; which could not be even in some cases of private grants. Thus in the case of the statute of uses, the statute says that the uses shall never be executed contrary to the intention of the party: the intention of the party shall prevail over the positive words of the act of parliament. Certainly the officers of the crown, in drawing the instructions to the Admiralty did not consider the power of the commissioners as revoked. But admitting that they were, the consequence now contended for might not follow. A policy of insurance is assignable, and if the crown had appointed other persons as prize agents, there is no reason why the commissioners might not by order of the crown have been authorized to assign the policy. Then being the same persons, there can be no assignment; but they ought to have the same benefit as prize agents as they would have had if there had been no prize agents, or hostilities had not commenced; and this benefit they may have consistently with the averments of the declaration; for though a policy may be assigned by the law merchant, yet the action must be brought in the name of the original insured.

(*a*) In stating the instructions to the Admiralty of the 10th October 1795, to "proceed to the adjudication of such ships and goods of which possession has been taken, or shall be taken, by the said commissioners, &c. reserving to the said commissioners the care, sale, and management thereof;" the printed case of the Plaintiff in error omitted the words "or shall be taken."

CHAMBRE J., LE BLANC J., LAWRENCE J., THOMPSON B., and MACDONALD Ch. B. answered in the negative, and argued thus:—The king has the sole right and interest in enemies' property from the time when hostili-[284]-ties commence: this appears by the adjudications of the Admiralty. The orders in council of January 1795, were made for the purpose of offering protection to those inhabitants of the United Provinces who entertained a favourable disposition towards this country, by opening our ports for the reception of their ships; but neither these orders nor the acts passed in aid of them assume any dominion over the property; but on the 9th of February it was thought necessary to have recourse to other measures, and to use force with respect to ships not meant to be sent here, but going either to or from Dutch harbours, and instructions were given for their seizure and detention, and an order for that purpose transmitted by the Admiralty to the commanders of ships of war. On the 16th of March 1795, an act passed for the further protection of the property voluntarily brought in, and on the 22nd of May, the 35 Geo. 3, c. 80 (being the act referred to in the question), passed. The subject of this latter act, and the commission to the Plaintiffs, was the Dutch property which was or should be seized and detained in pursuance of the instructions of the 9th of February. The instructions are to bring into British ports all Dutch vessels bound to or from any ports in Holland, in order that they with their cargoes, being Dutch property, may be detained provisionally. The title of the act is, "An act to make further provision respecting ships and effects coming to this kingdom to take the benefit of his majesty's orders in council of the 16th and 21st of January 1795, and to provide for the disposal of other ships and effects detained in or brought into the ports of this kingdom;" thus distinguishing between the two classes of property. The object of the first twenty sections is to protect property voluntarily brought in, and to authorize the disposal of it by the owners without subjecting it to any hostile restraint. The subject of the 21st section, which authorizes the commission and defines the powers and duties [285] of the commissioners, is property detained by force. That section recites, that several Dutch ships and property had been, or might be detained in, or brought into this kingdom, and might perish or be greatly injured if some provision was not made respecting the same; and then authorizes the crown to appoint commissioners to take such ships and cargoes into their possession and under their care, and to sell the same. The property therefore subjected to the commissioners was only property detained by force, and not detained as prize, or for the immediate purpose of changing the property, but in the language of the instructions, detained provisionally. Of the nature of the instructions there can be no doubt. The relation between the United Provinces and this country was ambiguous. It was probable that the former might soon assume the character of enemies, but they had not done so; nor was it resolved to treat them as enemies, though they could not be trusted as friends. A provisional detention of property therefore was resorted to as a measure of caution; and what could be the meaning of detaining it provisionally, but that the detention should cease when the relative state of the two countries should be decided, either by the restoration of amity, or the commencement of hostilities? Doctor Johnson, in explanation of the word provisionally, refers to Locke on the Human Understanding, who relates a story of an abbot of St. Martin, who when he was born had so little the figure of a man, that it bespoke him rather a monster; it was for some time under deliberation whether he should be baptized or no; however he was baptized, and declared to be a man provisionally, of which Mr. Locke's explanation is, "till time should show what he would prove;" so here the word provisionally cannot be understood otherwise than as limiting the detention till time should show what the Dutch would prove. The recitals of the act, the natures of the powers, given to the com-[286]-missioners, and the inconsistency of some of them with the rights of the original owners, when force could no longer be used with propriety, and with the rights of the captors, and the jurisdiction of the courts of admiralty after hostilities, still more plainly demonstrate the intent to limit the operation of the act and the authority of the commissioners to property provisionally detained. The act recites that the ships or cargoes might perish or be injured, and there being no captors interested, or any court of competent jurisdiction to interpose, commissioners are appointed and authorized to sell. But when the cause of provisional detention had ceased, and the rights of the parties either as original owners or captors been ascertained, how could sales by the commissioners be reconcileable with the undoubted

rights of the owners, or the captors, the law of nations, or the security of purchasers? Before the commencement of hostilities it was doubtful whether any act of the subjects of this country respecting the custody, sale, or disposition of this property could by the common law be justified, or any property legally conveyed to a purchaser of any of those articles of which an immediate sale might be necessary or convenient. This state of things called for the interposition of the Legislature to legalize such acts as would otherwise have remained without the protection of the law; but the moment hostilities were proclaimed, the necessity of those provisions ceased, and the property became subject to the known and established rules of proceeding and management. The act and commission were intended to supply an authority where it was wanted, and there seems to be no reason to extend it to matters for the preservation of which a sufficient authority existed as the law then stood. Nor can the act be intended to narrow the right of the Crown by subjecting it to the control of the Privy Council in cases where the king by the law might act without consulting them.

[287] To the third question GRAHAM B., ROOKE J., GROSE J., HEATH J., and MANSFIELD Ch. J. answered in the affirmative, that the Plaintiffs were duly constituted prize agents of the Dutch ships sent into Ireland, and that they exercised their authority in Ireland in that character; but that their appointment as prize agents in Ireland was not inconsistent with nor in any respect intended to revoke or abridge their power as commissioners in England. And that as soon as the four ships mentioned in the declaration were brought by the king's orders into the ports of England, their authority as commissioners attached upon them. And they relied upon the reasons given in answer to the last question.

CHAMBRE J., LE BLANC J., LAWRENCE J., THOMPSON B., and MACDONALD Ch. B. answered, that the Plaintiffs were duly constituted prize agents of the said ships, and that their authority to continue such ships under their care and management as well in Great Britain as in Ireland, was vested in them as agents appointed by order of council, and not as commissioners under the act. This answer they considered as following of course from the opinion before given, that after the commencement of hostilities the Plaintiffs could only act under a new authority derived from the crown, and not by virtue of the act of parliament. And with respect to the reservation contained in the order of council of the 10th of October 1795, they thought that it did not warrant any inference to the contrary. The only effect of that reservation being to limit their authority as prize agents by the powers which they enjoyed as commissioners.

To the fourth question, GRAHAM B., ROOKE J., GROSE J., HEATH J., and SIR JAMES MANSFIELD Ch. J. answered in the affirmative, considering the authority of the commissioners as subsisting notwithstanding the commencement of hostilities.

[288] LE BLANC J. also answered in the affirmative. He said that it appeared clearly from the subject-matter of the first count, that the averment in question was not meant to convey an unqualified proposition, the authority of the commissioners being expressly set forth and defined; that the legal meaning of the averment, therefore, ought to be taken according to the state of things at the time of effecting the policy, without regard to possible contingencies, in which sense the averment was true. That if the averment was to be taken in an unlimited sense, it was impertinent and unnecessary to maintain the action; the ships having been already sufficiently described in the declaration to show that they fell within the description of the act of parliament, and were the objects of the commission at the time when the policy was effected.

CHAMBRE J. answered in the negative. He said, that if the ships had arrived at the port of London, the Plaintiffs as commissioners would not have been authorized to take possession of them unless they had arrived before hostilities. That the "Zeelelye," if she had come in at all, must have come in after that period, being at sea upon her voyage after the proclamation; and though the others which were lost, might but for that loss have arrived before hostilities, yet they might not have arrived till after; and that being a matter of uncertainty, the averment was not made out in proof either in respect of the "Zeelelye," or of the other three ships, or any of them.

LAWRENCE J., THOMPSON B., and MACDONALD Ch. B. said, that as the "Zeelelye" was not lost till after hostilities, the commissioners would not have been entitled to take possession of her if she had arrived, inasmuch as she could not arrive till after

the proclamation. And with respect to the other ships, as they come within the de-[289]-scription of the act of parliament and commission, if they had arrived before the proclamation or any order for restoration, they would have been ships of which the commissioners would have had a right to take possession within the legal meaning of the averment, but not if the proclamation or any such order had been made before their arrival.

To the fifth question GRAHAM B., LE BLANC J., ROOKE J., GROSE J., HEATH J., MACDONALD Ch. B., and SIR JAMES MANSFIELD Ch. J., answered in the affirmative as to all the ships, and argued in substance as follows:—The subject of the present insurance being the ships and goods themselves, and not any profit or commission expected to arise from the sale, management, or disposition of them, the arguments which are founded upon the uncertainty of such interests may be laid out of the question. There can be no doubt that the ships and goods were insurable: but the question is, Whether the commissioners had a sufficient interest in those ships to authorize them to effect the insurance? The peculiar circumstances which attended the property insured are stated in the declaration: the act of parliament and commission are referred to; the seizure of the ships at sea for the purpose and to the intent of their being sent to this country and put into the possession of the commissioners is stated, and that the Plaintiffs effected the policy on those ships by name, not naming themselves individually as making the insurance, but as commissioners for the sale of Dutch property. It is with reference to these premises they aver, that they as such commissioners were interested, and that the insurance was made for their use and benefit as commissioners. The nature of their connexion with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it: they were merely consignees, agents, [290] or trustees for others; and to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those, for whose benefit the Plaintiffs were authorized by the act of parliament and commission to manage the property as consignees; that is, in the present instance for the king. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit: and if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not avert the interest in himself as such consignee; and would not such an averment, coupled with the disclosure of his having no interest but for the consignor's use, be equivalent to an averment of interest in his consignors? If the words, "for their use and benefit," should be thought repugnant to this construction, those words may be rejected as surplusage; for the averment is to be construed according to the apparent intention, according to the rule ut res magis valeat quam pereat. Besides, upon the arrival of these ships the whole legal interest would have vested in the commissioners, though subject to the trusts specified. And as the law does not regard the use or trust of a chattel, they were at liberty in insuring to aver the interest in themselves. It was the clear intention of the act of parliament and commission that the commissioners should have the care and management of these ships and goods in as effectual a manner as the owners would have in ordinary cases; and they would certainly fall very far short of their purpose if they did not extend to give the commissioners a power to insure. The operation of the act and commission was to constitute the commissioners parliamentary trustees or consignees of the property; and vested in them an insurable interest for the benefit of those who might ultimately be entitled. [291] To such persons, whoever they might be, the Plaintiffs having insured in their character of commissioners, would be accountable for the produce of the insurance, as much as for the sale of the property itself if it had arrived. It was their duty to provide for the security of the property till the event should happen which would enable them to take possession; and in insuring they only followed the provisions of the act of parliament, and the commission founded upon it. The Dutch owners knowing nothing of the situation of the property could make no insurance. But if the commissioners were trustees, they were authorized to act respecting the property as if it was their own, for the manifest benefit of the cestuy que trust. If the commissioners had been ordered by the crown to insure, there can be no doubt that it would have been their duty to have obeyed: and whether they had any directions is a matter of private trust, not now to be inquired into. The insurance being for the benefit of those ultimately entitled, the approbation of the crown may be

presumed. It is not necessary to consider whether if a mere stranger were to insure a ship, and such insurance were afterwards to be ratified by the owner, it would be valid. But there does not appear to be any rule of law to prevent it. It is not against the 19 Geo. 2. The insurance would be made by such person bonâ fide as agent for the owner, and if ratified why should it not, like any other contract, be binding on the parties? If this be so with respect to a private individual having no connexion with the property, à fortiori the insurance by these commissioners must be good. Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice Buller, in the case of *Wolf* v. *Horncastle*, 1 Bos. & Pul. 322, defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is [292] the mere agent of the consignor: and such a consignee may be appointed to any direction, verbal or written, to the captain to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where then is the difference between such a consignee and these commissioners? The ships were directed by the person who had the possession and power to direct the voyage to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest, or closer connexion with the ship does he acquire? If then there be no difference, no one ever questioned that a consignee or agent of the description spoken of, might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is authorized to act. But the interest of the commissioners is objected to on account of his contingency: that it depended upon the continuance of his majesty's intention, and that if the king had thought proper to restore these ships to the Dutch owners, or to alter their destinations, the authority of the commissioners would never have attached. But a vested interest is not necessary to give the right of insuring. The commissioners had a contingent interest; and supposing the intentions of the crown to remain unaltered, nothing stood between them and the vesting of that contingent interest but the perils insured against. It is stated that they cannot be entitled to an indemnity: for they had nothing to lose. But in fact they lost by the perils of the sea what but for those perils would have vested in them absolutely. At the time both of the insurance and the loss, their title, like that of a consignee, was inchoate: occupancy was necessary to perfect it. It is true that their interest was revocable; but so is that of a consignee. The owner [293] may at any time appoint another consignee or agent; he may change his intention in the course of the voyage. It is very common to direct the captain to touch at particular ports for new instructions. The powers of a consignee therefore are not more permanent than those of the commissioners. Many instances also may be put of contingent consignments; as a consignment to A., at London, if the ship loses her market at Calais; or to A., if living when the goods arrive, and if not, to B.; or to A. upon condition that he accept certain bills; in all these cases, and many others, as if the consignee became insolvent, and the goods are not paid for or the importation be prohibited by the Government of the country; the interest may be prevented from vesting by other events than the perils insured against, and yet this possibility of countermand will not prevent the consignee from insuring. Where there is an expectancy coupled with a present existing title, there is an insurable interest. It is argued that the title of the commissioners was contingent, because the ships which were the subject of their authority might never arrive. But although it was matter of contingency whether any ships would arrive upon which this right could operate, the right itself was not contingent. Antecedent to the arrival of any ships, the commissioners were invested with a right to take into their possession all ships of the description mentioned in the act of parliament which should arrive: and it might as well be insisted that the power of justices of the peace, or of the judges of assize, who act under a commission from the crown, was contingent, because no felony might be committed which could be the subject of their jurisdiction. The interest of the commissioners was very different from that of a prize agent, where the title to its profits arises from meritorious services to be performed at the end of the voyage; and from that of the next of kin of a lunatic, who at the end of the voyage [294] would have no interest whatever, and who eventually may never have any interest, because the lunatic may survive him. Inchoate rights founded on subsisting titles,

unless prohibited by positive laws, are insurable. Freight, respondentia, and bottomry, are of this description; the profit is prospective, but they are founded on existing charter-parties, bonds or agreements. Wages of seamen are in their nature insurable, though universally prohibited to be insured on principles of policy. The case of *Le Cras* v. *Hughes* was a case of mere expectation, and the circumstances were not near so strong in favour of the assured as the circumstances of this case. The doctrine there laid down by that great expositor of marine law Lord Mansfield, twenty-four years ago, has been recognized as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain in *Le Cras* v. *Hughes*, was not certain; yet it was all but certain, that the property would be given according to the custom of the crown in such cases: Captain Luttrell had an interest for which he would not have taken 20,000l.; and it would be a strange thing that he should not be allowed to insure that interest against the perils of the sea. There is a decision in a foreign court of prize very nearly corresponding with *Le Cras* v. *Hughes*, in 2 Valin. article 15, fo. 57. By the French ordinance future profits were prohibited to be insured. The author, in commenting on the article, says, "It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm;" and then cites an adjudication by the parliament of Aix. At common law a possibility may be transferred, and devised; and if **[295]** so, why may it not be insured? The commissioners might have sold these ships while at sea, subject to the contingency; and it would then be most extraordinary if they could not insure them. Suppose that power had been given to the commissioners to sell the ships upon their arrival for their own benefit, subject to the right of the crown to restore them or alter their destination. Could it then be contended that the commissioners would have no interest, or that they would not be damnified by their loss at sea? Yet whatever interest they would have had for themselves in that case, they had in this as trustees for others. The ancient definitions of insurance do not exclude contingent interest. The definition in Valin, sur article 1 mo. fo. 26 is, Assecuratio est conventio de rebus tuto aliunde transferendis pro certo præmio, seu est aversio periculi. In Loccen. lib. 2, c. 5, note, Aversio periculi, ita dicta quod alterius periculum in mari aversum it; aut in se recipit. In Roccus, Assecuratio est contractus quo quis alienæ rei persculum in se suscipit obligando se sub certo pretio ad eam compensandam si illo perierit. Ideo valet pactum ut si merces salvæ venierint in portum solvatur certa summa, si vero illæ perierint teneatur assecurator solvere damnum vel æstimationem istarum mercium. These definitions clearly embrace a contingent interest, which is subject to the perils of the sea, and for the loss of which a compensation may be made. All that these definitions require is that the insured shall be interested in the arrival of the thing insured, and the event of the voyage at the time of effecting the policy and at the time of the loss. Nor is it any objection to this insurance that other persons might have insured to the full value. Where a ship and cargo are insured to the full value, and money lent on bottomry or respondentia, the lender may insure as well as the owner of the ship and cargo. It has been expressly decided that a creditor may insure the life of his debtor; for though he has no right depending upon the life of his **[296]** debtor, he might be essentially injured by his death. With respect to the statute of the 19 Geo. 2 (*a*), it was clearly established as law among all the commercial nations of Europe that the insured must have an interest in the thing insured; and could not recover without proving that loss: and herein the marine law differed from the common law of England, which sanctioned an action on a wager without any interest in the parties but what was created by the wager itself. But as this law was introduced in favour of the insurers, and to prevent deceitful and unlawful gaming, the parties by stipulations inserted expressly for that purpose in the policy, might wave the proof of interest on the principle, that quisque potest renunciare juri pro se introducto: and this was usually done in the manner expressed in the statute; and this principle was recognized in an appeal from Scotland, determined in the House of Lords during the last session. As to the case of *Goddart* v. *Garrett*, 2 Vern. 269, in which the Court

(*a*) The following observations relative to the 19 Geo. 2, were made by Mr. Justice Heath.

declares the law to be settled that if a man has no interest and insures, the insurance is void, although it be expressed in the policy interest or no interest; it may be observed that this decision was made in the year 1692; and that before the 19 Geo. 2 different determinations had been made on the subject of such policies, the history of which is given by Lord Hardwicke in *The Sadlers' Company* v. *Badcock*, 2 Atk. 556, in a decree that he made in 1743, which was only three years before the making of the statute. His lordship says that such insurances began in the Spanish trade, and were called fraudulent insurances as early as when he first sat in the King's Bench. The fraud probably consisted in this, that under the mask of insuring interest or no interest, ships and their cargoes were insured for above their real value, and then fraudulently destroyed. It **[297]** has been said that to sustain policies of such a nature as the present, would be to depart from the wise and salutary provisions of the statute 19 Geo. 2, and to introduce a mischievous species of gaming: but this is a gratuitous assertion. It is impossible to elude that statute. The question always is, Whether the policy be a gaming contract? if it be no artifice how can it elude the force of the statute? The case of *Le Cras* v. *Hughes* was infinitely more likely to introduce an abuse of the statute than the present case. That has been decided above 20 years; yet what ill consequences have followed? The same may be said of valued policies. In the case of wagering policies, any number of persons may make insurances on the same ship. But that is not the case here. If the commissioners could not insure this property, the Dutch owners could not; and it would be a strange paradox to assert, that these are ships and cargoes subject to all the perils of the sea in their voyage, and yet none are competent to insure them. Though it may be admitted that the commissioners had no scintilla of right in possession or reversion; yet they had a contingent interest founded on the statute, the commission and the seizure. It was their duty by all lawful means to provide for the preservation of the property, till they should have an opportunity to take possession of it, and insurance was a proper mean for that purpose. The consequence is, that the commissioners had a right to insure. With respect to the "Zeelelye," the above observations put that ship upon the same footing with the rest. But it may further be observed, that at the time when the "Zeelelye" was lost she was detained under the original orders of seizure; for the captors knew nothing of hostilities having commenced. It is contended, however, that the proceedings of the Admiralty will make this ship a prize from the time of the seizure by relation. It is true that for certain purposes when a sentence of condemnation takes **[298]** place the property is changed from the time of the capture. But does it follow that the validity of this insurance is to be affected by relation? Before the property in the "Zeelelye" could be changed by any proceeding in the Admiralty she was gone to the bottom: and while she was in existence she was never detained under any other orders than those which were the foundation of the act of parliament and commission. The commissioners therefore had such an interest in this ship as enabled them to effect a valid insurance.

THOMPSON B. agreed in the above opinion with respect to all the ships except the "Zeelelye"; as to which he was of opinion that the commissioners were not interested in that ship at the time of the loss, which did not happen till after the proclamation for reprisals.

CHAMBRE J. and LAWRENCE J. answered in the negative.

CHAMBRE J. To constitute an interest, such as that which in the declaration is averred to be vested in the Plaintiffs as commissioners under the act, I presume it must be necessary to show that the ships and goods at the time of the sailing, or at least before or at the times of the losses, had become the objects of the Plaintiff's commission. If they were not the objects of their commission, I have no conception in what way they could have an interest in them as commissioners. The duties of their office were confined to Dutch property that was actually in the kingdom, and provisionally detained there under the king's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad, nor was any consignment in fact made to them. They have been called statutable consignees. If that phrase means any thing, it must mean that the sta-**[299]**-tute had consigned these particular ships to the commissioners; but look at the statute, and we find nothing more than that it authorizes a commission under which whatever property of a certain description arrives, it will, if they continue commissioners, fall within their care and management officially to prevent its perishing. But the act had

in no respect attached upon this property; it had only created a capacity in the Plaintiffs in certain events to receive these or any other Dutch ships or merchandizes. The intention of the crown was that it should come to England: true, but that created no contract with the Plaintiffs. It was a general intention applicable to all Dutch ships that were seized or might be seized. The destination of the property was alterable at any time, at the pleasure of his majesty. The crown might have given it up to the owners. The property might be changed by the commencement of hostilities. It is no answer to say that a defeasible interest would be sufficient, for there an interest exists till it is defeated. A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which though it may be defeasible, may operate in the mean time, and enable the consignee by his acts to bind the consignor. The statute creates neither trust or agency in them before arrival; they are not authorized to give any directions to those who have the ships, &c. in their charge at sea, or to maintain any action in the names of themselves or any others, for any wrong or injury the effects may receive. In short, there is no other foundation for the claim of interest than a mere naked expectation of acquiring a trust or charge respecting the property without a scintilla of present right either absolute or contingent, in possession, reversion, or expectancy, in the proper legal sense of the word. If this kind of expectancy which the commissioners had would be sufficient, what was there to hinder the commissioners from insuring every ship belong-[300]-ing to the provinces that were out at sea, or in any other situation of insurable risk. The British ships were to seize them if they could. If they succeeded they would endeavour to bring them to England, and when brought there, in the then state of things, they would fall under the management of the commissioners. That would only be adding one more chance to the many that intervened in the present case between the Plaintiff's possession and the subject insured, for it is by no means true that nothing intervened but the perils insured against the present case.

LAWRENCE J. It is first to be considered what that interest is, the protection of which is the proper object of a policy of assurance. And this is to be collected from considering what is the nature of such contract. The definition of an insurance given by Grotius in the 2d book of his Introduction to the Jurisprudence of Holland, part 24, as cited in Loccenius 175, is, that Assecuratio est conventio seu contractus quo quis in se suscipit incertum periculum cui alter est obnoxius qui e contrario eo nomine illi præmium retribuere tenetur. Pothier, in his Treatise on Contracts of Chance or Hazard, in his general definition of insurance, states it to be a contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself to indemnify the other from the loss which those accidents may occasion in case of their happening, in consideration of a sum of money which the other contracting party gives as the price of the risk with which he is charged. (Traités des Contracts Aleatoires, sec. 2); and Mr. Justice Blackstone in his Commentaries (v. 2, 458), states it to be a contract between A. and B. upon A.'s paying a premium equivalent to the hazard, B. will indemnify or secure him against a particular event. These definitions by writers of different countries are in effect [301] the same, and amount to this, that insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit, which but for such events they would acquire according to the ordinary and probable course of things. In the case of the loss of property it is obvious that the owner is prejudiced, and that therefore it is of importance to him, and he is concerned to avert the damage that it may be exposed to; in other cases there may be some difficulty in showing if the event had not happened, that those advantages would have arisen, against the interception of which by sea risks the assured means to be indemnified, but that difficulty when the nature of the contract is considered abstractedly does not prove that it must be confined to matters of property, where from the variety of probable contingencies (which independent of the specified risks may prevent the assured from deriving any benefit

from the subject matter insured), it is impossible to weigh the probability of its being intercepted by such risks; an interest so uncertain may not be the subject of insurance. And so Lord C. J. Willes, in *Fitzgerald* v. *Pole*, Willes, 648, considered it; where to show that in that case the insurance must be on the ship and not on the voyage, he relied on the impossibility of such contingency as the loss of the voyage being valued; so that according to him the impossibility of valuing, and not the **[302]** want of property, was the reason why that voyage could not be the subject-matter of this contract. That a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. According to Scaccia (Quæstio prima, No. 153). Assecurationis contractus habet locum in quâvis re, seu de quâvis re quæ subjacere possit periculo seu interitui. A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; in quantum mea interfuit i.e. quantum mihi abest quantum que lucrari potui. Dig. lib. 46, lib. 8, c. 13. And whom it importeth, that its condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest deviseable from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing, may be considered as being com-**[303]**-prehended. The objection to insuring that in which the assured has no property, seems to me to rest not so much on a want of interest as on this, that if the interest intended to be protected by the assurance is liable to be affected by other matters than the perils insured against, of which matters some might happen in the interval between the time of the loss and the probable time when the risk would have ceased had no loss happened, it may be impossible to refer to those perils the prejudice or damage against which the insured meant to protect himself with such degree of certainty, as to enable the assured to establish his claim to a compensation on the ground of his loss having clearly arisen from the perils insured against. This objection I conceive might have been made in the case of *Grant* v. *Parkinson*, though in that case the profits insured were ascertained by contract; for if the army had been marched from Quebec before the ship could have arrived, there would have been no army to supply, by which the profits were to have been made, and in such case, notwithstanding the loss of the molasses by the perils of the sea, the Plaintiff's profits would not have been defeated by them; but the event did not happen before the probable time of the ship's arrival, and was by no means likely to happen. And the Court of King's Bench, Lord Mansfield being then at the head of it, assisted by some of the ablest men who ever practised in Westminster-Hall, held such interest insurable. And it seems that this objection, if valid, would hold to all insurances where there is a possibility of the interest of the parties being defeated by other means than the ordinary perils insured against; e.g. it might be urged against insuring fish or fruit, because they might both perish by becoming putrid or rotten, between the time of the loss and arrival, if a loss had not happened. On these grounds it seems to me that the contract of marine insurance may extend to protect every kind of interest that may subsist **[304]** in or be dependant upon things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it has been reduced within narrower limits, though several statutes have been enacted to prevent its being made a colour for gaming. The 43 Eliz. c. 12, which erected a court for determining causes arising on policies of insurance, has indeed adverted only "to the usage of the merchants both of this realm and of foreign nations, when they make any great adventure, to

give some consideration of money to other persons to have from them assurance made of their goods, merchandizes, ships, and things adventured, which course of dealing is commonly called a policy of assurance." But this statute has not limited the contract in this country to such assurances, nor is it to be collected from any thing in the statutes that the framers of it supposed the contract of insurance to be of so confined a nature, for the recital speaks of the usage as obtaining among merchants both of this realm and of foreign nations, and that the usage of effecting policies of assurance among foreign nations on other subjects than those enumerated in the 12th of Eliz. will appear from various writers of those nations. And the 13th & 14th Cha. 2, c. 23, intituled, "An additional act concerning matter of assurance used among merchants," in its recital mentions a want of power in the commissioners to make any order against the ship or goods which commonly are the things assured, evidently implying that other matters might be insured. Conceiving for these reasons that the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to the risk insured against, I shall proceed to consider whether the Defendants in error, as such commissioners, could under the circumstances of this case suffer any prejudice or damage by the loss of the ships and goods described in this policy of insurance, so [305] as to entitle them to recover, as having an interest within the meaning of this policy. From which consideration I would exclude all interest from their title to recompence or profit from their services to be performed, which is the subject of another question. In order to decide this we must look at their commission to see what authority they had, and what duties were imposed upon them, and if it shall appear from it that the purpose and object of their commission was only to take care of the Dutch property after its arrival in England, and if till then they had not any power to interfere with it, they cannot be said at the time of the sailing insurance and loss to have been interested; for until the time should arrive when their authority and duty as such commissioners would attach, they would have no existing concern in such property, and could not in their character as commissioners suffer any prejudice or damage by a loss happening before they had any concern in the thing assured. Now the commission granted to the Defendants in error, in pursuance of 35 Geo. 3, c. 80, authorized them to take into their possession and care only such ships and merchandizes as his majesty by virtue of that act could authorize them to take possession of, so that by the letter of their commission referring to the statute. their care was confined to the ships which had been detained, or might be brought into the ports of this kingdom, and until arrival no property belonging to the subjects of the United States was clothed with those circumstances which designated it to be the object of their commission, and made it the duty of the commissioners to interfere in its preservation. The course of the argument at the bar has not, I think, tended to show that such was their duty; but to establish this proposition, that as the insurance by them was as commissioners, it was not a wager, nor for their benefit as individuals, but a contract of indemnity for the benefit and protection of those who might be ulti-[306]-mately beneficially entitled to the property of the subject-matter insured, if it were brought into this kingdom, and that it is in effect the same thing as if it had been so declared. Probably an insurance with such a declaration would have been good, but of that it will not be necessary to say any thing, inasmuch as I conceive (if it was not the duty of the Defendants in error, as such commissioners, to insure for the benefit of such persons) that the averment made use of in these pleadings will not bear that construction; whether it will or not must depend on the relation they had as commissioners to the subject insured at the time of the insurance. Had they been authorized generally to take care of ships detained by his majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the Defendants in error insured as such commissioners, might have borne the meaning which has been contended for, but that cannot be understood in this case, for the averment in effect refers their interest to the act of parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom; and I know not how to conceive an interest dependant on a thing, with which thing the persons supposed to be interested have nothing to do. The Defendants in error have been considered as trustees or consignees, who it is said have insurable interest. But I do not think

they can be considered as trustees, or as consignees, having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be consi-[307]-dered as consignees in whom any interest or right is vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment primâ facie will pass. If they be consignees they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were certain defined persons or uncertain persons, and not in themselves as commissioners: for taking the meaning of the word interest to be what I have stated it to be, it is obvious that a naked consignee who means that the insurance should be applied to the protection of the things insured, and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss as his commission, but that others interested as proprietors should be indemnified: it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there an interest. When such consignee insures to protect the interest which property gives, the interest should be averred, (vid. 1 Bos. & Pul. 323), either directly, or in terms tantamount, to be in those who are or may be beneficially entitled; for in such case interest means property, and the property must be shown to be in him in whom the interest is averred to be.

[308] To the sixth question GRAHAM B., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON B., HEATH J., MACDONALD Ch. B., and SIR JAMES MANSFIELD Ch. J. answered, First, that the averment touching the right of the commissioners to take possession of the ships and goods upon their arrival in Great Britain was unnecessary, and might be rejected as surplusage; that is, was only introduced to show an interest in the Plaintiffs; and as it would have been sufficient to aver an interest without showing how it arose, and as the averment in question was unconnected with the averment of interest, the latter might be proved in any way without regard to the establishment by evidence of the former; they referred to *Pippin* v. *Solomons*, 5 Term Rep. 496. Secondly, as to the averment of interest, that whether the Plaintiffs were bound to aver an interest or not, yet that having averred that the contract of assurance was made to protect an interest, it was not competent to them to desert that averment, and to recover, as if the contract had a different object. Thirdly, that the statute of the 19 Geo. 2 had not rendered any averment necessary which was not necessary before the passing of that act, the object of which was to prevent gaming, by prohibiting the insertion of certain clauses in the policy, which dispensed with proof of interest; that the statute therefore related only to the proof, and not to the form of pleading; that before the passing of that statute it had been most usual to make an averment of interest, or to state what was equivalent to it, but that there were precedents of considerable authority to show that such an averment was not necessary, which are collected in *Crawford* v. *Hunter*, 8 T. Rep. 13, and *Nantes* v. *Thompson*, 2 East, 385, and from which it appears that such an averment is not essential to maintain a declaration on a policy of insurance; but that notwithstanding such averment was not necessary to be inserted in the declaration, yet both before and since the statute [309] indemnity, was to be considered as the object of a policy insurance, being a contract to protect the insured from the consequences of certain events which might affect the property insured; and that it was therefore necessary to show that a real fair bonâ fide loss had been sustained.

CHAMBRE J. Beyond all question a policy of insurance is a contract of indemnity; and this is an insurance on a real existing interest in the property insured; and therefore it was incumbent on the Plaintiffs to state in the first place in their declaration, and afterwards to make out in evidence, a substantial interest. They have declared

as for an average loss; and if they can recover at all, it must be only according to the interest they have, according to the loss they have sustained. Their case is, that as such commissioners they have sustained a loss; and in proportion to that loss they claim an indemnity. I do not know that any particular sort of averment is necessary in a declaration, but it must be apparent from the facts stated in the declaration itself that there is an interest. It need not be called an interest, but in every case there must appear on the record a primâ facie ground of action, and in order that an action brought on a policy of insurance may be supported, it must appear on the face of the declaration that the party some way or other had an interest. Now I take it that one of these averments must be made out; perhaps both need not. If the Plaintiffs had alleged simply that they had this interest in this property, that would have done without the averment, that if it had arrived in the ports of this country it would have fallen under their care as commissioners under the act. But if the averment of interest is not made out in proof, it cannot be rejected as surplusage: for if you strike it out of the declaration there is no foundation for the action. With regard to the last **[310]** part of the question, whether after passing the 19 Geo. 2, c. 37, it was necessary in the law in a declaration in an action brought on a policy of insurance effected on a British ship, for the Plaintiff in such an action to make any averment touching his interest therein which was not necessary to be made in such declaration previous to the passing that act of parliament, the statute certainly introduces no form of averment, it takes away a clause that was frequently inserted in policies of insurance, but it introduces no new form of averment. It was made with an intention to prohibit gaming and wagering policies, and policies containing these words, "Interest or no interest," or "without further proof of interest than the policy." The statute, however, seems to require that there should be some averment. An averment might be made in the manner I have stated. The answer then which I give to this question is, either that some fact should appear on the face of the declaration to show an interest, or there should be an express averment of interest. Whether this was necessary before the statute seems to be doubtful. According to some precedents it should seem that the averment of interest was considered as unnecessary; but if these precedents may be supposed to be erroneous, I should say that even before the statute there must have been an averment of some kind or other, from which it must appear that such an interest existed.

To the seventh question GRAHAM B., LE BLANC J., LAWRENCE J., ROOKE J., GROSE J., THOMPSON B., HEATH J., MACDONALD Ch. B., and SIR JAMES MANSFIELD Ch. J. answered, that the want of power to abandon was not a certain criterion of insurable interest; that in many cases there might be insurable interest without power to abandon, as in the case of freight, bottomry, and respondentia; and that the 16 Geo. 2, which prohibited insurances without benefit of salvage, was not to **[311]** be understood as prohibiting the insurance of things, not capable of salvage, but only as prohibiting the insertion of a clause to that effect in a policy upon things which were capable of salvage. They all thought that the commissioners might have abandoned these ships and goods, if they had arrived in a British port in such a state as to justify abandonment; and most of them thought that they might have abandoned as agents or consignees of those who should ultimately be entitled, even if the ships did not arrive.

LE BLANC J., who agreed in the latter opinion, said, Where the subject-matter of insurance is such as not to be capable of being abandoned, there the incapacity to abandon will not affect the validity of the insurance; or in other words, an incapacity of the person to make an abandonment may, but an incapacity of the thing to be abandoned cannot affect the validity of the insurance.

SIR JAMES MANSFIELD Ch. J. said, The incapacity to abandon, as I apprehend, will have no other effect than this; that the person who cannot abandon can never recover for a total loss. While any thing remains of the things insured, he may take that and make the most of it; he can only recover for a partial loss.

CHAMBRE J. From the opinion I entertain on the other questions, I cannot give any other answer to this than by saying, that in my humble opinion the Plaintiffs had not any such interest in the bodies of these ships, or in the goods, or any part of them, as was capable of any abandonment. I think they were quite strangers. My answer, therefore, is in the negative, that they had not any such interest as was capable of being abandoned. This policy of insurance is on such a species of property as is in its

own nature capable of abandonment, and to be sure it is a pretty good test to try the interest of the [312] party by examining whether they were so connected with the property that they could have abandoned it, or whether they could not. I do not mean whether those for whom they acted, for whom they were agents, consignees, or trustees, could abandon; but whether the commissioners could; and I think they could not. I am likewise of opinion that an incapacity on their part to abandon rendered the policy in question invalid.

LAWRENCE J. The doctrine of abandonment being founded on this ground, viz. that no person shall be paid as for a total loss and retain any interest in the thing insured by which he may receive more than an indemnity, an incapacity to abandon in cases where the subject-matter is capable of abandonment operates as a medium to show a want of interest in the subject of the insurance, at the time of the loss. And if the commissioners had not a capacity to abandon the subject of the insurance, it will affect the validity of it, as showing they had no interest. And that they had no interest in the subject-matter of the insurance I have endeavoured to establish in my answer to the fifth question. But if the averment in the declaration of the interest of the Plaintiffs as commissioners can be understood as an averment that the insurance was made for the benefit of those who might be ultimately entitled to the things insured, the incapacity in the Plaintiffs to abandon would prevent a recovery for a total loss, where any thing had been or might be saved, until they were enabled by those for whom the insurance was made to convey to the underwriters the benefit of such salvage.

To the eighth question; first, the great majority of the learned Judges declared their opinion, that the profits of the commissioners were insurable; they said the commissioners were materially concerned in the safe arrival of [313] the ships, because their profits depended upon it, and they would therefore sustain a loss if the ships did not arrive; that if the commissioners had a moral certainty of deriving the profit, that was an insurable interest; that the commissioners had such a moral certainty, it being contrary to the usage of the crown to remove commissioners when once appointed, except for some misconduct, which was not to be intended; and that they had an existing right to future management. They referred to *Grant* v. *Parkinson* (Park. M. I. 267), *Le Cras* v. *Hughes* (Park. M. I. 269), and *Henrickson* v. *Margetson* (Park. M. I. Ed. ult.), before Lord Mansfield in 1776, where his lordship held that imaginary profits on a cargo of indigo were insurable; and his opinion was confirmed on a motion for a new trial; to *Craufurd* v. *Hunter* (8 Term Rep. 13), *Flint* v. *Le Mesurier* (Park. M. I. 268, n. (*a*)), and *Wolfe* v. *Horncastle* (1 Bos. & Pull. 316), where Buller J. held that a creditor who had advanced money which would have been a lien on a cargo if it had arrived, might insure; also to *Barclay* v. *Cousins* (2 East, 544); and they observed that the possibility of the interest being defeated by other events than the perils insured against, such as a countermand by the consignee, was not considered as affecting the right of insurance in those cases; and they put the instance of an insurance of profits upon a perishable cargo, which might become of no value independently of sea risk.

LAWRENCE J. agreed in the above opinion respecting the right to insure profits; but said that the commissioners in the present case never could have insured if the policy had been effected on their profits, as none of the ships arrived till some time in the year following the declaration of hostilities; and the others, which were lost before the declaration, were lost at a time and at a dis-[314]-tance which made it impossible for them to have arrived before such declaration; and that if they could have had no profit as commissioners on the ships' arrival, they could suffer no damage by the loss; for whatever took away the damnification in the whole or in part must operate upon the indemnity in the same degree.

None of the learned Judges denied that the profits were insurable.

Secondly, with respect to the 19 Geo. 2, GRAHAM B. and ROOKE J. thought that an insurance on profits did not fall within the provisions of that statute.

CHAMBRE J., LE BLANC J., MACDONALD Ch. B., and SIR JAMES MANSFIELD Ch. J. inclined to think that such an insurance was within the provisions of that statute: they observed that the point arose in *Grant* v *Parkinson*, but was not determined, the Court being of opinion that the words in dispute, viz. "profits valued at 1000l. without other voucher than this policy," only made it a valued policy, and did not amount to a dispensation from proving interest. They observed that though the subject of

insurance was profit, yet that the risk was in fact incurred by ships or goods, upon which the profit was dependent, and the preservation or destruction of which occasioned the profit or loss; and that an insurance upon the profits of any ship or goods, by way of wager, would be a mere evasion of the statute; and though not within the words, must be taken to be within the spirit.

LAWRENCE J. said, If the question had respected a recompence for services to be performed in regard to the ships of his majesty or his subjects, or goods laden on board the same, in order to advance the remedy intended to prevent the mischiefs recited in the act, it probably would be held that no insurance can be made on matters **[315]** connected with the ships of his majesty, or his subjects, and the merchandizes, goods, or effects laden on board them, against any events affecting the same by way of gaming or wagering. But it is not necessary to deliver any opinion on that point; for as it has been decided that this statute does not extend to foreign ships, it will follow, from such construction of the act, that policies on matters connected with foreign ships are not within it; and that the insurance of the commission of the Defendant in error to arise from the care, management, and disposition of the ships in question, and of the goods laden on board the same, they not being the ships of his majesty or his subjects, is not an insurance within the 19 Geo. 2.

The other learned Judges did not deliver any precise opinion on this part of the question.

Thirdly. The learned Judges were unanimously of opinion that the policy in question could not be considered as a policy upon profits, having been expressly declared upon as a policy upon the Plaintiffs' interest in the ships and goods themselves; and that if it had been intended as a policy on profits, it should have been so stated.

After the learned Judges had delivered their opinions, the further consideration of the subject was adjourned to the 10th July, on which day

LORD ELDON spoke to the following effect: Before I state the first count in the declaration in this case, it will be extremely material to call your lordships' attention to the counts upon which the jury have found for the Defendant. For whatever might have been the opinion of any of your lordships, if the subject-matter of those counts had been brought before the House by the bill of exceptions, all further consideration of the matters of law and fact arising on those counts is **[316]** excluded by the form of proceedings, unless some means can be found of giving the parties an opportunity to lay the matters stated in those counts again before a jury. The second count states the interest of the property insured to be in his majesty, and avers that the policy was made on his majesty's account, and that the commissioners had given directions to the agents to negotiate policies on his account. But as the jury have found for the Defendant on this count, it is not open to us to say that his majesty had any interest in the property, or that the commissioners insured on his account, except so far as those circumstances arise out of the first count. The third count avers that the property, at the time of the insurance and loss, belonged to foreigners. The object of this count was to dispense with the averment of interest; for if the property belonged to foreigners, the insured might recover, although he had not an interest. But the jury having also found for the Defendant on this count, it cannot now be said that these were ships on which an averment of interest is unnecessary. Upon all the common counts the jury have also found for the Defendant. The question, therefore, upon this bill of exceptions is reduced to this, Whether the Plaintiffs have supported their demand upon the first count, and to the extent to which they have recovered, as to each and every of the ships mentioned in the declaration? (His lordship then stated the first count.) The effect of the averment of interest in this count, as it seems to me, is, that the commissioners had a right and an interest, as such commissioners, to make an insurance for their use, benefit and account, as such commissioners, at the time when the ships were at St. Helena, when they sailed from thence, and till the time of the losses. And the averment is not only predicated of all the ships, but of each of them at each of the times mentioned in this part of the declaration. It is averred that the ships sailed from St. Helena upon the 2nd of July 1795 for London; that **[317]** the "Houghly," with part of her cargo, was lost by perils of the sea on the 1st of September 1795; and the "Surcheance" and her cargo on the 5th of September; that the "Dordrecht" was disabled on the 13th, but was carried into Ireland and

sold there, and her cargo brought to London; and that the "Zeelelye" was lost on the 29th of September, which was after the declaration of hostilities between this country and the United Provinces, which took place on the 15th of September, and which stamped the character of enemies' property upon the "Zeelelye" from the date of that declaration. As I understand the case, the verdict has been taken for damages, computed upon the principle that the commissioners had a right to recover in respect of all these ships and their cargoes, and not merely upon some of them. If, therefore, it should turn out that they have only a right to recover upon some, and that it should appear upon the record that they have recovered upon all, there will be a miscarriage in the course of justice. (His lordship then stated the bill of exceptions.) The questions now are, First, Whether upon the matters disclosed on the first count the commissioners had an insurable interest in any of the ships and cargoes upon which they have recovered? Secondly, If they had an insurable interest in any, whether there are not some on which they had no such right? Whether your lordships shall come to the conclusion that they have no right to recover upon any of these ships and cargoes, or to a more limited conclusion, and take such steps as may be in your power to collect the true result of the proceedings which have been had, it seems to me due to the importance of the subject to enter into some of the topics which have been discussed at the bar; and to determine the real character of the Plaintiffs which led to the existence of their commission. The orders of Council, referred to in the bill of exceptions, applied to a state of this country with relation to the United Provinces and their inha-[318]-bitants, which I may represent as perfectly unparalleled. The United Provinces had been reduced under the yoke of France, then at open war with this country; whether finally reduced or not was the question. The former Government and a great part of its subjects were adverse to France, and attached to this country; many of the inhabitants had proposed to resort to this country for protection, and some had come here with their property. It was thought a humane policy not only to protect the individuals, but to bring into the ports of this country Dutch property bound to Holland, for the benefit of those who might ultimately turn out to be entitled. On the other hand, in case a war should take place the property of the United Provinces and of its inhabitants would become the property of the crown, and subject to be disposed of by his majesty. Yet even in that event it appears to me to have been taken for granted that many Dutchmen might acquire a friendly character, and be entitled to be considered as owners of the property taken, and to whom therefore it would have become liable to have been restored. It was impossible, however, to make a provision of this sort in the exercise of his majesty's prerogative, since such ships and cargoes could not enter British ports consistently with law. The power of the Legislature therefore was called in; but it may be observed, that so far as related to detaining Dutch ships and cargoes at sea, by the force of the state the prerogative of the crown was fully sufficient, and the act appears to have been studiously framed to avoid any interference with that prerogative. Accordingly, the power of the commissioners is expressly limited to ships and goods that have actually come, or been brought into the ports of Great Britain. All the directions relative to bringing these ships into port were given in the legitimate exercise of the king's prerogative for the protection of the state and its allies; and it appears to me, as it has done to the [319] learned Judges unanimously, that there is nothing in this act of parliament which touches the prerogative while the ships and cargoes were at sea, or even in the ports of Ireland; and that it was competent to the crown from the moment they were taken possession of to restore them to the Dutch owners or the Dutch government, or to deal with them in any manner which should be thought fit; for the power of the commissioners never attached till they actually came into a British port. If this be the law, it is a direct negative of that which the averment seems in a general sense to import, and those averments can only be true in this sense, that the commissioners had a power to dispose of the ships and cargoes if they happened to come into port, and his majesty's orders did not intervene to prevent their being brought in, or hostilities did not intervene to prevent their being brought in, or to change the characters of the owners. For it appears to me, that even though the ships and cargoes were taken possession of by the commissioners, the act was not intended to operate upon them if hostilities should take place. With respect to those brought in after hostilities, they would be ships in the hands of the king's officers, to be condemned as seized by the force of the state, and distributed according to his majesty's

bounty. It could not be the intention of the act to affect the rights of the crown. It has indeed been stated by one of the learned Judges, that these commissioners might have sold the ships. With great deference to the authority of that learned Judge I must state to your lordships my humble but confident opinion, that they could not have sold them; and I go much further; the commissioners could not have made a good title, even if they had been brought into an English port. Among the subjects of this country indeed who are bound by an English act of parliament they might have made a good title. But if a ship be taken by hostile force, the title to that ship as against **[320]** foreigners cannot be changed by any act of local legislature, but the ship must be condemned in a court proceeding according to the law of nations on rules binding not only on the subjects of the country where the court is held, but on foreigners who are not so. So far therefore from these commissioners having a power to sell the ships in transitu, they could never make a good title against the Dutchmen at sea, unless the person having possession could show the condemnation of a prize court. These principles are strongly illustrated by the evidence. The moment hostilities took place the property was condemned as prize. The power of the commissioners could never have attached upon it in the hands of the king, nor could they have any authority to deal with it, unless the king had thought proper to grant it to them. With respect to the ships in the ports of Ireland, he expressly constitutes them prize agents; and with respect to those brought into this country and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal as commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though I hope with proper humility, as my clear opinion, that after the declaration of hostilities the commissioners neither did deal, nor had a right to deal with the property as commissioners. His majesty having a title to it makes them his agents, and points out to them in what manner they shall exercise that agency; directing that it should be in the same manner as if they had derived their title under the commission, and not under their special appointment as prize agents. This is not a case in which there is any averment of an interest in these commissioners beneficial to themselves, and the question is, Whether the power, or faculty, or right of concern and management which these commissioners might or might not have had, which they would have had if these ships had come **[321]** into port, and which they might have ceased to have the moment after, be the subject of a legal insurance? Since the 19 Geo. 2 it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. In the 19 Geo. 2, as well as in every other statute and charter relating to insurance, the objects of insurance are plainly described to be ships, cargoes, wares, merchandizes, or effects. One or two later statutes mention property; but as to expectation of profits and some other species of interest which have been insured in later times, there is nothing to show that they were considered as insurable. I do not wish that certain decisions which have taken place since the 19 Geo. 2 should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found to be upon closer investigation. Lord Kenyon, in *Craufurd* v. *Hunter*, considered the 19 Geo. 2 as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertained doubts on that subject. Ld. Ch. Baron Comyns, in the case of *Depaba* v. *Ludlow*, Com. 360, speaking of this **[322]** statute says, that it was an act to affect the form of the policy: and Lord Hardwicke has said the same in two cases, *The Sadlers' Company* v. *Badcock*, 2 Atk. 554, and *Pringle* v. *Hartley*, 3 Atk. 195. In the latter of which he distinctly says, that the words "interest or no interest" were meant only to dispense with the proof of interest on the trial. If then a policy with the words "interest or no interest" were stated in a declaration, and

those words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part and an admission on the other that there was an interest. I cannot conceive how such decrees could have been made in courts of equity as were made there previous to the 19 Geo. 2 if an insurance could have been made without interest, for no court of equity could relieve against the effect of a contract valid in law. But if the words "interest or no interest" amounted to an agreement to dispense with the proof of interest, the principles upon which those decrees proceeded may easily be accounted for. If the insurer, having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a court of equity that he had been taken by surprize in his admission, and the policy would be ordered to be delivered up. There is some strange language to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition of them. But the language of all courts of justice has been extremely careful lest the permission of valued policies should introduce a species of gambling policies. With respect to foreign ships, the averment of interest has been dispensed with, not because insurance on them could be made without interest, but on account of the difficulty of proof. But whatever **[323]** may have been the common law, the 19 Geo. 2 has prescribed what should be the law thereafter, and all courts of justice are bound to follow up the spirit of that act. If this power and faculty of future concern be an insurable interest, we ought at least to take care not to extend to such interest a protection that would be denied to policies of a more solid nature, lest that sort of wagering in policies should grow up, which has of late been extending itself considerably. It has been said, that the commissioners either are or are not like trustees, consignees, or agents, and that they had as good an insurable interest as the captors in the "Omoa" case, or a creditor on the life of his debtor. If the "Omoa" case was decided upon the expectation of a grant from the crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation. That which was wholly in the crown, and which it was in the power of his majesty to give or withhold, could not belong to the captors, so as to create any right in them. I am far from saying, however, that that case might not have been put upon other ground. The captors not only had the possession, but a possession coupled with the liability to pay costs and charges if they had taken possession improperly. There was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the king as their principal; and I should be disposed to say, that the king had an insurable interest as the person who had the jus possessionis. His right indeed was liable to be affected by a sentence of the Court of Admiralty. But as the insured is often entitled to consider the property as gone the moment the capture takes place, so I think that the king may be considered as against all the world as having an interest in the property before condemnation for the purpose of in-**[324]**-suring. With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So a consignee has the power of selling, and the same may be said of an agent. I cannot agree to the doctrine said to be established in the courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract, nor can I advise your lordships to proceed without much more discussion upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal. But in the present case the commissioners do not insure in respect of any benefit to themselves, nor of any benefit to the crown, or to any other person or persons stated on this record; they insure merely as commissioners, and if they have a right so to insure, it seems to me that any person who is directed to take goods into his warehouse may insure; and that there is nothing to prevent the West India Dock Company from insuring all the ships and goods which come to their docks. If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dock-master, then the warehouse-keeper, then the porter,

then every other person who to a moral certainty would have any thing to do with the property, and of course get something by it. Suppose A. to be possessed of a ship limited to B. in case A. dies without issue; that A. has 20 children, the eldest of whom is 20 years of age; and B. 90 years of age; it is a moral certainty that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth 20,000l. a-year, who **[325]** is 90 years of age; upon his death-bed intestate, and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or any thing more than a mere expectation. I am the more surprized at the doctrine which has been advanced upon this subject, recollecting the case of a gentleman who had been in a state of incurable lunacy for many years, in the time of Lord Bathurst, who was then assisted by no less a man than Lord Chief Justice De Grey. Certain individuals filed a bill to perpetuate the testimony of their being heirs at law, and next of kin. Lord Thurlow, then attorney-general, demurred to that bill, and the ground of his demurrer was, that though it was as morally certain as any thing could be, that those individuals would succeed to the property; yet as the whole of it was in the lunatic, no part of it could be in any body else, and therefore their moral certainty raised no title in a court of justice. One of the persons to whom I am alluding concluded with these words: "Courts of justice sit here to decide upon rights and interests in property; rights in property, or interest derived out of contracts about property. They do not sit here to decide upon things in speculation. Speculative profits are nothing." I send my ship to India; I expect profit from the voyage; if the ship is lost, my expectation is defeated; but of those expected profits the law can have no consideration: and I am sure that Lord Ch. J. Willes did not hold that such expectations might be regarded in the case of *Pole* v. *Fitzgerald* (Willes, 641); the doctrines of which case have been wounded to the quick by the representations made of them in subsequent cases; and among the rest in the first volume of Burrow; which representations are most inaccurate, if they are meant to convey, as the result of that case, that where there is a **[326]** contract under which a party is to receive profit, and such profit so secured by contract may be affected by some contingency connected with the voyage, it is insurable. I do not assert that it is not insurable; but I cannot accede to that which has been stated as part of the doctrine upon this subject—that unascertained profits, which may or may not be made, may be insured. The present case, however, assumes not only that a man may insure unascertained profits from his own losses, but that he may insure profits to arise out of ships and goods, which he has not, and which he never may have in his possession, and from the management of which he never can obtain any profit. If I were bound now to state my opinion judicially upon this first count, I should be obliged very strongly to say, that the claims of the Plaintiffs could not be supported; but I do not think it will be necessary for me to say, that I am sure that it cannot be supported to the extent to which damages have been found, for the "Zeelelye" having been lost after the declaration of hostilities, unless I mistake the act and commission altogether, she was not a ship which the Plaintiffs could have taken into their possession as commissioners; they have therefore sustained no loss as commissioners with respect to that ship; and it will be essentially necessary that a distinction should be made in the proceedings in the court below with respect to the different ships, in order that the damages may be properly computed. It appears to me that the proper mode of proceeding will be, that we do award a venire de novo for this purpose. The whole record will then be carried down, and the case will be open, and all the different interests which are averred in the other counts. As the matter now stands, I think it impossible to affirm this judgment. With respect to the conduct of the underwriters I have said nothing. Courts of justice have no right to tell men whether they are acting honestly or dishonestly. It is the duty of a court to say whether they have acted le-**[327]**-gally. To that consideration I have entirely confined myself.

LORD ELLENBOROUGH, Chief Justice of the King's Bench.

From a due regard to your lordships' time, and a recollection of the very urgent business which presses, I shall occupy but a very short portion of time, more especially as I entirely coincide with my noble and learned friend who has just spoken, not only in his general views of the case, and the principles which he has stated, but in every part of that discussion, and the application of every part of what he has said to

this record; I will therefore only state my opinion very shortly, that the direction of the noble Lord, to which exception has been taken, cannot (independent of the general doctrines of law, upon which you have heard different opinions from the learned Judges) be sustained in its terms. The direction was, that if the jury believed the whole of the evidence, they might find a verdict for the Defendant in error upon the issue joined on the first count. That count states the periods of time at which the several losses happened, and it predicates the loss of the "Zeelelye" on the 20th of September 1795. That loss, therefore, is posterior to the declaration of hostilities, which is upon the same record stated to be upon the 15th of September. The periods of the several losses are not laid, as is usually the case, under a videlicet; and it is stated that the Plaintiffs below proved that the ships and cargoes were, at the times and in the manner in the first count mentioned, damaged, lost, and destroyed, whereby an average or partial loss of 40 per cent. was sustained. Now the average loss given by the verdict is combined, the aggregate, consisting of those ships which were lost before the declaration of hostilities, and one, namely the "Zeelelye," which was lost after, and which therefore could not be lost at that time to the [328] commissioners, who had no antecedent power of taking possession; the property in that ship having, by the declaration of hostilities, become vested in the crown jure belli; the loss, therefore, could not have been the loss of the commissioners, but of the crown. The damages, therefore, being composed of an aggregate, of which one ingredient cannot by law be admitted, the finding is erroneous. With all deference to the noble Judge, the direction should have been, that as to so much of the count as charged the loss to have been sustained by the commissioners, except as to what related to the "Zeelelye," they might find their verdict, but as he has not drawn the distinction, and the "Zeelelye" is made to form a constituent portion of the loss, the direction is upon clear principles a mistaken direction. There ought, therefore, to be an opportunity given for the rights of the parties to be properly adjudged, and for that purpose I should recommend to your lordship to grant a venire facias de novo. Upon that venire, which it is competent to this House to grant, there may be a verdict found: if the evidence shall sustain it upon the count which avers the interest to be in the king. And if the party can make out his case upon that count in point of evidence, that count appears to me much more competent to sustain the case in point of law. It does not become me to anticipate the decision upon the question whether the case can be sustained or not, but by granting a new trial, your lordships would enable the parties to litigate their best title, instead of being restrained to that which is a futile one. I have a further opinion, which it is unnecessary to discuss. The direction of the noble lord being certainly erroneous in the particular which I have stated, it appears to me that there ought to be a venire facias de novo.

LORD CHANCELLOR (Lord Erskine). I will not detain your lordships further than to state my entire concur-[329]-rence in the opinions delivered by my noble and learned friend, and the reasons given by my noble friend who first addressed you. I feel so much reverence for the opinion of the learned Judges, that I should have been greatly embarrassed in presuming to differ from them, if this subject had not been one in which I have in a manner spent my whole life, and if I had not lived in that particular court in which questions of this sort are in daily occurrence. But I feel myself obliged to state (without anticipating at all what may be the event of a new trial) my clear opinion, that if the verdict be suffered to stand as it now does upon the first count, and above all if it be affirmed by your lordships, judgment upon the principles on which it has been argued at your bar, and received the sanction of the learned Judges, it would introduce infinite confusion into the administration of justice, and enable persons to insure property who have no manner of right. Independent of the objections that have been taken, supposing the commissioners to have had a right at all events to take possession of these ships on their arrival in England, they could have had no such right after the commencement of hostilities, and after the rights of the captors and the crown had intervened. I am therefore most clearly of opinion, that a venire facias de novo should be granted.

The Lord Chancellor then moved that a venire facias de novo should be awarded; which was ordered accordingly.

The venire de novo having issued, the cause was again tried before Lord Ellenborough Ch. J. at the Guildhall sittings after Michaelmas term 1806, when a verdict

was found for the Plaintiffs upon the second count of the declaration, which averred the interest to be in the king.

[330] At the trial a bill of exceptions was tendered to his Lordship upon two points, which it is understood are now in a course of being submitted to the opinion of the Judges.

ROE *v.* WIGGS. Nov. 6, 1806.

If upon notice to quit given to a tenant he give notice to his under-tenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself but his under-tenants refuse to quit, an ejectment may still be maintained against him for so much as his under-tenants have not given up.

Ejectment.

At the trial of this cause before Macdonald Ch. B. at the last Hertford assizes, it was proved that a notice had been duly given to the Defendant to quit the premises at Michaelmas 1805, which he accordingly did, and gave notice to his sub-tenants to quit also, but which they did not. It was objected on the part of the Defendant, that the sub-tenants were in possession at the time when the ejectment was brought; and that although the Defendant might be liable to an action of assumpsit for not delivering up possession, yet the default of others could not make him a wrong doer in ejectment. His Lordship however overruled the objection, and a verdict was found for the lessor of the Plaintiff.

Bayley Serjt. now moved to set aside this verdict, and contended, that as the interest of the Defendant ceased at Michaelmas 1805, and he had done every thing in his power by quitting himself, and by communicating to the other tenants that they must do the same, he ought not to be answerable in this form of action for the acts of others.

SIR JAMES MANSFIELD Ch. J. I never understood that it was necessary for a landlord to give notice to any one but his own tenant. If possession be not delivered up after such notice, the landlord may take a verdict against **[331]** his own tenant, and sue out execution, upon which the sheriff will turn the under-tenants out of possession; and as to the costs, the Defendant ought to be subject to them if possession be not delivered up; otherwise the landlord would be in danger of having a pauper put into possession.

CHAMBRE J. of the same opinion (*a*)[1].

Bayley took nothing by his motion.

BLAND *v.* ANSLEY AND OTHERS. Nov. 8, 1806.

[Not followed, *Martin* v. *Jackson*, 1823, 1 Car. & P. 17.]

In an action of trespass against the sheriff for taking the goods of A., in execution for the debt of B., where the question was, Whether the goods had been previously assigned by B. to A. or not? B. was held not to be a competent witness to disprove the assignment to A. (*a*)[2].

This was an action of trespass for taking the Plaintiff's goods in execution. The cause was tried before Sir James Mansfield Ch. J. at the Middlesex sittings after last term, when it appeared that the goods in question were taken in execution in a suit against Philip Aubray, and the question was, Whether the goods belonged to Aubray or the Plaintiff? Aubray had sold to the Plaintiff the house in which the goods were, but whether the goods were sold at the same time was matter of dispute; and the Defendants proposed to call Aubray as a witness to prove that the goods were not assigned to the Plaintiff, and consequently remained his property. The Chief Justice having refused to receive the testimony of Aubray, a verdict was found for the Plaintiff.

Vaughan Serjt. now moved for a new trial, and contended, that Aubray ought to have been admitted as a **[332]** witness, insisting that he was indifferent in point of

(*a*)[1] Heath and Rooke Justices were absent.

(*a*)[2] And see *Nex* v. *Cutting*, 4 Taunt. 18. *Upton* v. *Curtis*, 1 Bing. 210.

TAB 8

1987 CarswellOnt 132
Supreme Court of Canada

Kosmopoulos v. Constitution Ins. Co. of Canada

1987 CarswellOnt 1054, 1987 CarswellOnt 132, [1987] 1 S.C.R. 2, [1987] I.L.R. 1-2147, [1987] S.C.J. No. 2, 21 O.A.C. 4, 22 C.C.L.I. 296, 34 D.L.R. (4th) 208, 36 B.L.R. 233, 3 A.C.W.S. (3d) 22, 63 O.R. (2d) 731 (note), 63 O.R. (2d) 731, 74 N.R. 360, J.E. 87-218, EYB 1987-68613

CONSTITUTION INSURANCE CO. OF CANADA et al. v. KOSMOPOULOS et al.

Beetz, McIntyre, Chouinard, * Lamer, Wilson, Le Dain and La Forest JJ.

Heard: November 1 and 6, 1985
Judgment: January 29, 1987
Docket: No. 17911

Counsel: *Ronald J. Rolls, Q.C.*, for appellants.
W.P. Somers, Q.C. and *Christine Mauro*, for respondents.
V.R.P. Bersenas, for cross-respondents.

***Wilson J. (Beetz, Lamer, Le Dain* and *La Forest JJ.* (concurring):**

1 The issue in this appeal is whether a sole shareholder of a corporation has in insurable interest in the assets of that corporation. The traditional view is that a sole shareholder has neither the legal nor the equitable interest in the corporate assets required for a valid insurance on those assets: *Macaura v. Northern Assurance Co.*, [1925] A.C. 619, [1925] All E.R. Rep. 51 (H.L.). In examining the issue it will be necessary to consider first whether *Macaura* would provide the insurers with a valid defence in this case and, if so, whether *Macaura* is or should continue to be the law in Ontario.

1. The Facts

2 On February 7, 1972, the respondent, Andreas Kosmopoulos, entered into a commercial lease for premises located in the City of Toronto. From these premises he operated a business of manufacturing and selling leather goods under the name of Spring Leather Goods. This business was carried on as a sole proprietorship.

3 On the advice of his solicitor, Mr. Kosmopoulos incorporated Kosmopoulos Leather Goods Limited ("the company") in order to protect his personal assets. Mr. Kosmopoulos was the sole shareholder and director of the company. Even though the business was thereafter technically carried on through the limited company, Mr. Kosmopoulos always thought that he owned the store and its assets. Virtually all the documentation required in the business, including bank accounts, sales tax permits and hydro and telephone accounts, made no reference to the company but rather to "Andreas Kosmopoulos carrying on business as Spring Leather Goods" (or some similar phrase). Although Mr. Kosmopoulos' solicitor tried to obtain the approval was never obtained. The lessee at all material times was Mr. Kosmopoulos and not the company.

4 Soon after Mr. Kosmopoulos started conducting his business in the leased premises he contracted the respondent, Aristides Roussakis, in order to obtain insurance for the contents of the business premises. The respondent, Aristides Roussakis and Art Roussakis Insurance Agency Limited ("the insurance agency") obtained a fire insurance policy with the General Accident Group for coverage from March 14, 1972 to March 14, 1975. Even though the insurance agency was well aware of the fact that the business was being carried on by an incorporated company, the insured was described on the policy as "Andreas Kosmopoulos O/A Spring Leather Goods". This policy was renewed but expired before the date of the loss and was replaced with subscription policies issued by Simcoe-Bay Group and Commercial Insurance Company. The appellant insurance companies are subscribing

companies to the two replacement policies. Both of the replacement policies showed the insured as "Andreas Kosmopoulos O/A Spring Leather Goods".

5 On May 24, 1977, a fire broke out in the adjoining premises and caused fire, water and smoke damage to the assets of the company and to the rented premises. Mr. Kosmopoulos filed proofs of loss under the replacement policies on December 6, 1977 but the appellant companies refused payment and the present action was commenced.

2. The Courts Below

6 On October 29, 1981, Mr. Justice R.E. Holland of the Supreme Court of Ontario held that Mr. Kosmopoulos was the tenant of the premises in which the business was carried on. Therefore, on established authority, he had an insurable interest in the leasehold improvements and damage to these totalled $1,699.26.

7 Holland J. also observed that on established authority Mr. Kosmopoulos could not recover for the destruction of the assets of the business because these were owned by the company which he had incorporated. But he held that the source of that principle, *Macaura v. Northern Assurance Co.* supra, could be distinguished because in this case the company was a mere "fiction" which had nothing to do with the risk that was underwritten. Mr. Kosmopoulos was therefore held to have an insurable interest and judgment was given in his favour against the appellant companies for the total amount of $68,726.26, plus interest.

8 Mr. Kosmopoulos also claimed against the insurance agency. Holland J. found the agency liable for undertaking to see that the patterns which were destroyed in the fire were insured. Judgment was given in favour of Mr. Kosmopoulos for $2,500 which was the value of the patterns. Had he found that Mr. Kosmopoulos had no insurable interest, Holland J. would have found the insurance agency fully liable for the loss because it was put on inquiry to obtain the correct name of the insured and was negligent in failing to do so.

9 On June 8, 1983, the Court of Appeal of Ontario dismissed the insurers' appeals and Kosmopoulos' cross-appeal against the agency [reported 42 O.R. (2d) 428, 1 C.C.L.I. 83, 149 D.L.R. (3d) 77, [1983] I.L.R. 1-1660]. Mr. Justice Zuber, MacKinnon A.C.J.O. and Brooke J.A. concurring, considered whether the Court of Appeal was bound to accept *Macaura* as the law in Ontario in light of the decisions of this Court in *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, [1966] S.C.R. 133, 54 D.L.R. (2d) 229, [1965] I.L.R. 1-153, and *Wandlyn Motels Ltd. v. Commerce Gen. Ins. Co.*, [1970] S.C.R. 992, 12 D.L.R. (3d) 605, [1970] I.L.R. 1-352, 3 N.B.R. (2d) 6. After examining these decisions, Zuber J.A. concluded [p. 85, C.C.L.I.]:

> ... the Supreme Court of Canada had accepted the rule in *Macaura* only to the extent that it needed to do to decide the *Aqua-Land* case, i.e., that one shareholder of three had no insurable interest in the assets of the Corporation. Therefore, the issue of whether a sole shareholder has an insurable interest in the assets of the Corporation, in my view, remains open in this province.

He then went on to point out that in the days when both the federal and provincial legislation required a company to have more than one shareholder the issue was of little significance. But now that single shareholders and single directors are possible under both the Canada and Ontario *Business Corporations Act* it has assumed new importance. He saw no reason to impose "the rigidity of the *Macaura* rule on this recent development in company law". He then referred to *American Indemnity Co. v. Southern Missionary College*, 260 S.W. 2d 269 (Tenn. S.C., 1953) in which a parent company was held to have an insurable interest in the assets of its subsidiary and in particular the following passage from the judgment of Neil C.J. at p. 272:

> We think the two corporations are separate entities, but their existence as such is a mere fiction of the law. The subordinate corporation does the bidding of its parent down to the minutest detail. The domination of the parent over its offspring was so complete as to make them practically indistinguishable except in name. There can be no other reasonable conclusion from the admitted facts but that Mercentile Enterprises was an agency or instrumentality of the complainant, and all property including the money burglarized was in reality the property of the latter, subject of course to the claims of creditors of the former.

In effect, Neil C.J. "lifted the corporate veil" in order to find an insurable interest.

10 On November 21, 1983, this Court granted the insurers leave to appeal and granted Mr. Kosmopoulos and Kosmopoulos Leather Goods Limited leave to cross-appeal.

3. The Issue

11 Counsel for the appellant insurance companies submit that Mr. Kosmopoulos as sole shareholder had no legal or equitable interest in the company's assets. They urge the Court to follow *Macaura*. Counsel for the respondents argue that the corporate veil should be lifted and, when this is done, it becomes clear that the company's property was, in law, the property of Mr. Kosmopoulos. The *Macaura* case therefore provides no defence of lack of insurable interest to the insurers. Alternatively, it is submitted by the respondents that Mr. Kosmopoulos had an insurable interest as bailee of the company's assets. Finally, the respondents urge that this Court should no longer follow *Macaura*. I shall deal with the respondent's submissions in order.

(a) "Lifting the corporate veil"

12 As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a Court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed., 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College* supra, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.

13 There is a persuasive argument that "those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138. Mr. Kosmopoulos was advised by a competent solicitor to incorporate his business in order to protect his personal assets and there is nothing in the evidence to indicate that his decision to secure the benefits of incorporation was not a genuine one. Having chosen to receive the benefits of incorporation, he should not be allowed to escape its burdens. He should not be permitted to "blow hot and cold" at the same time.

14 I am mindful too of this Court's decision in the *Aqua-Land Exploration Ltd.* case, supra, in which the Court did not "lift the veil" in order to find that one of three shareholders in a corporation had an insurable interest in its asset. So also in the *Wandlyn Motels Ltd.* case, supra, the Court refused to regard a motel owned by a man who held all but two of the shares of the insured, Wandlyn Motels Limited, as the property of that corporation. If the corporate veil were to be lifted in this case, then a very arbitrary and, in my view, indefensible distinction might emerge between companies with more than one shareholder and companies with only one shareholder: for a recent comment on the arbitrary and technical distinctions that would be created by lifting the corporate veil in this case, see Jacob S. Ziegel, "Shareholder's Insurable Interest — Another Attempt to Scuttle the *Macaura v. Northern Assurance Co.* Doctrine: *Kosmopoulos v. Constitution Insurance Co.*" (1984), 62 Can. Bar Rev. 95 at 102-03. In addition, it is my view that if the application of a rule leads to harsh justice, the proper course to follow is to examine the rule itself rather than affirm it and attempt to ameliorate its ill effects on a case-by-case basis.

15 For all these reasons, I would not lift the corporate veil in this case. The company was a legal entity distinct from Mr. Kosmopoulos. It, and not Mr. Kosmopoulos, legally owned the assets of the business.

(b) Mr. Kosmopoulos as Bailee

16 It is submitted by counsel for the respondents that Mr. Kosmopoulos was in possession and control of the stock and merchandise of the corporation and was responsible for its safekeeping. This was said to make Mr. Kosmopoulos a bailee of the assets for the corporation and to give him an insurable interest. But there does not appear to be any evidence of an express bailment. If Mr. Kosmopoulos possessed and controlled the property of the corporation merely by virtue of his being director and senior employee of the corporation, his possession and control would be that of the corporation. Indeed, there is authority to the effect that a servant cannot, except in exceptional circumstances, be a bailee of his master's goods: *Associated Portland*

Cement Manufacturers (1910) Ltd. v. Ashton, [1915] 2 K.B. 1 (C.A.). A bailment cannot exist if the bailor still has possession and control of the items alleged to be bailed. To assert that Mr. Kosmopoulos possessed and controlled the property in his personal capacity would be to lift the veil and regard Mr. Kosmopoulos as separate and distinct from the company rather than as its director and senior employee. For the reasons I have given I would not lift the corporate veil in this case. Accordingly, I find no merit in the bailment argument.

17 I would conclude, therefore, that Mr. Kosmopoulos was a sole shareholder with neither a legal nor an equitable interest in the assets of the company. If *Macaura* is presently the law in Ontario and should continue to be the law in Ontario, then the defence of lack of insurable interest must succeed. It is to that question that I now turn.

(c) The Macaura Principle

18 A review of the *Macaura* principle requires, I believe, some analysis of the background against which the decision was made, an examination of the decision itself and of the way in which it has been applied in Canada.

19 Over a century before the House of Lords decided *Macaura* it had considered the nature of an insurable interest in *Lucena v. Craufurd* (1906), 2 Bos. & Pul. (N.R.) 269, 127 E.R. 630. In that case the Royal Commissioners had obtained policies of insurance on several ships and their cargos. During a voyage from the United Provinces, several of the ships were lost at sea before reaching a British port. The Royal Commissioners argued (in the first count) that an Act of Parliament, which authorized them in time of war to take possession of ships and cargos belonging to inhabitants of the United Provinces and detained in or brought to British ports, gave them sufficient interest to insure the ships. It was also alleged (in the second count) thae insurance was obtained for the benefit of the Crown and that the Crown had an insurable interest. The House of Lords ordered a new trial because of misdirection of the jury on the first count. At the new trial there was a verdict for the plaintiffs on the second count and this was sustained on appeal. Accordingly, the frequently cited opinions of their Lordships on the nature of an insurable interest were not critical to the ultimate disposition of the case. Nevertheless, these opinions form the substratum of the subsequent debate over the nature of an insurable interest.

20 Lawrence J. expressed what is now called by academic commentators the "factual expectancy test" at p. 643:

> ... interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction.

To Lawrence J. a moral certainty of profit or loss was a sufficient interest.

21 Lord Eldon was somewhat nervous of the "moral certainty" test for an insurable interest. He said at p. 650:

> This is not a case in which there is any averment of an interest in these commissioners beneficial to themselves, and the question is, Whether the power, or faculty, or right of concern and management which these commissioners might or might not have had, which they would have had if the ships had come into port, and which they might have ceased to have the moment after, be the subject of a legal insurance? Since the 19 Geo. 2 it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. In the 19 Geo. 2, as well as in every other statute and charter relating to insurance, the objects of insurance are plainly described to be ships, cargoes, wares, merchandize, or

> effects. One or two later statutes mention property; but as to expectation of profits and some other species of interest which they have been insured in later times, there is nothing to show that they were considered as insurable. I do not wish that certain decisions which have taken place since the 19 Geo. 2 should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found to be upon closer investigation.

Because he required a legally enforceable right of some kind in order to constitute and insurable interest, he said that, if he had to pronounce on the first count, he would have held that the Act of Parliament did not afford a sufficient legal basis for an insurable interest since the Royal Commissioners acquired no legal rights over the ships until they reached British ports. Besides emphasizing the difficulty of identifying an "intermediate thing" between a legal right and a mere expectation in the passage immediately supra, Lord Eldon elsewhere stressed the problem of ascertaining the limit on who could insure. He said at pp. 651-52:

> If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dock-master, then the warehouse-keeper, then the porter, then every other person who to a moral certainty would have any thing to do with the property, and of course get something by it.

Before turning to an examination of the later cases which considered the divergent opinions expressed in *Lucena v. Craufurd*, it is appropriate at this point to assess the two reasons cited by Lord Eldon in support of his position.

22 It is interesting that Lord Eldon should have advanced in support of the restrictive definition of insurable interest the virtue of certainty and pointed to the alleged lack of certainty which would, in his view, result from a broader definition. Brown and Menezes, *Insurance Law in Canada* (1982), at p. 84 suggest the very opposite:

> After *Macaura* it is no longer possible to claim merely that one would be adversely affected by the loss; the insured must assert that he owned an interest in the objects destroyed. This provides the illusion of great certainty. Property law is among the most technical and certain segments of the law. This certainty is totally illusory because the new formulation makes no concessions either to the reasons for which insurable inter est is a component of insurance law or for commonplace business transactions ... Assuming that an insurable interest in 'things' must mean property, among the simple questions raised are matters such as how does one own a direct interest in property which is not in existence at the time of the contract? Can next season's crops or fluctuating inventory be insured? Are warehousing and other bailee policies subject to the law as set out in *Macaura* so as to limit the right to insure to the bailee's liability to the bailor?

Lawrence J.'s view of insurable interest avoids these problems and, in my view, provides a readily ascertainable standard.

23 Lord Eldon's concern that a broader definition of insurable interest would lead to too much insurance may also be illusory. Insureds will still have to disclose all material circumstances (see the *Insurance Act*, R.S.O. 1980, c. 218, s. 125, statutory condition 1) and declare the nature of their interests (*Insurance Act*, s. 125 statutory condition 2) to the insurer in order to enable it to judge the risk to be taken. If the insurer cannot estimate the likelihood of the loss occurring (because, for example, the information is in the hands of third parties) then it does not have to write the policy. It can also protect itself by limiting its liability or it can charge larger premiums. As is stated in a learned article by Bertram Harnett and John V. Thornton, "*Insurable Interest in Property: A Socio-Economic Re-evaluation of a Legal Concept*" (1948), 48 Columbia Law Rev. 1162 at 1175, "an effective curb on excessive insurance is the general ability of insurance carriers to decline risks, or insert protective clauses". I recognize that a broadening of the definition of insurable interest may increase the liability of the insurance companies upon the occurrence of a single insured event owing to an increased number of policies for the same risk. But insurance companies have always faced the difficult task of calculating their total potential liability arising upon the occurrence of an insured event in order to judge whether to make a particular policy or class of policies and to calculate the appropriate premium to be charged. It is not for this Court to substitute its judgment for the sound business judgment and actuarial expertise of insurance companies by holding that a certain class of policies should not be made because it will result in "too much insurance".

24 I would have thought that a stronger argument could be made that there is too little insurance. Why should the porter in Lord Eldon's example not be able to obtain insurance against the possibility of being temporarily out of work as a result of the sinking of the ships? As far as the insurer is concerned how would this insurance differ from, say, health insurance covering loss of wages resulting from his own disability? If anything, the moral hazard would seem to be lower in the case of a porter's insurance on the possibility of loss resulting from the sinking of a ship. A broadening of the concept of insurable interest would, it seems to me, allow for the creation of more socially beneficial insurance policies than is the case at present with no increase in risk to the insurer. I therefore find both of Lord Eldon's reasons for adopting a restrictive approach to insurable interest unpersuasive.

25 It seemed for a time as if Lord Eldon's view was going to be abandoned and that of Lawrence J. upheld. In *Patterson v. Harris* (1861), 1 B. & S. 336, 121 E.R. 740, and in *Wilson v. Jones* (1867), L.R. 2 Ex. 139, Courts allowed two shareholders of a company established for the purpose of laying down a trans-Atlantic submarine cable to recover on an insurance policy once the cable had been destroyed even although neither had a legally enforceable right in the cable. In *Blaschek v. Bussell* (1916), 33 T.L.R. 51 (K.B.), there was no challenge to the insurable interest of the plaintiff who had insured the health of an actor he had engaged for a performance. That interest was a purely pecuniary, non-legal one concerned with the consequences of the actor's non-performance on account of injury. But the House of Lords in *Macaura* resolved the matter in favour of Lord Eldon.

26 Macaura, owner of the Killymoon estate in Northern Ireland, obtained five fire insurance policies in his own name on timber situated on the estate. The timber was in fact owned by the Irish-Canadian Saw Mills Ltd., the sole shareholder of which was Macaura. Macaura was, as well, the sole creditor of the company apart from a few small debts. The House of Lords nevertheless held that Macaura had no insurable interest either as creditor or shareholder in the timber which was subsequently destroyed by fire. Lord Sumner stated at p. 630:

> He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no 'legal or equitable relation to' the timber at all. He had no 'concern in' the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire.

Lord Buckmaster, supporting the decision in *Macaura*, put his support on two grounds. First, like Lord Eldon in *Lucena v. Craufurd*, supra, he could not understand "how a moral certainty can be so defined as to render it an essential part of a definite legal proposition" (p. 627). As I have already mentioned in the context of Lord Eldon's difficulty in identifying an "immediate thing" between a legal right and a mere expectation, the *Macaura* definition, if anything, is even more uncertain than Lawrence J.'s definition in *Lucena v. Craufurd*. Second, he was of the view that major problems of valuation would arise (p. 627):

> If he [the shareholder] were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset — a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity.

The difficulty of measuring the loss suffered by an individual shareholder should not, in my view, prevent a broadening of the definition of insurable interest. Modern company statutes, such as the *Business Corporations Act*, S.O. 1982, c. 4, s. 184, and ss. 186-189, require Courts in certain circumstances to value shares. The task is obviously not considered impossible. Indeed, the House of Lords knew that it was feasible at the time *Macaura* was decided. In *Wilson v. Jones*, supra, which the House distinguished but did not disapprove in *Macaura*, the Court allowed an insurance based on an interest in the "adventure" of the corporation even although the insured did not own the property involved in that adventure. One might be forgiven for thinking that the interests of individual shareholders in the "adventure" of a corporation are fully as difficult of computation as the interests of individual shareholders in the assets of the corporation.

27 Quite apart from the fact that Lord Buckmaster's rationale for a restrictive concept of insurable interest seems somewhat less than convincing, the *Macaura case is in itself a rather odd case. The case originally went to arbitration on the question of fraud. The arbitrator held that there was no fraud but that the insured had no insurable interest. Professor Robert Keeton, Basic Text on Insurance Law* (1971) has noted that "it is difficult to reject the inference that, though not proved [the charges of fraud], influenced the court to reach a theory of insurable interest that is nothing short of pernicious" (p. 117). See also Brown and Menezes, supra, at p. 69. In my view, this inference, if legitimate, further weakens the authority of *Macaura* as a precedent.

28 Another curious thing about *Macaura* is that it has not been strictly applied in later cases. An attempt has been made to offset the arbitrariness and harshness of the *Macaura* principle by the use of a presumption of sorts. This presumption first appeared in the pre-*Macaura* case of *Stock v. Inglis* (1884), 12 Q.B.D. 564 (C.A.), where Brett M.R. stated at p. 571:

> In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer.

The existence of this presumption since *Macaura* has been noted in a number of cases: see, for example, *Zimmerman v. St. Paul Fire & Marine Ins. Co.* (1968), 67 W.W.R. 26, 1 D.L.R. (3d) 277 at 281, [1968] I.L.R. 1-213 (Sask. C.A.); *Aqua-Land Exploration Ltd. v. Guarantee Co. of North America*, [1964] 2 O.R. 181, 44 D.L.R. (2d) 645 at 652, [1964] I.L.R. 1-127 (Ont. C.A.) per Schroeder J.A.; *Norwich Union Fire Ins. Soc. Ltd. v. Traynor*, [1972] N.Z.L.R. 504 at 505 (C.A.). In view of the questionable reasoning of Lord Eldon in *Lucena v. Craufurd*, and of their Lordships in [Macaura], and in view of the fact that the allegation of fraud may have influenced the result in *Macaura*, the expressed reluctance in these cases to follow it to the letter is hardly surprising. In addition, the *Macaura* principle has not been extended to all types of insurance. Professor Marvin G. Baer notes that the factual expectancy test has been used in Canada to define insurable interest in the life and health insurance fields: see Baer, "Recent Developments in Canadian Law: Insurance Law (1985), 17 Ottawa Law Rev. 631 at 655 and the *Insurance Act*, s. 156 (life insurance) and s. 258 (accident and sickness insurance).

29 Nevertheless, long ago this Court, without referring to *Lucena v. Craufurd*, approved and adopted Lord Eldon's view of the nature of an insurable interest. In *Clark v. Scottish Imperial Ins. Co.* (1879), 4 S.C.R. 192 , Ritchie C.J. held that "any interest which would be recognized by a Court of Law or Equity is an insurable interest" (p. 204). As well, this Court has recently referred to *Macaura* in *Aqua-Land Exploration Ltd.* and in *Wandlyn Motels Ltd.* In neither case did the Court examine the case in any detail. It appears to have been accepted without question. The following comment by Harnett and Thornton, supra, at pp. 1162-63, on the state of the law in some American jurisdictions in 1948 may regrettably be applicable to the state of the Anglo-Canadian law on insurable interest during this century:

> The requirement of insurable interest in property insurance, like most legal abstractions, has developed over the centuries primarily through judicial resolution of relatively isolated problems. Seldom have the courts examined the entire picture in terms of meaningful underlying policies, and the myopic views of older cases, canonized by precedent, often reflect themselves too brightly in later years to the detriment of sound modern analysis.

It is to such an analysis that I now turn in order to assess whether this line of authority should continue to be followed in Ontario. I begin by examining whether the current law is consistent with the policies underlying the requirement of insurable interest generally.

30 Three policies have been cited as underlying the requirement of an insurable interest: see Harnett and Thornton, supra, at pp. 1178-83. They are (1) the policy against wagering under the guise of insurance; (2) the policy favouring limitation of indemnity; and (3) the policy to prevent temptation to destroy the insured property. Does the implementation of these policies require the restrictive approach to insurable interest reflected in *Macaura*?

(1) The Policy Against Wagering

31 The public policy against wagering has a long history in English law. The first statutory expression of this policy occurred in 1745 when the British Parliament enacted the *Marine Insurance Act* (19 Geo. 2), c. 37. This policy was extended to other types of insurance by the *Life Insurance Act* 1774 (U.K., 14 Geo. 3), c. 48. At least since the enactment of these Acts English Courts have consistently expressed concern that such contracts might be used to effect wagers. They have been understandably reluctant to enforce an insurance contract if it appeared to embody a wagering transaction. However, I think it is probably easy to overestimate the risk of insurance contracts being used in today's world to create a wagering transaction. There seem to be many more convenient devices available to the serious wagerer.

32 If wagering should be a major concern in the context of insurance contracts, the current definition of insurable interest is not an ideal mechanism to combat this ill. The insurer alone can raise the defence of lack of insurable interest; no public watchdog can raise it. The insurer is free not to invoke the defence in a particular case or it can invoke it for reasons completely extraneous to and perhaps inconsistent with those underlying the definition: see Keeton, supra, at p. 117.

33 The *Macaura* principle, in my view, is an imperfect tool to further the public policy against wagering. By focusing merely on the type of interest held by an insured, the current definition gives rise to the possibility that an insured with the "correct" type of interest, but no pecuniary interest, will be able to receive a pure enrichment unrelated to any pecuniary loss whatsoever. Such an insured is, in effect, receiving a "gambling windfall". But this same approach excludes insureds with a pecuniary interest, but not the type of interest required by *Macaura*. Such insureds purchase insurance policies to indemnify themselves against a real possibility of pecuniary loss, not to gain the possibility of an enrichment from the occurrence of an event that is of no concern to them. This is illustrated by the finding of no insurable interest in the *Aqua-Land* case. Brown and Menezes, supra, have shown that the public policy against wagering could not have justified that result. They state at p. 71:

> A corporation that has advanced $30,000 to designers of a marine drilling rig are (*sic*) not affronting any social anti-gambling norms by insuring the rig. If there is a 'gamble' involved, it is in backing technological development — a highly regarded activity.

It is only where "the insured has no valuable relationship to the property or where the insurance is in excess of the insured's interest ... [that] the evils of wagering in part reappear": see Harnett and Thorton, supra, at p. 1181. Harnett and Thornton conclude at p. 1181:

> While some form of valuable relationship to the occurrence is necessary to avoid the wagering aspect, the policy against wagering is satisfied by any valuable relationship which equals the pecuniary value of the insurance, regardless of the legal nature of that relationship.

I agree with their conclusion and find, therefore, that the restrictive definition of insurable interest set out in *Macaura* is not required for the implementation of the policy against wagering.

(2) Indemnification for Loss

34 The public policy restricting the insured to full indemnity for his loss is not consistent with the restrictive definition of insurable interest set out in *Macaura*. Indeed, an extension of that definition may better implement the principles of indemnity. At present, insureds such as Mr. Kosmopoulos who have suffered genuine pecuniary loss cannot obtain indemnification because of the restrictive definition. The *Macaura* case itself shows how the indemnity principle is poorly implemented by the current definition of insurable interest. Had Macaura named the corporation as the insured, or had he taken a lien on the timber to secure the debt, he would have been held to have had an adequate interest. But without these formal steps Macaura's interest satisfied the principle of indemnity.

35 Another case which illustrates the inadequacy of the current definition of insurable interest in furthering the indemnity principle is *Zimmerman v. St. Paul Fire & Marine Insurance Co.*, supra. In that case the insured (together with another person) owned all the shares in a company which owned a building. The insurance on the building was in the shareholder's name. Consistent with authority it was held that the shareholder had no insurable interest in the building even although the company

had long since ceased active business and had been struck off the register of companies for non-payment of fees. Had the building been transferred to the two shareholders the insured would have prevailed and, as Wood J.A. noted (at p. 279), this was "but a matter of conforming to certain procedural formalities". The only effect of the *Macaura* definition of insurable interest in such a case is to "trap the unwary person whose interest truly satisfies the principle of indemnity rather than to advance that principle": Keeton, supra, at p. 117.

(3) Destruction of the Subject Matter

36 It has also been said that if the insured has no interest at all in the subject matter of the insurance, he is likely to destroy the subject matter in order to obtain the insurance moneys. Thus, the requirement of an insurable interest is said to be designed to minimize the incentive to destroy the insured property. But it is clear that the restrictive definition of insurable interest does not necessarily have this result. Frequently an insured with a legal or equitable interest in the subject matter of the insurance has intimate access to it and is in a position to destroy it without detection. If Lawrence J.'s definition of insurable interest in *Lucena v. Craufurd* were adopted, this moral hazard would not be increased. Indeed, the moral hazard may well be decreased because the subject matter of the insurance is not usually in the possession or control of those included within Lawrence J.'s definition of insurable interest, i.e., those with a pecuniary interest only. It seems to me, therefore, that the objective of minimizing the insured's incentive to destroy the insured property cannot be seriously advanced in support of the *Macaura* principle.

37 It is no doubt true that if in fact the proceeds of insurance could be paid to a sole shareholder free of the corporation's creditors, the sole shareholder would have a greater incentive to destroy the business assets than if the proceeds were paid into the insolvent corporation subject to the claims of its creditors. But it seems to me that the greater incentive stems from *Salomon v. Salomon & Co.*, supra, which allows a single shareholder corporation to be treated as a different legal entity from the single shareholder. The unhappy consequences of that case for corporate creditors are well-known. Indeed, one commentator has described the *Salomon* decision as "calamitous": see O. Kahn-Freund, "Some Reflections on Company Law Reform" (1944), 7 M.L.R. 54. *Salomon* nevertheless is now part of our law and, while broadening the definition of insurable interest may permit one more unhappy consequence of the *Salomon* principle, it would also remove another. For it is the notion of separate corporate personality which has prevented Mr. Kosmopoulos and others in his position from having the kind of insurable interest required by *Macaura*. In my view, this is quite a price to pay for the supposed disincentive to wilful destruction of the insured property. I would accept the view expressed by Brown and Menezes, supra, at p. 74 to the effect that;

> ... insurance concepts cannot on their own prevent deliberate causing of loss. The primary burden for discouraging anti-social activity lies with the criminal justice system. Insurance principles cannot eliminate arson or murder any more than banking legislation can eliminate armed robbery.

38 The preceding discussion has proceeded on the assumption that corporations would not insure their own assets and that shareholders would receive the proceeds of insurance taken out in their own names free of corporate creditors. But the circumstances in which this would occur if the definition of insurable interest were extended would be rare indeed. There exist a number of remedial devices by which Courts can make the insurance proceeds held by shareholders available to the corporation in appropriate cases. Courts may be willing to imply a trust of the insurance proceeds received by an insured shareholder in favour of the corporation when it appears to implement the shareholder's actual intention that the corporation not suffer loss as a result of the destruction of corporate property. An implied trust may also be available when a shareholder has insured for an amount in excess of full indemnity for his own loss. Normally a shareholder is only entitled to full indemnity but where there is an intention on the part of the shareholder to insure both his own pecuniary interest and the corporation's interest, the shareholder is entitled to receive full indemnity for his own pecuniary loss and the excess is held on trust for the corporation: *Keefer v. Phoenix Ins. Co.* (1901), 31 S.C.R. 144 (S.C.C.). If a number of shareholders similarly insure with such an intention, the corporation may be fully indemnified, in which case none of the shareholders will have suffered a pecuniary loss and all of the insurance proceeds will be held for the corporation. If it is not possible to imply a trust for the corporation, the Court may consider it appropriate to lift the corporate veil and impose a constructive trust in favour of the corporation. I have already noted that while in the case of a single shareholder corporation Courts are unlikely to lift the corporate veil for the benefit of that single shareholder, they may be willing to lift the corporate veil "in the interests of third parties who would otherwise suffer as a result of that choice": Gower, supra, at p. 138. In addition, where a controlling shareholder insures corporate assets in his or her own

name and by using that control does not arrange for insurance to be taken out by the corporation on its assets, that conduct on the shareholder's part may constitute an act "oppressive or unfairly prejudicial" to the interests of creditors and result in liability under s. 247(2) of the Ontario *Business Corporations Act*, 1982. A creditor may, by order of the court, be able to bring such an action: see ss. 244(*b*)(iii) and 247(1). The directors of the corporation themselves may be liable to the corporation through a derivative action under s. 245 for breach of the duty of care under s. 134(1)(*b*) or even under the oppression section (s. 247) itself. In light of these considerations, I simply cannot imagine that a corporation would not insure the assets of the corporation in its own name. Once the corporation has insurance on its assets, its shareholders would not suffer an injury to their pecuniary interests if some corporate property were damaged or destroyed because the corporation would be indemnified by the insurer. In such a situation the shareholders would be unable to recover under their policies and would accordingly have no incentive to destroy the corporate property. There is therefore, in my view, little merit to the submission that a broadening of the definition of insurable interest will increase the temptation of shareholders to destroy the corporate property.

39 In summary, it seems to me that the policies underlying the requirement of an insurable interest do not support the restrictive definition: if anything, they support a broader definition than that set out in *Macaura*.

40 While *Macaura* continues as the law in the United Kingdom (see R. Colinvaux, *The Law of Insurance* (5th ed., 1984), at pp. 40-42) and in Australia and New Zealand (see K.C.T. Sutton, *Insurance Law in Australia and New Zealand* (1980), at pp. 213-21), many jurisdictions in the United States have abandoned the restrictive definition of insurable interest in favour of the "factual expectancy test": see, for example, *Van Cure v. Hartford Fire Ins. Co.*, 253 A. 2d 663 (Penn. S.C., 1969): *Pacific National Fire Ins. Co. v. Watts*, 97 So. 2d 797 (Ala. S.C., 1957); *Royal Ins. Co. v. Sisters of the Presentation*, 430 F. 2d 759 (9th Cir., 1970) (where, even although the insured had a legal interest, recovery was denied because there was no factual expectancy of loss), and see generally, G. Couch, *Cyclopedia of Insurance Law* (2nd ed., 1960, by R. Anderson), vol. 3, at pp. 36-51 and cases cited in *Ninth Decennial Digest*, vol. 21, "Insurance", paras. 114, 115(1) and 115(2), pp. 30-32. The State of New York has now embodied the factual expectancy test in a statute. Paragraph 3401 of the New York Insurance Law, art. 34, defines "insurable interest" as including "any lawful or substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage". Many other states have adopted the "any lawful or substantial economic interest" formulation: see, for example, *California Insurance Code*, para. 281; *Louisiana Insurance Code*, R.S. 22:614, para. 614B; *Utah Insurance Code*, s. 31A-21-104(2)(b), and see also the *Wisconsin Insurance Code*, s. 631.07, which has done away with the requirement of an insurable interest for the validity of an insurance policy. No material has been referred to us by counsel to show that these developments in the United States have led to insoluble problems of calculation, difficulties in ascertaining insurable interest, wagering, over-insurance or wilful destruction of property. Indeed, the commentators both in the United States and Canada seem to be uniformly in favour of the adoption of the factual expectancy test for insurable interest and the rejection of the test set out by the House of Lords in *Macaura*: see, for example, Marvin G. Baer, "Annotation: Kosmopoulos v. Constitution Ins. Co. of Can." (1983), 1 C.C.L.T. 83; Brown and Menezes, supra, at pp. 81-84; A.J. Campbell, "Some Aspects of Insurable Interest" (1949), 27 Can. Bar Rev. 1 at 22-23; Harnett and Thornton, supra; R.A. Hasson, "*Reform of the Law Relating to Insurable Interest in Property* — Some Thoughts on *Chadwick v. Gibraltar General Insurance*" (1983-1984), 8 C.B.L.J. 83; Keeton, supra, at pp. 112-19; R.M. McLeod, "*Aqua-Land Exploration Ltd. v. Guarantee Co. of North America et al.*: Insurable Interest in an Indemnity Policy" (1966), 24 U. of T. Faculty of Law Rev. 154 at 159-60; and Ziegel, supra.

41 In my view, there is little to commend the restrictive definition of insurable interest. As Brett M.R. has noted over a century ago in *Stock v. Inglis*, supra, it is merely "a technical objection ... which has no real merit ... as between the assured and the insurer". The reasons advanced in its favour are not persuasive and the policies alleged to underlie it do not appear to require it. They would be just as well served by the factual expectancy test. I think *Macaura* should no longer be followed. Instead, if an insured can demonstrate, in Lawrence J.'s words, "some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring", that insured should be held to have a sufficient interest. To "have a moral certainty of advantage or benefit, but for those risks or dangers", or "to be so circumstanced with respect to [the subject matter of the insurance] as to have benefit from its existence, prejudice from its destruction" is to have an insurable interest in it. To the extent that this Court's decisions in *Clark v. Scottish Imperial Ins. Co.*, supra; *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, supra, and *Wandlyn*

Motels Ltd. v. Commerce Gen. Ins. Co., supra, are inconsistent with this definition of insurable interest, I respectfully suggest that they should not be followed.

(4) Conclusion

42 Mr. Kosmopoulos, as sole shareholder of the company, was so placed with respect to the assets of the business as to have benefit from their existence and prejudice from their destruction. He had a moral certainty of advantage or benefit from those assets but for the fire. He had, therefore, an insurable interest in them capable of supporting the insurance policy and is entitled to recover under it.

Disposition

43 I would dismiss the appeal with costs to both respondents. In view of the disposition of the main appeal, the cross-appeal of the respondents against the insurance agency is also dismissed. I would award both respondents their costs of the cross-appeal against the appellants.

McIntyre J. **(concurring):**

44 I have read the reasons of my colleague, Madame Justice Wilson, in this appeal. She has set out the facts, referred to many authorities, and considered the law on this question of an insurable interest. I agree with her result. I would dismiss the appeal. In doing so, however, I would not go as far as my colleague has gone in rejecting totally the limited definition of an insurable interest in *Macaura v. Northern Assurance Co*, [1925] A.C. 619, [1925] All E.R. Rep. 51 (H.L.), and adopting the expansive definition of Lawrence J. in *Lucena v. Craufurd* (1806), 2 Bos. & Pul. (N.R.) 269, 127 E.R. 630. I would prefer to adopt the approach of Zuber J.A. in the Court of Appeal [42 O.R. (2d) 428, 1 C.C.L.I. 83, 149 D.L.R. (3d) 77, [1983] I.L.R. 1-1660]. He was of the view that the *Macaura* rule should not be accepted to compel a holding that a sole shareholder and sole director of a company could not have an insurable interest in the assets of the company. Modern company law now permits the creation of companies with one shareholder. The identity then between the company and that sole shareholder and director is such that an insurable interest in the company's assets may be found in the sole shareholder. This approach fits well with *Lucena v. Craufurd* without opening the concept of insurable interest to indefinable limits.

45 As I have said, I would dismiss the appeal with costs.

Appeal and cross-appeal dismissed.

Footnotes

* Chouinard J., did not take part in the judgment.

TAB 9

GARY ABRIC and PAULA ABRIC (plaintiffs)
v. COMMERCIAL UNION ASSURANCE COMPANY
OF CANADA, a body corporate (defendant)
(S/C/594/85)

INDEXED AS: ABRIC v. COMMERCIAL UNION ASSURANCE COMPANY OF CANADA

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Saint John
Jones, J.
July 24, 1986.

Counsel:
David G. Gauthier, for the plaintiffs;
Thomas G. O'Neil, for the defendant.

This case was heard on April 2, 1986, before Jones, J., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Saint John, who delivered the following judgment on July 24, 1986:

.....

[1] Jones, J.: This is an action by the plaintiffs against the defendant insurer wherein the plaintiffs claim that by a contract of insurance the defendant insurer undertook to insure a premises at Apohaqui, New Brunswick,

[1] Le juge Jones [Traduction]: Il s'agit, en l'espèce, d'une action intentée par les demandeurs contre la compagnie d'assurance défenderesse; les demandeurs prétendent que la compagnie d'assurance défenderesse s'est engagée

against certain perils including that of fire. It is alleged by the plaintiffs that on or about August 24, 1984, while the insurance contract was in full force and effect the premises were destroyed by fire and the plaintiffs suffered a loss.

[2] The contract of insurance provided a limit of liability for the principal building in the sum of $40,000.00. This claim is with respect to the principal building which it is alleged was totally destroyed. The undisputed evidence is that in fact it was. It was agreed between the parties that the value of the destroyed building was $40,000.00.

[3] It was further agreed by the defendant that the policy of insurance was in full force and effect at the time in question. The defendant insurer however by its pleadings denied that the plaintiffs had an insurable interest in the property and therefore denied liability.

[4] The insured property was a residence at Apohaqui, N.B. It had formerly been owned by the late Roy M. Lawson of Saint John.

[5] Mr. Abric testified that after his father had passed away when he was ten or twelve years of age that he was looked after by the late Mr. Lawson. Initially Mr. Abric lived in Mr. Lawson's home but subsequently after the death of Mr. Lawson's sister he was provided for outside of the Lawson home. In 1972 the plaintiffs married and from about that period on Mr. Abric worked for Lawson Motors Limited and other companies in Saint John with which Mr. Lawson was associated. Mr. Abric's responsibilities increased as did his income so that by September of 1982 he was earning approximately $40,000.00 per year as a sales supervisor.

[6] Mr. Abric testified that during his

par un contrat d'assurance à assurer des locaux situés à Apohaqui, au Nouveau-Brunswick, contre certains risques dont celui d'incendie. Les demandeurs prétendent que le 24 août 1984 ou vers cette date, pendant que l'assurance était en vigueur, les locaux ont été détruits par le feu et les demandeurs ont subi des pertes.

[2] Le contrat d'assurance prévoyait une garantie maximale de 40 000 $ pour ce qui est du bâtiment principal. La demande de règlement, en l'espèce, porte sur le bâtiment principal qui, prétend-on, a été tout à fait détruit. La preuve incontestée est, en fait, que le bâtiment a été réduit en cendres. Les parties sont d'accord pour affirmer que le bâtiment détruit était d'une valeur de 40 000 $.

[3] La défenderesse a de plus reconnu que l'assurance était en vigueur à la date en question. La compagnie d'assurance défenderesse a toutefois nié, dans ses plaidoiries, que les demandeurs avaient un intérêt assurable dans le bien et a, par conséquent, refusé d'admettre sa responsabilité.

[4] Le bien assuré consistait en une résidence à Apohaqui, au Nouveau-Brunswick. Cette résidence appartenait anciennement au défunt Roy M. Lawson, de Saint John.

[5] M. Abric a témoigné qu'à la mort de son père, lorsqu'il était âgé de 10 ou 12 ans, M. Lawson s'était occupé de lui. Au début, M. Abric vivait chez M. Lawson, mais après la mort de la soeur de M. Lawson, ce dernier pourvoyait aux besoins du garçon à l'extérieur du foyer Lawson. En 1972, les demandeurs se sont mariés et à partir de cette période-là ou à peu près, M. Abric a travaillé pour Lawson Motors Limited et pour d'autres compagnies sises à Saint John auxquelles M. Lawson était associé. Les responsabilités de M. Abric ont crû comme l'a fait son revenu de sorte que dès septembre 1982, il gagnait environ 40 000 $ par année comme directeur de ventes.

[6] M. Abric a témoigné que durant son

childhood he had become familiar with the property in Apohaqui and had visited there in the summers. Subsequent to their marriage the two plaintiffs had visited the home. At this time it was run down and not fit for habitation. Mr. Abric was interested in the property and in fixing it up. He discussed this with Mr. Lawson and with Mr. Lawson's agreement over the years substantial repairs were made to the property.

enfance il avait appris à bien connaître le bien-fonds situé à Apohaqui et qu'il y avait séjourné pendant les étés. Après leur mariage, les deux demandeurs ont visité la maison qui était alors délabrée et inhabitable. Le bien intéressait M. Abric et il voulait le remettre en état. Il en a parlé à M. Lawson et du consentement de M. Lawson d'importants travaux de réparation ont été effectués au bien.

[7] Photographs in evidence confirm that substantial changes were made in this property. There was a kitchen at the rear of the house which was taken down and replaced with a totally new building. A recreation room was built in the basement. A new roof was placed on the home, bedrooms were refinished in the upstairs. Insulation was added and interior finish was put on throughout the house. Mr. Abric estimates that over a period of years between $30,000-.00 and $35,000.00 was expended in upgrading this home. Photographs showing this property both before and after repairs support this assessment.

[7] Des photographies présentées en preuve confirment que d'importants changements ont été apportés à ce bien. Une cuisine qui se trouvait à l'arrière de la maison a été démolie et remplacée par un autre bâtiment tout neuf. Une salle de récréation a été construite au sous-sol. Un nouveau toit a été posé sur le bâtiment, des chambres ont été refaites à l'étage supérieur. De l'isolant a été posé et les finitions ont été effectuées à l'intérieure de la maison. M. Abric estime qu'au cours d'un certain nombre d'années, de 30 000 à 35 000 $ ont été affectés à la remise en état de cette maison. Des photographies qui montrent cette maison avant que les travaux de réparation n'aient été entrepris, et après l'exécution des travaux, appuient cette estimation.

[8] It appears that as the work was done Mr. Abric would report periodically to Mr. Lawson who would reimburse him with respect to portions of the accounts. I was not given any breakdown as to the amount which was paid by Mr. Lawson as opposed to Mr. Abric. Some cheques of Mr. Abric were entered in evidence but they substantiate only a very minor portion of the expenses. I am satisfied that Mr. Lawson paid the substantial amount of the cost of the work done on this house.

[8] Il semble qu'au fur et à mesure qu'avançaient les travaux, M. Abric faisait régulièrement rapport de la situation à M. Lawson, qui lui remboursait une partie des dépenses. On ne m'a pas fait part de la somme payée par M. Lawson par rapport à celle payée par M. Abric. Certains chèques faits par M. Abric ont été présentés en preuve, mais ils ne représentent qu'une très faible partie des dépenses. Je suis convaincu que M. Lawson a supporté la plus grande partie des frais engagés pour la réparation de cette maison.

[9] The evidence was that Mr. and Mrs. Abric and their family lived on the premises initially in the summer months in a trailer. Subsequently for two to three years they lived in the house the year round. It appears that this was in the vicinity of 1981 through 1983.

[9] Tout indique que M. et Mme Abric et leur famille ont d'abord habité ces lieux pendant la saison estivale; ils vivaient dans une roulotte. Par la suite, pendant deux ou trois ans, ils habitaient la maison tout au long de l'année. Il semble que cela a débuté vers 1981 pour se poursuivre jusqu'en 1983.

[10] Mr. Abric testified that it was always understood with Mr. Lawson that the property would be deeded to him. He testified that for the last five years he in fact had paid the taxes on the property as well as the utilities.

[10] M. Abric a témoigné qu'il avait toujours été entendu, entre lui et M. Lawson, que le bien lui serait transféré par acte de transfert. Il a témoigné qu'au cours des cinq dernières années il avait, en fait, payé l'impôt foncier de même que les frais des services publiques.

[11] On October 4, 1982, Mr. Lawson executed a deed to the property to Mr. and Mrs. Abric and this deed was recorded in the Registry Office in November of that year. The evidence indicates that there was no exchange of a deed between the parties at the time and in fact Mr. Lawson apparently instructed his lawyer to prepare the deed and record it. Mr. and Mrs. Abric had carried fire insurance on the premises from as early as 1982 and shown themselves as the insureds.

[11] Le 4 octobre 1982, M. Lawson a signé l'acte transférant le bien à M. et Mme Abric; l'acte de transfert a été enregistré au bureau de l'enregistrement en novembre de cette même année. Selon la preuve, aucun acte de transfert n'a été remis aux demandeurs à cette époque-là et, en fait, M. Lawson aurait donné à son avocat la directive de préparer l'acte de transfert et de le faire enregistrer. M. et Mme Abric ont assuré les locaux contre l'incendie dès 1982 et ils contractaient l'assurance en leur propre nom.

[12] Previous to the execution of the deed from Mr. Lawson to Mr. and Mrs. Abric Mr. Lawson had executed a deed for the aforementioned premises to a numbered company 030514 N.B. Ltd. which deed was dated June 30, 1982, and recorded on July 9, 1982.

[12] Avant la signature de l'acte transférant le bien de M. Lawson à M. et Mme Abric, M. Lawson avait passé un acte transférant les locaux susmentionnés à la société à dénomination sociale numérique 030514 N.B. Ltd.; cet acte daté du 30 juin 1982 a été enregistré le 9 juillet 1982.

[13] Evidence was led at trial that coincident with the execution of this deed in June of 1982 there was a trust agreement entered into between Mr. Lawson and the aforementioned numbered company. Mr. Milton Downey the president of the numbered company testified with respect to this matter and the trust agreement itself was entered in evidence. The trust agreement recited that Mr. Lawson was indebted to Mr. Downey with respect to certain business transactions and had assigned certain properties, a mortgage and shares in other companies to the numbered company in trust. These assets were to be held in trust either until such indebtedness of Mr. Lawson to Mr. Downey was satisfied or alternatively demand had been made on Mr. Lawson for payment of the indebtedness and he had been in default for a period of fifteen days. No evidence was led as to the amount of the indebtedness although I note that

[13] Lors du procès, on a introduit une preuve établissant qu'une convention de fiducie a été signée par M. Lawson et la société à dénomination sociale numérique susmentionnée en juin 1982, en même temps que l'acte de transfert. M. Milton Downey, président de la société à dénomination sociale numérique, a témoigné relativement à cette affaire, et la convention de fiducie a été présentée en preuve. La convention de fiducie indiquait que M. Lawson avait des dettes envers M. Downey relativement à certaines opérations commerciales et qu'il avait cédé en fiducie à la société à dénomination sociale numérique certains biens, une hypothèque et des actions d'autres sociétés. Ces biens devaient être détenus en fiducie soit jusqu'à ce que soient remboursées les dettes que M. Lawson avaient contractées envers M. Downey ou, subsidiairement, que soit faite à M. Lawson une demande de

the mortgage which was included in the assigned documents showed a principal sum of $100,000.00 at the time of its execution in 1968. The only evidence with respect to the amount involved was that of Mr. Downey who said that he was owed a substantial amount of money.

paiement des dettes et que ce dernier ait manqué à son engagement de payer depuis quinze jours. Aucune preuve n'a été présentée quant au montant des dettes, mais je constate que l'hypothèque qui faisait partie des documents cédés indiquait que le principal était de 100 000 $ au moment de sa signature en 1968. La seule indication quant à la somme due a été donnée par M. Downey qui a affirmé qu'on lui devait une importante somme d'argent.

[14] Evidence indicated that on September 25, 1982, one of Mr. Lawson's companies Lawson Motors Limited with whom Mr. Abric was employed was placed in receivership. Mr. Abric appears to have worked subsequent to this for associated companies.

[14] Selon la preuve, au 25 septembre 1982, une des compagnies de M. Lawson, Lawson Motors Limited, qui employait M. Abric, a été mise sous séquestre. Par après, M. Abric semble avoir travaillé pour des compagnies associées.

[15] Mr. Roy M. Lawson passed away in January of 1984. Mr. Downey testified that there still remains outstanding indebtedness although some of the assets referred to in the aforementioned trust agreement have been liquidated and applied against this indebtedness.

[15] M. Roy M. Lawson est décédé en janvier 1984. M. Downey a témoigné qu'il y a encore des dettes impayées, quoique certains des éléments d'actif identifiés dans la convention de fiducie susmentionnée aient été liquidés et utilisés au règlement de ces dettes.

[16] A letter of opinion by James S. Dobbin was submitted as exhibit #4. Mr. Dobbin had done a title search and found that the title was in the numbered company 030514 N.B. Ltd. as of July 1982. It is conceded by the plaintiffs that as a result of the above mentioned conveyance they do not have the legal title. It is argued on behalf of the plaintiffs that they in effect had an equity of redemption in the property. On the above mentioned facts the plaintiffs did not have an equity of redemption.

[16] Une lettre d'opinion de James S. Dobbin a été présentée en preuve (pièce 4). M. Dobbin avait fait une recherche de titres et trouvé qu'à compter de juillet 1982 le titre de propriété appartenait à la société à dénomination sociale numérique 030514 N.B. Ltd. Les demandeurs reconnaissent qu'en raison de l'acte de transfert susmentionnée ils n'ont pas le titre de propriété en **common law**. En faveur des demandeurs, on soutient qu'ils avaient, en fait, un droit de rachat relativement à ce bien. Compte tenu des faits susmentionnées, les demandeurs n'avaient pas de droit de rachat.

[17] It appears that the plaintiffs at best had an estate by estoppel capable of supporting an after-acquired title. See Anger and Honsberger, **Canadian Law of Real Property** (2nd Ed.), volume 2, at pp. 1472-1473:

[17] Il semble que les demandeurs avaient, tout au plus, un droit de tenure acquis par voie de préclusion et capable de supporter un titre de propriété acquis par la suite. Voir Anger and Hongsberger **Canadian Law of Real Property** (2e édition), volume 2, aux p. 1472 et 1473:

"Where a person conveys by deed an interest in land which he does not

"Lorsqu'une personne transfère par acte scellé un droit de propriété sur

own, the deed in itself can convey no interest to the grantee. However, as between the parties to the deed and their privies, the grantor is estopped by his deed from denying that the grantee has acquired the title purported to be granted, so that, as against the grantor and those claiming under him, the grantee is said to have an estate by estoppel."

un bien-fonds qui ne lui appartient pas, l'acte scellé ne peut de lui-même transférer de droit de propriété au cessionnaire. Néanmoins, pour ce qui est des parties à l'acte de transfert et leurs ayants droit, le cédant est préclus par son acte de nier que le cessionnaire a acquis le titre de propriété qui était censé avor été cédé, de sorte qu'on dit que le cessionnaire a un droit de tenure acquis par voie de préclusion, face au cédant et à ces ayants droits."

And at p. 1475:

"Where an estate by estoppel exists, and the grantor subsequently acquires the legal title originally purported to be granted, the estoppel is said to be 'fed', that is, by a legal fiction, the grantee's estate in estoppel becomes an estate in interest by operation of law. This estate is valid against the world and is created without any further grant or other documentation."

Et à la p. 1475:

"Lorsqu'il existe un droit de tenure acquis par voie de préclusion et que le cédant acquiert ultérieurement le titre de propriété en **common law** qui était censé avoir été cédé à l'origine, on dit que la préclusion est 'alimentée', c'est-à-dire que par une fiction juridique le droit de tenure que le cessionnaire a acquis par voie de préclusion devient, par l'effet de la loi, un droit de tenure acquis pour jouissance future. Ce droit de tenure est valable contre tous et est créé sans autre cession ou autre documentation."

[18] In the present case the evidence is that subsequent to the fire the land was conveyed by the numbered company to a third party. The plaintiffs executed a conveyance releasing their interest in the property and title was not returned to the late Roy Lawson or his estate so as to bring the aforementioned principle into operation.

[18] Selon la preuve en l'espèce, après l'incendie, le bien-fonds a été transféré à un tiers par la société à dénomination sociale numérique. Les demandeurs ont passé un acte de transfert renonçant à leur droit sur le bien-fonds et le titre de propriété n'est pas retourné à Roy Lawson ou à sa succession de sorte à faire prendre effet au principe susmentionné.

[19] It is common ground that the plaintiffs did not have legal title to the property at the time of the loss. It is contended on behalf of the plaintiffs that they had an insurable interest in the property. This is denied by the defendant.

[19] Les parties s'entendent sur le fait que les demandeurs ne possédaient pas le titre de propriété en **common law** à l'époque du sinistre. On soutient, au nom des demandeurs, qu'ils avaient un intérêt assurable dans le bien, ce que nie la défenderesse.

[20] Parties who have entered into a contract of insurance and paid premiums therefor are entitled to recover upon loss of that property as a result of a peril insured against if they have an insurable interest therein.

[20] Les parties qui ont passé un contrat d'assurance et versé une prime aux termes de ce contrat, ont le droit de recouvrer la prestation à la perte de leur bien à la suite de la réalisation d'un risque contre lequel elles

[21] One definition of insurable interest is set out in **MacGillivray on Insurance Law** (5th Ed.), at pp. 219-220, where it is said:

"Insurable interest in property is not confined to the absolute legal ownership. Generally, any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it. But there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable. In **Lucena v. Craufurd** (1806), 2 Bos. & Pul. (N.R.) 269 - Lord Eldon said, 'I am unable to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property' and if we add to this 'or some legal liability to make good the loss', we get a substantially accurate definition of insurable interest in property."

[22] The above mentioned statement has been quoted with approval in **Guarantee Company of North America et al. v. Aqua-Land Exploration Limited**, [1966] S.C.R. 133, at p. 140. It has also been quoted with approval in the New Brunswick Court of Appeal in **Cunningham & Cunningham v. Security Mutual Casualty Co.** (1979), 28 N.B.R.(2d) 413; 63 A.P.R. 413 at p. 417.

[23] Courts tend to lean in favour of an insurable interest in such circumstances. I refer to the words of Brett, M.R., in **Stock v. Inglis** (1884), 12 Q.B.D. 564, at p. 571:

"In my opinion it is the duty of a court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable

s'étaient assurées, si elles ont un intérêt assurable dans ce bien.

[21] Une définition de l'intérêt assurable est donnée dans **MacGillivray on Insurance Law** (5e édition), aux p. 219 et 220, où on affirme:

"L'intérêt assurable dans un bien ne se limite pas à la propriété absolue en droit. Généralement, a un intérêt assurable dans ce bien toute personne qui se retrouve dans une situation où elle subira une perte par suite directe du dommage causé au bien ou de sa destruction. Mais il doit y avoir un rapport direct avec le bien même, parce que autrement l'intérêt est trop lointain et, par conséquent, n'est pas assurable. Dans **Lucena v. Craufurd** (1806), 2 Bos & Pul. (N.R.) 269, lord Eldon a affirmé, 'Je suis incapable de désigner ce qu'est un intérêt à moins que ce ne soit un droit sur le bien ou un droit qui provient d'un contrat quelconque visant le bien,' et si nous ajoutons à cela, 'ou quelque responsabilité légale de réparer la perte', nous obtenons une définition assez exacte de l'intérêt assurable dans un bien."

[22] L'observation qui précède a été citée et approuvée dans **Guarantee Company of North American et al. v. Acqua-Land Exploration Limited**, [1966] S.C.R. 133, à la p. 140. Elle a aussi été citée et suivie par la Cour d'appel du Nouveau-Brunswick dans l'affaire **Cunningham & Cunningham v. Security Mutual Casualty Co.** (1979), 28 N.B.R. (2d) 413; 63 A.P.R. 413, à la p. 417.

[23] Les tribunaux ont tendance à favoriser l'intérêt assurable dans de telles circonstances. Je me réfère aux paroles du maître des rôles Brett, dans **Stock v. Inglis** (1884), 12 Q.B.D. 564, à la p. 571:

"Selon moi, un tribunal a le devoir de toujours pencher en faveur d'un intérêt assurable, si possible, parce qu'il me semble qu'après que les souscripteurs aient accepté la prime, l'objection qu'il n'y a pas d'intérêt

interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest."

assurable est le plus souvent une objection technique, qui est sans fondement réel, certainement sans aucun fondement en ce qui touche les rapports entre l'assuré et l'assureur. Bien sûr, nous ne devons ni supposer des faits qui n'existent pas, ni étendre la portée de la loi au-delà de ses limites véritables, mais nous devrions, je pense, réfléchir à cette question en ayant l'idée de conclure en faveur d'un intérêt assurable, si les faits et le droit nous le permettent."

[24] In the present case the plaintiffs had possession of this property for a period of years. They expended considerable time and effort on the property as well as investing monies together with Mr. Lawson. They had in recent years before the fire paid the taxes and in fact carried the insurance coverage. After they had ceased living on the premises they rented it and collected the rents therefrom. This continued into 1984 and after the legal title had passed for security reasons to the numbered company.

[24] Dans cette affaire, les demandeurs avaient la possession de ce bien depuis un certain nombre d'années. Ils y ont mis beaucoup de temps et d'efforts et y ont aussi investi des sommes d'argent, comme l'a fait M. Lawson. Dans les dernières années qui ont précédé l'incendie, ils ont payé l'impôt foncier et, en fait, assuré le bien. Lorsqu'ils ont cessé d'habiter les lieux, ils les ont loués et en ont perçu le loyer. Cela s'est poursuivi jusqu'en 1984 et après que le titre de propriété en **common law** eût passé à la société à dénomination sociale numérique pour fins de garantie.

[25] On the facts in this case I find that while the plaintiffs did not have legal title they had an interest in the property which constituted an insurable interest and they are entitled to recover for the loss which was sustained as a result of an insured peril.

[25] A la lumière des faits en l'espèce, je conclus que même si les demandeurs n'avaient pas le titre de propriété en **common law**, ils avaient un intérêt dans le bien qui constituait un intérêt assurable et ils ont le droit de recouvrer pour une perte résultant d'un risque assuré.

[26] It is further argued on behalf of the defendant insurer that the plaintiffs were in breach of statutory condition 2 of the policy and as such this constituted a defence to their claim. Statutory condition 2 under s. 127 of the **Insurance Act**, R.S.N.B. 1973, c. I-12, states as follows:

[26] De plus, on oppose l'argument, en faveur de la compagnie d'assurance défenderesse, que les demandeurs étaient en violation de la condition légale 2 de la police d'assurance et qu'en tant que tel cela constituait une défense à leur réclamation. La condition légale 2 aux termes de l'article 127 de la **Loi sur les assurances**, L.R.N.-B. 1973, c. I-12, prévoit ce qui suit:

"Property of Others

2. Unless otherwise specifically stated in the contract, the insurer

"Biens d'autrui

2. Sauf stipulation contraire expressément indiquée dans le contrat,

is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract."

l'assureur n'est pas responsable des pertes ou dommages causés à un bien appartenant à une autre personne que l'assuré, à moins que l'intérêt de l'assuré dans ce bien ne soit mentionné au contrat."

[27] This issue has been previously dealt with in the New Brunswick Court of Appeal where it was held in **Cunningham & Cunningham v. Security Mutual Casualty Co.**, supra, that the fact that an insured had an insurable interest in the property was sufficient answer to this requirement.

[27] Cette question a déjà été examinée par la Cour d'appel du Nouveau-Brunswick qui a statué dans **Cunningham & Cunningham v. Security Mutual Casualty Co.**, précité, que le fait qu'un assuré avait un intérêt assurable dans un bien était suffisant pour satisfaire à cette exigence.

[28] In the decision of **Wabco Insulating Ltd. and Chaleur Country Club Ltd. v. St. Paul Fire & Marine Insurance Company** (1983), 48 N.B.R.(2d) 339; 126 A.P.R. 339, Ryan, J.A., stated at p. 344:

[28] Dans l'affaire **Wabco Insulating Ltd. and Chaleur Country Club Ltd. c. St. Paul Fire & Marine Insurance Company** (1983), 48 R.N.-B.(2e) 339; 126 A.P.R. 339, le juge Ryan de la Cour d'appel a affirmé, à la p. 344:

"... It is now settled law that statutory condition 2 is satisfied if the 'owner' has an insurable interest in the property insured."

"... il est maintenant de droit bien établi que la condition légale 2 est remplie, si le 'propriétaire' a un intérêt assurable dans le bien assuré."

[29] In **Commerce & Industry Insurance Co. et al. v. West End Investment Company**, [1977] 2 S.C.R. 1036, Pigeon, J., at p. 1044 stated:

[29] Dans l'arrêt **Commerce & Industry Insurance Co. et autres c. West End Investment Company**, [1977] 2 R.C.S. 1036, le juge Pigeon a dit, à la p. 1044:

"This court recently dealt with the New Brunswick statutory condition corresponding to Quebec statutory condition 10(a). This condition, now numbered 2 in New Brunswick as in Ontario, reads as follows:

"Récemment, notre cour avait à se prononcer sur la condition statutaire établie par la loi du Nouveau-Brunswick et correspondant à la condition statutaire 10(a) du Québec. Cette condition, qui porte maintenant le numéro 2 au Nouveau-Brunswick comme dans l'Ontario, est rédigée comme suit:

'2. Unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the contract.'

'2. Sauf stipulation contraire expressément indiquée dans le contrat, l'assureur n'est pas responsable des pertes ou dommages causés à un bien appartenant à une autre personne que l'assuré, à moins que l'intérêt de l'assuré dans ce bien ne soit mentionné au contrat.'

"This court unanimously agreed that all that is necessary to satisfy this

"La cour a été unanime à accepter que tout ce qui est nécessaire pour

condition is that the insured have an insurable interest (**Wandlyn Motels v. Commerce General Insurance Company**, [1970] S.C.R. 992)."

[30] In the present case the insureds had an insurable interest in the property. This is sufficient answer to the contention that they are in breach of statutory condition 2.

[31] There remains the question as to the amount recoverable by the plaintiffs in this action. The plaintiffs' position is that they have a contract of insurance to a limit of $40,000.00 with respect to this building. There is agreement between the parties that the damage to the building was $40,000.00 and the plaintiffs take the position that they are entitled to recovery of $40,000.00 even though they did not have legal title to this property. It is their position that once an insurable interest is established that one then turns to a calculation of the value of the property destroyed.

[32] The case law appears to support the plaintiffs' position in this matter. In **Caldwell v. Stadacona Fire and Life Insurance Co.** (1886), 11 S.C.R. 212, Strong, J., stated at pp. 242-243:

> "There remains only the question of damages. Whatever doubts may be raised by text writers, it is clear, from the language of judges used in delivering judgments in cases of authority, that provided the assured had an interest at the time of the execution of the policy, and at the date of the loss, he is entitled to recover upon a fire policy the full value of the property destroyed, provided the whole interest in the property was insured, although his interest may have been a limited one merely."

[33] The above statement was quoted with approval in the case **Keefer v. Phoenix Insurance Company of Hartford** (1902), 31 S.C.R. 144. See also **Decelle et al. v. Lloyd's of London et al.** (1973), 33 D.L.R.(3d) 743.

satisfaire à cette condition c'est que l'assuré ait un intérêt assurable. (**Wandlyn Motels c. Cie d'Assurance Générale de Commerce**, [1970] R.C.S. 992)."

[30] En l'espèce, les assurés avait un intérêt assurable dans le bien. Cela constitue une réponse suffisante à l'allégation qu'ils sont en violation de la condition légale 2.

[31] Reste la question de savoir quelle somme est recouvrable par les demandeurs dans cette action. Les demandeurs ont soutenu qu'ils avaient un contrat d'assurance d'une valeur maximale de 40 000 $ en ce qui a trait à ce bâtiment. Les parties conviennent du fait que les dommages subis par le bâtiment s'élèvent à 40 000 $ et les demandeurs soutiennent qu'ils ont le droit de recouvrer les 40 000 $ même s'ils n'avaient pas le titre de propriété en **common law**. Ils soutiennent qu'une fois qu'est établi l'existence d'un intérêt assurable, il convient de calculer la valeur du bien détruit.

[32] La jurisprudence semble appuyer la position des demandeurs dans cette affaire. Dans **Caldwell v. Stadacona Fire and Life Insurance Co.** (1886), 11 S.C.R. 212, le juge Strong a affirmé, aux p. 242 et 243:

> "Il ne reste que la question des dommages. Quels que soient les doutes que peuvent soulever les ouvrages de doctrine, il est évident, à partir des propos des juges dans les jugements faisant autorité, que pourvu que l'assuré ait un intérêt à l'époque de l'exécution du contrat d'assurance, et à la date du sinistre, il a le droit de recouvrer, aux termes d'une police d'assurance-incendie, la pleine valeur du bien détruit, pourvu qu'était assuré en entier l'intérêt dans le bien, même si l'assuré n'avait qu'un intérêt limité."

[33] L'exposé ci-haut a été cité et suivi dans l'affaire **Keefer v. Phoenix Insurance Company of Hartford** (1902), 31 S.C.R. 144. Voir aussi **Decelle et al. v. Lloyd's of London et al.** (1973), 33 D.L.R.(3d) 743.

[34] At first glance it might appear that the result of this reasoning would be that in the case of such a loss there could be a profiting by more than one party having an insurable interest as opposed to restricting the loss to that of indemnification. Section 129 of the **Insurance Act**, R.S.N.B. 1973, c. I-12, provides however that where there is more than one policy of insurance there can be only recovery rateably among the policies to the extent of the loss sustained. There is no such issue advanced in this matter. We are dealing here with one policy of insurance for the amount of the actual loss sustained. The parties having the insurance coverage had an insurable interest in the property.

[34] A première vue, il semblerait peut-être, à partir de ce raisonnement, que, dans le cas d'un tel sinistre, plus d'une partie ayant un intérêt assurable pourrait tirer profit, par opposition au fait de restreindre la perte à l'indemnisation des sinistrés. L'article 129 de la **Loi sur les assurances**, L.R.N.-B. 1973, c. I-12, prévoit cependant que lorsqu'il existe plus d'un contrat en vigueur couvrant le même intérêt, les sommes recouvrées aux termes des contrats respectifs doivent être en proportion de leur garantie. Cette question n'est pas soulevée en l'espèce. Dans cette affaire, nous traitons d'un seul contrat d'assurance pour le montant de la perte réelle subie. Les parties ayant contracté l'assurance avaient un intérêt assurable dans le bien.

[35] In its argument submitted to me following trial the defendant took the position that if there is judgment for the plaintiffs for the full amount of the loss that a direction should be given that the monies be held by them in trust for the numbered company. The numbered company is not a party to this action and the rights between those parties with respect to the insurance proceeds would be a matter for determination if necessary in an action between them.

[35] Dans les arguments qu'elle m'a présentés après le procès, la défenderesse a soutenu que s'il y avait jugement en faveur des demandeurs pour le montant global du sinistre, une directive devait être donnée à l'effet que cet argent soit détenu en fiducie par eux pour le bénéfice de la société à dénomination sociale numérique. Cette dernière n'est pas partie à l'action et la question des droits de chacune de ces parties relativement au produit de l'assurance devrait être tranchée, au besoin, dans une action entre elles.

[36] The plaintiffs will therefore have judgment against the defendant in the sum of $40,000.00 with interest thereon at the rate of 10% per annum from the 28th day of April 1985, which is the date of the institution of the action. In a case of this nature interest would normally be allowed from sixty days following the filing of the proof of loss. There is no evidence as to the date of the filing of the proof of loss although the defendant does not take issue with respect to proof of this requirement.

[36] Par conséquent, le jugement sera rendu en faveur des demandeurs, contre la défenderesse; le montant du jugement est fixé à 40 000 $ avec des intérêts au taux de 10 pour cent par année à compter du 28 avril 1985, date à laquelle l'action a été intentée. Dans une affaire de cette nature, les intérêts seraient accordés, d'ordinaire, à compter de soixante jours de la présentation de la preuve de sinistre. Il n'y a aucune indication quant à la date de la présentation de la preuve de sinistre, mais la défenderesse ne soulève aucune objection à cet égard.

[37] The plaintiffs will also recover costs against the defendant. For the purpose of assessing costs I set the

[37] Les demandeurs recouvreront aussi leurs dépens de la défenderesse. Aux fins du calcul des dépens, je fixe le

amount involved at $40,000.00 and under Scale 3 the plaintiffs will have costs in the sum of $4,125.00 for solicitor's services in addition to allowable disbursements.

Order accordingly.

montant-clé à 40 000 $ et, selon l'échelle 3, les demandeurs recevront, au titre des dépens, un montant de 4 125 $ pour les honoraires d'avocat, en plus des débours remboursables.

Ordre en conséquence.

TAB 10

2002 CarswellOnt 1980
Ontario Court of Appeal

Assaad v. Economical Insurance Group

2002 CarswellOnt 1980, [2002] I.L.R. I-4116, [2002] O.J. No. 2356, [2002] O.T.C. 532, 114 A.C.W.S. (3d) 1097, 160 O.A.C. 396, 214 D.L.R. (4th) 655, 43 C.C.L.I. (3d) 40, 59 O.R. (3d) 641 (Eng.), 59 O.R. (3d) 641, 59 O.R. (3d) 648 (fr.), 59 O.R. (3d) 648

RAFIK ASSAAD (Plaintiff / Respondent) and THE ECONOMICAL MUTUAL INSURANCE GROUP and MERIT INSURANCE BROKERS INC. (Defendants / Appellant)

Carthy, Cronk, Gillese JJ.A.

Heard: March 25, 2002
Judgment: June 19, 2002
Docket: CA C35985

Proceedings: reversing (2000), 24 C.C.L.I. (3d) 128 (Ont. Div. Ct.); varying (1999), 12 C.C.L.I. (3d) 1 (Ont. S.C.J.)

Counsel: *David A. Zuber*, for Appellant, Economical Mutual Insurance Group
Elliot S. Birnboim, *Judy Piafsky*, for Respondent

***Carthy J.A.*:**

1 The plaintiff's vehicle was stolen from him and he claimed recovery from the defendant on his insurance policy. The defendant denied coverage on the basis that the plaintiff had no insurable interest in the property because it was a stolen vehicle at the time of his purchase. At trial, Campbell J. applied what has become known as the factual expectancy test from the judgment of Wilson J. in *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2 (S.C.C.) and granted judgment to the plaintiff. The defendant appealed to the Divisional Court against the finding on liability and the plaintiff cross-appealed seeking an increase in the assessment of damages. The Divisional Court dismissed the liability appeal and allowed the damages appeal. By leave granted by this court the appellant, The Economical Mutual Insurance Group, appeals both findings.

2 For the reasons that follow I would allow the appeal. It will be unnecessary for me to deal with damages because in my view the respondent did not have an insurable interest in the vehicle.

Facts

3 The respondent, Rafik Assaad is a financial consultant and is certified as an insurance agent and a securities broker. At the time of trial he was 49 years old. One of Assaad's clients, Mohammed Malik, was heavily in debt and had decided to leave the country. The respondent's evidence was that Malik owed him $10,000 on an undocumented loan and told him he could not repay him but could get him a new car worth $30,000 for $16,000 cash plus forgiveness of the loan.

4 In August 1996, Malik showed the respondent a 1996 Chrysler minivan. The respondent liked it and agreed to buy it. Malik took the respondent's driver's license and returned with the vehicle and a new registration. The respondent and Malik did not discuss the history of the vehicle which, according to the Ministry of Transportation ownership document, had about 33,000 kilometres on it. There is no bill of sale or any other documentation. No search was conducted, no vehicle information package was obtained, no inquiries whatsoever were made. According to the respondent: "This time I was so excited about the look of the car I did not ask for a bill of sale for two reasons. Number one, I did not think that anything would go wrong with it. Second, just out of excitement, I didn't ask him." The respondent took the keys and ownership from Malik and gave him $16,200 in cash. Soon thereafter, Malik left Canada and his whereabouts are unknown to the respondent.

5 The respondent insured the vehicle with the appellant and two months later it was stolen. The police investigation revealed that the vehicle had previously been stolen in Quebec and the vehicle identification number had been changed. Before the respondent registered the vehicle it was registered in the name of Bloor Street Auto Sales Ltd.

6 The trial judge's essential findings were:

> [14] Cross-examination established that Mr. Assaad not only did not know, but did not care about the origin of the vehicle he purchased from Malik nor about the mileage on the vehicle or its registration. As he stated, he entered the transaction simply in order to be able to be repaid the debt that was owed to him. Cross-examination also revealed some inconsistencies in statements made by Mr. Assaad in the proof of loss sent to the insurer and in an affidavit on this action on a motion for Summary Judgment. One must view with suspicion the evidence of a seemingly intelligent person such as Mr. Assaad who from his position as a financial consultant, tax preparer and life insurance salesman surely knows the importance of documentation of transactions. Nevertheless I am for the purposes of the relief sought in this action, prepared to accept his evidence. In doing so I recognize that the major elements of the Claim are entirely based on his testimony with no corroborating evidence.
>
> [15] I do find however that he must have at least suspected if not been blind to the background of the vehicle that he purchased and the identity of the vendor, but I am not prepared to conclude that he wilfully participated in a knowingly fraudulent transaction. Mr. Assaad's conduct may be important in considering what damages he may be entitled to, but it does not in and of itself, preclude his ability to pursue a claim against the insurer.

7 These findings are problematic and bear further analysis. For the moment I note only that there is no specific finding that the respondent was a purchaser for value without notice. The reference to suspicion and blindness suggests the contrary.

8 Both the trial judge and the Divisional Court based their conclusions on an application of the factual expectancy test established by the Supreme Court of Canada in *Kosmopoulos*. They found that the respondent had dominion and control over the vehicle and an expectation of continued benefit from its use at the time it was stolen, even if for only a limited time until his lack of any property interest was exposed.

9 *Kosmopoulos* was the case of a sole shareholder and creditor of a company claiming for a fire loss of company property on a policy in the shareholder's name. In those circumstances, it had been held by the House of Lords in *Macaura v. Northern Assurance Co.*, [1925] A.C. 619 (U.K. H.L.) that the proprietor had no insurable interest in the corporate assets and could not recover on the personal policy.

10 In a detailed analysis of the jurisprudential history of the issue of insurable interest, Wilson J. identified three underlying policy concerns: (1) the policy against wagering in the guise of insurance; (2) the policy favouring limitation of indemnity to the loss actually suffered; and (3) the policy of resisting encouragement to the temptation to destroy the insured property. She found that none of these policy concerns was served by the restrictive approach in *Macaura*. Further, she found that many jurisdictions in the United States have adopted the factual expectancy of loss approach.

11 Wilson J. concluded at para. 42:

> In my view, there is little to commend the restrictive definition of insurable interest. As Brett M.R. has noted over a century ago in *Stock v. Inglis, supra*, it is merely "a technical objection . . . which has no real merit . . . as between the assured and the insurer". The reasons advanced in its favour are not persuasive and the policies alleged to underlie it do not appear to require it. They would be just as well served by the factual expectancy test. I think *Macaura* should no longer be followed. Instead, if an insured can demonstrate, in Lawrence J.'s words, "some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring", that insured should be held to have a sufficient interest. To "have a moral certainty of advantage or benefit, but for those risks or dangers", or "to be so circumstanced with respect to [the subject-matter of the insurance] as to have benefit from its existence, prejudice from its destruction" is to have an insurable interest in it.

12 This then becomes the modern statement of our common law as to the extent of proprietary interest required to establish an insurable interest. It is expressed in extremely broad terms and, although emanating from a case involving the interest of a sole shareholder in the assets of the corporation, could be applied with semantic sense to a case such as this of stolen goods. Yet the context and policy considerations are so different that I cannot take it as the intent of the Supreme Court that its pronouncement be given such universal application.

13 The person who stole this vehicle had for a time a relation to it which would be prejudiced by the happening of events for which insurance might be purchased. He would have had a certainty of benefit from the vehicle's continued existence and a loss from its destruction; precisely the position of the respondent, if without the same degree of awareness, as a successor to the thief. The common law would certainly deny the thief recovery on the policy ground against benefitting from your own wrongdoing, if for no other reason. Further, the policy issue relating to the temptation to destroy goods and convert them to cash where there is no true ownership, put aside by Wilson J. as of no concern to the issues in *Kosmopoulos*, comes to the forefront with stolen goods. Who would not prefer insurance proceeds to a vehicle that the police are looking for?

14 Wilson J. in *Kosmopoulos* points out that many American jurisdictions have adopted the factual expectation test, usually by statutory definition. However, she had no reason on the facts before her to note that the test in the United States is not applicable to cases involving stolen goods. An example of a stolen goods case is *Nelson v. New Hampshire Fire Insurance Co.*, 263 F.2d 586 (U.S. 9th Cir. Idaho 1959), a decision of the United States Court of Appeals Ninth Circuit. The insured had purchased a trailer from strangers at considerably less than its value and without documentation. Insurable interest was defined by statute as "every interest . . . of such a nature that a contemplated peril might directly damnify the insured".

15 At paras. 19-20 the court's opinion reads:

> Appellant has not pointed out nor have we been able to locate a case wherein a thief, or one who *knowingly purchases* from a thief, has been held to have an insurable interest. It has been suggested that a *thief* is denied such an interest solely on the ground of *public policy*. 32 Yale L.J. 497. If this is the case, those policy reasons would have no validity against one who *innocently purchases* from the thief, but as against a *knowing* purchaser, they would be as equally valid as against the thief himself.
>
> The trial court found that appellant knew, or with the exercise of reasonable care would have known, of her vendor's lack of interest in and authority to sell the subject trailer house. We agree with the finding and conclusion of the trial court that appellant had no insurable interest in the said trailer house.

16 I endorse that approach to the application of the factual expectation test to stolen property and now turn to analyze the position of the respondent on the findings of the trial judge.

17 While full deference must be given to the findings of the trial judge, the facts are not in dispute and I find his reasoning, quoted above, internally contradictory. The trial judge found that the respondent did not know or did not care about the origins of the vehicle, that his evidence was uncorroborated and should be viewed with suspicion, and that he must have suspected if not been blind to the origins of the vehicle and the identity of the vendor. And then the curious finding, "I am for the purposes of the relief sought in this action, prepared to accept his evidence." Would the trial judge not have accepted the respondent's evidence had some other relief been sought? Or, as his subsequent remarks indicate, was a different standard of conduct considered in assessing damages? That would be an unsupportable equivocation. If insured, the respondent was entitled to payment in accordance with the contract.

18 The contradiction is between the finding of suspicion and blindness and the evidence of the respondent which the trial judge says that he accepts. The respondent did not testify to being suspicious, quite the contrary. The finding of suspicion and blindness undermines all his evidence. And the evidence was overwhelming that the respondent was wilfully blind. Malik, the vendor, was leaving the country because of significant debts. Yet he had an apparently new vehicle worth $30,000 that he was prepared to sell for $16,000 cash plus an irrecoverable $10,000 debt. A financial adviser, or anyone, might wonder why

Malik would not sell this vehicle for value in the marketplace, not to mention be concerned by the lack of documentation and mileage on the vehicle.

19 Suspicions combined with blindness adds up to an absence of good faith. In *Bank Leu AG v. Gaming Lottery Corp.*, [2001] O.J. No. 4715 (Ont. S.C.J. [Commercial List]), Lederman J. relied on the House of Lords in arriving at this conclusion. At para. 75 *et seq*. he states:

> The term "good faith purchaser" has been recognized in the common law for centuries. While mere negligence, commercial stupidity or unreasonableness will not be sufficient to negative good faith on the part of a plaintiff, wilful blindness amounting to dishonesty and refusal to ask obvious questions will suffice. In *Jones v. Gordon* (1877), 2 App. Cas. 616 (H.L.), Lord Blackburn stated at pages 628-9:
>
> > But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was (if I may use the phrase) honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he *must have had a suspicion* that there was something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty. I think, my Lords, that that is established, not only by good sense and reason, but by the authority of the cases themselves.
>
> In *London Joint Stock Bank v. Simmons*, [1892] A.C. 201 (H.L.) at page 221, Lord Herschell stated:
>
> > One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. *If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry*. [Emphasis added.]
>
> GLC acknowledges that mere negligence in the conduct of the transaction concerned on the part of the purchaser of the instrument will not deprive such purchaser of good faith status. But if there is anything which excites the suspicion that there is something wrong (and it is not necessary to have notice of what the particular wrong may be) in the transaction, the taker of the instrument is not acting in good faith if the taker shuts his or her eyes to the facts presented and puts the suspicions aside without further enquiry.

20 The evidence in this case fills every crack and cranny of this description of what constitutes wilful blindness and the trial judge should have gone beyond a finding of suspicion and the non-committal "if not blindness" to a specific finding of wilful blindness. I come to that conclusion as the only one available on the evidence and, having done so, further conclude that policy concerns dictate that the respondent had no higher insurable interest than the thief and cannot rely upon factual expectation as a basis for recovery.

21 This conclusion, I believe, is consonant with the principles behind *Kosmopoulos* if not with its literal language. Any other finding would encourage persons such as used car dealers or pawnbrokers to ignore suspicions or to be wilfully blind in anticipation of converting the goods to cash through insurance policies.

22 I note in passing that in *Kosmopoulos*, McIntyre J. concurred in the result but would have limited the exception to sole shareholders with the prescient observation at para. 45, that this would avoid "opening the concept of insurable interest to indefinable limits".

23 For these reasons I would allow the appeal, set aside the judgment of the Divisional Court and that of the trial judge, and dismiss the claim with costs throughout. There is no evidence that the insurer ever offered to return the premiums and this is a novel point of insurance law. In light of those two factors I would limit the appellant's costs to $7,500 for the entire proceedings, including disbursements and G.S.T. The insurer may retain the premiums.

***Cronk J.A.*:**

I agree.

***Gillese J.A.*:**

I agree.

Appeal allowed.

TAB 11

2015 ONCA 746
Ontario Court of Appeal

Rochon v. Rochon

2015 CarswellOnt 16821, 2015 ONCA 746, [2015] I.L.R. I-5820, 259
A.C.W.S. (3d) 147, 341 O.A.C. 211, 392 D.L.R. (4th) 304, 53 C.C.L.I. (5th) 1

Paulette Rochon and Marcel Rochon, Plaintiffs (Appellants) and Francois Rochon, Defendant (Respondent)

Janet Simmons, Gloria Epstein, G. Pardu JJ.A.

Heard: May 26, 2015
Judgment: November 6, 2015 *
Docket: CA C58777

Proceedings: affirming *Rochon v. Rochon* (2014), [2014] I.L.R. I-5598, 34 C.C.L.I. (5th) 152, 119 O.R. (3d) 747, 2014 CarswellOnt 4946, 2014 ONSC 2337, Helen MacLeod-Beliveau J. (Ont. S.C.J.)

Counsel: Steven Baldwin, Daniel Baldwin, for Appellants
Alan L. Rachlin, for Respondent

***Gloria Epstein J.A.*:**

Overview

1 On March 28, 2010, a fire broke out in the garage of the home of Paulette and Marcel Rochon when their son, Francois Rochon, who was living at home with them, was working on his car in the garage.

2 At the time of the fire, the house, including the garage, was insured under a residential home owner's insurance policy (the "Policy") issued by Grenville Mutual Insurance Company. Paulette and Marcel Rochon were the named insured under the Policy and Francois Rochon was an unnamed insured. Francois Rochon's car was insured under an Ontario automobile policy of insurance issued by Economical Insurance.

3 Grenville paid Paulette and Marcel Rochon $148,581.65 for property damage caused by the fire. In this subrogated action, Grenville claims it is entitled to recover this amount from Economical. In addition, Paulette and Marcel Rochon sought judgment for their uninsured loss of $8,000.

4 While this appeal focuses on the interpretation of the Policy, from a practical perspective it effectively involves a contest between Grenville and Economical over which insurer bears the ultimate responsibility for the fire loss. Therefore, for ease of reference, I will refer to Grenville as the appellant and Economical as the respondent.

5 The trial judge concluded that Francois Rochon was negligent. And, in accordance with the parties' agreement, the trial judge analyzed the issues on the basis that the negligence took place in the course of Francois Rochon's use and operation of his motor vehicle. However, she dismissed the action on the basis that Grenville was not entitled to subrogate against its own insured; namely, Francois Rochon. The trial judge granted judgment in the amount of $8,000 against Francois Rochon to reimburse Paulette and Marcel Rochon for their uninsured loss.

6 Grenville advances three main arguments in support of its position that the trial judge erred in dismissing its subrogation claim:

1. The trial judge erred in concluding that Francois Rochon was an insured under the Policy for the purposes of the claim;

2. The trial judge erred in finding that Francois Rochon had an insurable interest in the loss; and

3. The trial judge erred in failing to give effect to the policy argument for allowing subrogation in the circumstances of this case.

7 In my view, dismissal of Grenville's subrogation claim is consistent with the language of the Policy, the jurisprudence, and the policy against allowing an insurer to subrogate against its own insured. I would therefore dismiss the appeal.

The Facts

The Circumstances Surrounding the Fire

8 Francois Rochon, then a 21-year-old technician-mechanic, used the garage attached to the home where he lived with his parents to do personal general maintenance work, including car maintenance.

9 On the evening of March 28, 2010, Francois Rochon was in the garage, installing auxiliary lights under the headlights of his car. He needed direct power to the headlights to check his wire and electrical connections. He used the car battery as the power source, connecting it to a battery charger. After working on the car for about five minutes, he checked the connections on the battery charger. Everything appeared fine.

10 After about an hour of work, Francois Rochon checked the battery connections again and then went into the house to get his cell phone charger. He spent approximately 30 to 45 minutes in the house, before returning to the garage. When he opened the door, he saw flames coming mainly from the trunk of his car where the battery was located. The fire quickly spread to the structure of the garage causing extensive damage.

The Policy and Francois Rochon's Insurance with Economical

11 The Policy consists of two parts — the Declaration Page and the Policy itself. The Policy has five sections:

1. Section 1 — Property Coverages;

2. Section 2 — Liability Coverage;

3. Section 3 — Limited Coverages;

4. Section 4 — Miscellaneous Coverages; and

5. Conditions; Statutory and Additional.

12 The Policy provides coverage for the garage as well as the house, in two main areas — multi-peril loss and third party liability. Named and unnamed insured are covered for loss of buildings and contents by fire. Fire loss is not dealt with separately: it is included in the general list of insured perils covered under Section 1 — Property Coverages.

13 The definition of who is insured under the Policy is found on page 1-1 in the terms "you" and "your". The Policy provides that the definitions of "you" and "your" apply to Sections 1, 2, 3 and 4. This definition reads as follows:

> **"You"** or **"your"** means the person(s) named as Insured on the Declaration Page and, while living in the same household, his or her spouse, the relatives of either or any person under the age of 21 in their care. "Spouse" includes either of two persons who are not married to each other and have lived together continuously for a period of not less than three years or, in a relationship of some permanence where there is a child born of whom they are the natural or adoptive parents, and have cohabited within the preceding year. Only the person named on the Declaration Page may take legal action against us.

[Emphasis added.]

14 The Policy also provides liability coverage for negligence claims brought against the insured by third parties but specifically excludes coverage for claims resulting from "the ownership, use or operation of any motorized vehicle, trailer or watercraft except those for which coverage is provided by this policy". It was agreed that the work Francois Rochon performed on his car constituted the "use and operation of a motor vehicle".

15 As previously mentioned, Francois Rochon had third party liability coverage for loss caused by his negligence in the use and operation of a motor vehicle under his insurance policy with Economical.

The Judgment Below

The Negligence Issue

16 The trial judge was satisfied that Francois Rochon's negligence had caused the fire. She accepted the expert evidence of a professional engineer who concluded that the fire was started by electrical arching due to a poor connection between the battery charger and the positive battery post, and found that Francois Rochon was the only person who could have made the loose connection. In doing so, his conduct fell below the standard of care required in the use of this type of equipment. He also failed to check the battery connections sufficiently.

The Subrogation Issue

17 The trial judge held that despite Francois Rochon's negligence, Grenville was not entitled to subrogate its claim against Economical because an insurer cannot subrogate against its own insured. At para. 48, the trial judge reasoned that Francois Rochon was an insured as follows:

> In the [Policy], there is no definition of who is an "Insured". Rather the [P]olicy defines "You" and "Your". Importantly, this definition applies to all four sections of the [P]olicy. As [Francois Rochon] is an unnamed insured on the [P]olicy, by the definition of "You" and "Your" in the [P]olicy, [Francois Rochon]'s rights are the equivalent of [Paulette and Marcel Rochon]'s throughout the [P]olicy.

18 The trial judge distinguished this court's decision in *Morawietz v. Morawietz* (1986), 18 C.C.L.I. 108 (Ont. C.A.). In *Morawietz*, the insurer brought a successful subrogation claim by the parents, as named insured, against their son, whose negligence caused the loss. Significantly, this court held that the son was not an insured under the separate fire section of the policy under which the loss was paid out and had no insurable interest in the loss.

19 The trial judge held that those two critical findings rendered the reasoning in *Morawietz* inapplicable to this case.

20 In addition to concluding that Francois Rochon was an insured under Section 1, which paid out the fire loss, the trial judge held that Francois Rochon had an insurable interest in the loss, following the Supreme Court's decision in *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445 (S.C.C.), which established that an insurable interest can exist absent legal ownership. She also found that some of his possessions were in the garage and were damaged in the fire. I will return to *Scott* later in these reasons.

21 Having found the language that established Francois Rochon as an insured under Section 1 of the Policy clear and unambiguous, the trial judge held that the fact that Francois Rochon owned contents that were insurable (presumably referring to his automobile policy with Economical) was irrelevant. In reaching this conclusion, she relied on *Scott* where, at para. 51, the Supreme Court held that absent ambiguity, no further inquiry is required or appropriate; the wording of the insurance contract prevails.

22 The trial judge identified Conditions 5, 6, and 11 of the Policy as reinforcing her conclusion that Grenville's subrogated claim could not succeed, on the basis that Francois Rochon was an insured and an insurer cannot sue its own insured. These

conditions, which required Francois Rochon to assist Grenville in investigating the incident and to take reasonable steps to recover lost property, were contrary to Francois Rochon's interest if Grenville, his own insurer, could sue him under the Policy. At para. 61, the trial judge put it as follows: "The only way these contractual requirements make sense is that [they] relate to the conditions required of the insurer's own insured on the [P]olicy to recover losses from *third persons, not their own insured*" (emphasis added).

23 On the basis of this analysis, the trial judge dismissed Grenville's subrogated claim for $148,581.65.

24 The trial judge granted judgment in favour of Paulette and Marcel Rochon for $8,000 — the amount of their loss that was not covered by insurance — based on the trial judge's conclusion that Francois Rochon's negligence caused the fire.

Analysis

The Standard of Review

25 In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at paras. 50-55, the Supreme Court of Canada held that absent an extricable error of law, the standard of review on matters of contractual interpretation is reasonableness. Although a correctness standard is appropriate when an extricable error of law is identified, such circumstances will be rare: *Sattva*, at para. 55.

26 The Alberta Court of Appeal has held that this general approach does not apply to certain standard form contracts. In *Vallieres v. Vozniak*, 2014 ABCA 290, 377 D.L.R. (4th) 80 (Alta. C.A.) and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121, 386 D.L.R. (4th) 482 (Alta. C.A.), leave to appeal granted, 36452 (September 24, 2015) [2015 CarswellAlta 1769 (S.C.C.)], the Alberta Court of Appeal applied a correctness standard to the interpretation of a standard form real estate contract and a standard form insurance policy respectively: see also *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281 (B.C. C.A.).

27 I do not find it necessary to express a view on this issue as I see no reason to interfere with the trial judge's interpretation of the Policy whether it is reviewed on a correctness or deferential standard.

1. Did the trial judge err in concluding that Francois Rochon was an insured under the Policy for the purposes of the claim?

28 Grenville takes the position that Francois Rochon was not an insured under Section 1 of the Policy, the section that responded to the claim.

29 I do not agree. For the following reasons, I am of the view that the language of the Policy is clear and that the trial judge properly gave effect to it.

(a) Francois Rochon is an Unnamed Insured under Section 1

30 As noted above, the parties agreed that Francois Rochon is an unnamed insured under the Policy, which does not define "insured". Instead, the definition of "you" and "your" on page 1-1 expressly applies to Sections 1, 2, 3 and 4.

31 In Section 2, the terms are again defined: "*'You' or 'your'* in this Section have the same meaning as in the Definitions applicable to Sections 1, 2, 3 and 4 on page 1. *In addition, the following persons are insured*..." (emphasis added). On its face, this definition means that all persons listed in the definition of "you" and "your" in Section 2 of the Policy are "insured", "[i]n addition" to the parties listed on page 1, who are also "insured". In this way, the definition in Section 2 supports the trial judge's interpretation.

32 I agree with the trial judge's finding that the Policy unambiguously defined Francois Rochon as an insured under Section 1. He fell under the definition of "you" and "your", which applies to all sections of the Policy.

33 My conclusion on this issue renders *Morawietz* inapplicable insofar as Grenville relies on it to support its argument that it is entitled to subrogate against an unnamed insured under the same policy. As previously mentioned, this court's conclusion in that case depended on the finding that the son was not an insured under the section of the insurance policy that responded to the claim.

(b) Inconsistent Use of "You" and "Your"

34 The relevant portion of Section 1 reads as follows:

> [W]e insure your dwelling, detached private structures, and your personal property against direct loss or damage caused by the following perils as described and limited:
>
> 1. FIRE or LIGHTING.
>
> [Emphasis added.]

35 Grenville submits that the inconsistent use of the words "you" and "your" throughout the Policy suggests that it cannot be safely assumed that the words "you" and "your" have their defined, extended meaning, wherever they appear in the Policy.

36 According to Grenville, in Section 1 "your" means the person making the claim. Francois Rochon was not an insured under Section 1 because he made no claim. He suffered no loss.

37 I would not give effect to this argument.

38 I start by referring to the decision of the British Columbia Court of Appeal in *Riordan v. Lombard Insurance Co.*, 2003 BCCA 267, 13 B.C.L.R. (4th) 335 (B.C. C.A.). In that case, the Court concluded that since the son of the named insured fell within the definition of "you" and "your", he was an insured whose intentional and criminal acts were unambiguously covered by the exclusion clause.

39 I note that the Court reached that conclusion notwithstanding "you" and "your" were sometimes used inconsistently in the policy; the meaning of insured within the exclusion clause was clear.

40 I have similarly concluded that, here, the definition of "you" and "your" and its applicability to Section 1 is unambiguous. It is also clear that in Section 1, "your" is not confined to persons making the claim, but refers to unnamed resident insured.

41 However, even if I were to hold otherwise, I would not give effect to Grenville's position on this issue. I say this based on the well-established law concerning the interpretation of insurance contracts.

42 In *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.), the Supreme Court performed a comprehensive review of the general principles of interpreting insurance contracts. At para. 70, Iacobucci J. considered the existence of ambiguities in insurance contracts, which are "essentially adhesionary":

> [T]he standard practice is to construe ambiguities against the insurer. A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly". Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly. [Citations omitted.]

43 Following *Scalera*, the definition of "you" and "your" must be interpreted broadly and any ambiguity must be construed against Grenville.

44 If Grenville wished, in these circumstances, to preclude coverage of Francois Rochon — someone who expressly fell within the definition of "you" and "your" in its own Policy — it was incumbent on Grenville to clearly so provide in the wording of its contract of insurance.

(c) Privity Argument

45 Grenville further submits that because the definition of "you" and "your" provides that only named insured can take legal action against it, Francois Rochon lacks privity of contract with Grenville and therefore has no independent rights under the Policy. However, Grenville cites no authority for this proposition.

46 In fact, there is authority to the contrary. I rely again on the decision in *Riordan*. In response to the same privity argument advanced in this case, the Court said, at para. 16, that "not being able to take legal action against the insurer does not...make [the son] any less an insured as a person in his situation as defined in 'you' and 'your' in the policy."

47 I agree with this reasoning and thus reject Grenville's privity argument.

(d) Conclusion Regarding Issue 1

48 I see no reason to interfere with the trial judge's finding that Francois Rochon was an unnamed insured under Section 1 of the Policy — the section that responded to the claim in issue.

2. Did the trial judge err in finding that Francois Rochon had an insurable interest in the loss?

49 Grenville submits that the trial judge erred in stretching the rationale of the Supreme Court in *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.), and in applying *Scott*, to find that Francois Rochon had an insurable interest in the garage.

50 According to Grenville, his interest was separate from his parents and limited to the value of his personal property, because he did not rely on the garage as a source of accommodation and support. He cannot derive an insurable interest simply through his use and enjoyment of the garage.

(a) The Insurable Interest Requirement

51 Essential to the disposition of this appeal is the determination of whether Francois Rochon had an insurable interest in the property, a requirement for recovery under an insurance policy: *Zurich Insurance Co. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 1870, 106 O.R. (3d) 201 (Ont. S.C.J.), at para. 28, aff'd 2011 ONCA 663, 342 D.L.R. (4th) 501 (Ont. C.A.).

52 Absent an insurable interest in the subject-matter of the insurance, an insurance contract is not legally enforceable: Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2d ed. (Markham: LexisNexis Canada Inc., 2014), at p. 35.

53 There are three reasons for mandating an insurable interest in property: (1) the policy against wagering; (2) the principle of indemnity (i.e. that the insured should not profit upon a loss occurring); and (3) the policy of preventing the insured from being tempted to intentionally destroy the insured property: *Kosmopoulos*, at p. 22; see also Billingsley, at p. 36.

The Supreme Court's Decision in Kosmopoulos

54 In *Kosmopoulos*, the Supreme Court defined the concept of insurable interest in terms of the "factual expectancy test". At p. 30, Wilson J. borrowed the words of Lawrence J. in *Lucena v. Craufurd* (1806), 127 E.R. 630 (U.K. H.L.), at p. 643: "To 'have a moral certainty of advantage or benefit, but for those risks or dangers', or 'to be so circumstanced with respect to [the subject matter of the insurance] as to have benefit from its existence, prejudice from its destruction' is to have an insurable interest in it."

55 Thus, an insurable interest exists if, apart from the insurance contract itself, the insured would benefit or suffer from the continued existence or destruction of the subject-matter of insurance or from the occurrence of the insured-against risk: Billingsley, at p. 36.

56 This takes me to the second basis upon which Grenville relies on *Morawietz* — to support its position that Francois Rochon did not have an insurable interest in the loss. In my view, it is clear that, to the extent that this court may have held in

Morawietz that an insurable interest requires legal ownership, this position has been overtaken by the factual expectancy test articulated in *Kosmopoulos*: see also *Scott*.

57 *Kosmopoulos* established that courts must determine the existence of an insurable interest on a case-by-case basis. The test is a flexible one based on the "the actual relationship between a particular individual and the item or risk insured rather than on the basis of a predetermined indicator, such as legal title": Billingsley, at p. 40.

The Supreme Court's Decision in Scott

58 In *Scott*, the Supreme Court applied the factual expectancy test from *Kosmopoulos* and concluded that an insurable interest in a residence can exist absent legal ownership. The Scotts' residence sustained damage from a fire deliberately set by their 15-year-old son.

59 Under their policy, "insured" included named insured and any household resident under the age of 21 in the care of the insured, among others. However, an exclusion clause excluded loss or damage caused by a criminal or wilful act or omission of the insured or of any person whose property was insured under the policy.

60 The majority of the Supreme Court of Canada upheld the insurer's denial of coverage. The key passage is found at p. 1467:

> [E]ven if we were to accept the more narrow definition... it would be impossible to say that the insurable interest of the infant...was limited to his personal possessions. He had a direct relationship to the family home and its contents, since they were his source of accommodation and support. To apply the analysis in *Kosmopo[ulos]*, [the son] had occupation, use and enjoyment of the family home. He received a benefit from its existence. As a dependent living in that home, he suffered a direct prejudice when it was destroyed by fire. The interests of parent and child in this case..."are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance". [Citation omitted.]

(b) Francois Rochon's Insurable Interest

61 On this record, I see two areas in which Francois Rochon had an insurable interest in the loss.

62 The first is mentioned in "Coverage C" under Section 1 of the Policy, which states: "We insure the contents of your dwelling and any other personal property you own, wear or use while on your premises which is usual to the ownership or maintenance of a dwelling." The trial judge found as a fact that Francois Rochon had contents and tools on the premises and therefore that he had an insurable interest in the loss.

63 Second, *Scott* shows that the rights and interests of parents and their children are highly interrelated when they are living together. A loss or gain in relation to the property necessarily affects them both.

64 Applying the analysis in *Kosmopoulos* here, as in *Scott*, Francois Rochon had an insurable interest in the garage. As a dependent living with his parents, Francois Rochon's interests are "inseparably connected" to those of his parents. Simply put, the garage formed a part of the residence that he enjoyed with his parents. Francois Rochon received a "benefit" from the family garage and its contents, and suffered "direct prejudice" when it was destroyed by fire. Francois Rochon had an insurable interest in the loss.

Applicability of the Supreme Court's Decision in Scott

65 Grenville contends that the trial judge erred in her application of *Scott* to the facts of this case. The policy reasons at play in *Scott* (i.e. preventing collusion between insured with a common interest in collecting under a homeowner's policy) are not relevant in a contest between two insurers.

66 I disagree. In my view, the factual expectancy test applies with equal force here.

67 In *Scott*, the Supreme Court's application of the factual expectancy test is not tied to any specific policy rationale as Grenville suggests. While the Court may have allowed subrogation, in part, to avoid the moral hazard of children and parents conspiring to collect insurance proceeds, as can be seen from the passage in *Scott* set out above, the Court's analysis is expressly based on the nature of the relationship between children, their parents, and their shared residence.

68 I find *Scott* to be dispositive of the issue whether Francois Rochon had an insurable interest in the loss.

(c) Conclusion Regarding Issue 2

69 I would therefore not give effect to Grenville's argument that the trial judge erred in concluding that Francois Rochon had an insurable interest in the loss.

3. Did the trial judge err in not giving effect to the policy argument for allowing subrogation in the circumstances of this case?

70 Grenville contends that the rule against an insurer suing its own insured under the same policy, no matter how negligent they were in causing the loss, should not apply to a dispute between two insurers. There is nothing improper, unfair, or contrary to public policy when a home insurer subrogates against an automobile insurer for damages arising from the use or operation of a motor vehicle.

71 I would not give effect to Grenville's policy argument.

(a) Policy Reasons for not Allowing Subrogation

72 There are powerful policy reasons working against Grenville's position.

73 I start with the fundamental notion that insurers should not be permitted to subrogate against their own insured: *Commonwealth Construction Co. v. Imperial Oil Ltd.* (1976), [1978] 1 S.C.R. 317 (S.C.C.). The fact that an insured may have other insurance is, in my view, irrelevant. A suit by an insurer against its own insured does not fulfil the aims of subrogation, which is to avoid overpayment of the insured: *Condominium Corp. No. 9813678 v. Statesman Corp.*, 2007 ABCA 216, 409 A.R. 152 (Alta. C.A.), at paras. 26-28, leave to appeal refused, (2008), 454 A.R. 102 (note) (S.C.C.).

74 Further, subrogation against an insured should be barred because the insurer has contracted to take onto itself the very risk at issue, thereby taking it away from the insured: *Statesman*, at para. 49.

(b) Conditions 5, 6, and 11

75 Finally, in terms of the policy supporting the decision that Grenville's subrogation action must fail, I agree with the trial judge that Conditions 5, 6, and 11 would be contrary to Francois Rochon's interest if his own insurer could sue him under the Policy. At para. 61 of her reasons, the trial judge noted the following:

> [These] conditions...required the insured, [Francois Rochon], to take reasonable steps to recover lost property, transfer his right against others to the insurer Grenville and to submit to an examination under oath and produce all documentation in his possession at Grenville's request. In accordance with this contractual requirement, [Francois Rochon] was required to speak to Grenville's adjuster and provide a statement, which he did, to assist Grenville in recovering the loss.

(c) Conclusion Regarding Issue 3

76 All said, there are several cogent policy reasons for dismissing Grenville's subrogation claim against Economical.

Conclusion

77 In my view, the trial judge correctly held that Grenville could not subrogate against its own insured, Francois Rochon.

Disposition

78 For these reasons, I would dismiss the appeal. In accordance with the parties' agreement, I would award costs in favour of Economical in the amount of $10,000, including disbursements and applicable taxes.

***Janet Simmons J.A.*:**

I agree

***G. Pardu J.A.*:**

I agree

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on November 10, 2015 has been incorporated herein.

TAB 12

2023 ONSC 1887
Ontario Superior Court of Justice [Commercial List]

Original Traders Energy Ltd.

2023 CarswellOnt 4138, 2023 ONSC 1887, 6 C.B.R. (7th) 324

Original Traders Energy Ltd. (Applicant)

Osborne J.

Heard: March 15, 2023
Judgment: March 21, 2023
Docket: CV-23-693758-00CL

Counsel: Steven Graff, Samantha Hans, Martin Henderson, for Original Traders Energy Ltd.
Fredrick Schumann, Dan Goudge, Mitch Grossell, for 2658658 Ontario Inc.
Natai Shelsen, for Mandy Cox
Raj Sahni, for Court-appointed Monitor, KPMG Inc.
Melanie Fishbein, for Essex Financial
Doug Smith, for Royal Bank of Canada
Steven Groeneveld, for Ministry of Finance

***Osborne J.*:**

1 On March 15, 2023, I heard a motion by the OTE Group for a *Mareva* injunction over certain assets and related relief, at the conclusion of which I granted the order, with minor amendments, with reasons to follow. These are those reasons.

2 Unless otherwise indicated, defined terms in this Endorsement have the meaning given to them in my Initial Order Endorsement dated January 30, 2023, the motion materials, and/or the Second Report of the Court-appointed Monitor.

3 On January 30, 2023, I granted the Applicants protection from their creditors pursuant to the CCAA. I appointed KPMG as Monitor, with certain investigatory powers in the circumstances, given that the Applicants were unable to locate all books and records, said to be as a result of alleged misconduct of certain former executives, including Mr. Glenn Page. On February 9, 2023, I granted an amended and restated initial order.

4 On this motion, the OTE Group seeks an interlocutory injunction restraining Mr. Page, his spouse Ms. Mandy Cox, and 2658658 Ontario Inc. ("265") (collectively for the purposes of this motion and this Endorsement, the "Respondents"), and those acting on their behalf or in conjunction with them, from directly or indirectly selling, transferring encumbering or dealing with a 70 foot yacht bearing the name "Cuz We Can" or "Home South", together with its engines, all as further described in the motion materials (the "Yacht").

5 265 is an entity owned and/or controlled by Page and Cox. They are both directors of 265.

6 The OTE Group also seeks ancillary relief requiring the Respondents to deliver a sworn statement providing particulars with respect to the Yacht as set out in the motion material, and directing the Boat Brokers who may have possession of the Yacht to not remove or transfer the Yacht, and other relief.

7 The motion did not proceed *ex parte* or without notice. The Respondents were given advance notice of this motion by the OTE Group and were served with the Notice of Motion and materials on Monday, March 15, 2023.

8 The hearing of this motion was scheduled to proceed at 12 PM noon on Wednesday, March 17, 2023. As further discussed below, the Respondents were represented by counsel today who opposed the granting of any relief for a number of reasons, including but not limited to the fact that they had received only two days' notice. At the outset of the hearing, counsel for the Respondents indicated that a brief adjournment of the matter might allow the parties to agree to consensual interim terms of an order. I granted that request for a brief adjournment to allow the parties and their counsel to have discussions, in fact twice, and the parties advised that they were unable to agree to terms, with the result that the motion was argued on the merits beginning at 1:30 PM.

9 Prior to filing for CCAA protection, the OTE Group and others commenced a claim in this Court against Page, Cox and others asserting unjust enrichment, fraud, breach of fiduciary duty and other causes of action.

10 Among other things, that claim alleges that Page and Cox purchased, in 2021, and through a corporate entity (265) the Yacht using funds wire transferred from OTE LP accounts, and caused OTE Logistics to guarantee chattel mortgage secured by the vessel (both entities are defined in my Endorsement of January 30, 2023).

11 Today, the OTE Group relies upon the Affidavit of Scott Hill sworn March 12, 2023 with exhibits thereto, the Affidavit of Miles Hill sworn March 12, 2023 and exhibits thereto, and the Second Report of the Monitor.

12 As set out in the Affidavit of Scott Hill, the position of the OTE Group is that at least USD $3,675,687.05 of OTE Group funds were used to purchase the Yacht, currently owned by 265.

13 At the time of filing the Notice of Motion, OTE Group was unaware of the exact whereabouts of the Yacht, although filed evidence confirming that it was listed for sale by various Boat Brokers in Hollywood, Florida without the permission of the OTE Group which maintains the security interest registered over the Yacht.

14 At the outset of the hearing of this motion, Mr. Martin as counsel for the OTE Group advised the Court that the Applicants had just been advised, although had no sworn evidence, that subsequent to the service and filing of the Notice of Motion, the Yacht had in fact left port at Hollywood, Florida, and was believed to be bound for the Bahamas.

15 Mr. Schumann, as counsel for the Respondents advised, in fairness and with candor, that while he had just recently been retained and could not advise the Court with certainty when the Yacht had left port, it was at the time of the hearing at sea and, he believed, headed for the Bahamas.

16 The Respondents control the Yacht, and the evidence on this motion was to the effect that it was up for sale with multiple Boat Brokers (with active listings at the time of the hearing of the motion).

17 Moreover, the evidence of the OTE Group is that the Respondents have caused a deregistration of the Yacht from Canada, changed its name and taken other steps all in an attempt to remove the asset from the control or reach of the OTE Group, have forged certain documents to fund the purchase of the Yacht, and are otherwise acting in an attempt to frustrate the efforts of the OTE Group and the Monitor to investigate the use of OTE Group funds, the purchase of the Yacht and the whereabouts of the Yacht.

18 As a result of the above, the OTE Group brought this motion for *Mareva* relief to freeze the Yacht and direct the Respondents to order its return to Florida pending a determination of the origin and ownership of funds used to purchase it and guarantee payment of the balance of the purchase price, and the determination of rights to the Yacht or any proceeds of sale thereof.

19 As stated above, at the conclusion of the hearing and having heard from counsel for all parties who wished to make submissions, I granted the order freezing the Yacht and directing the Respondents to order its return to port in Florida.

Mareva Injunction

20 The test for a *Mareva* injunction is well established. This Court has jurisdiction to grant an interlocutory injunction, including a *Mareva* injunction, pursuant to section 101 of the Courts of Justice Act, where it appears just or convenient to do so. Pursuant to Rule 40.01, an interlocutory injunction or mandatory order under section 101 may be obtained on motion to a judge. The order may include such terms as are just, and may be sought on motion made without notice for a period not exceeding 10 days.

21 That said, the relief is extraordinary. As numerous courts have observed, the harshness of such relief, usually issued *ex parte*, is mitigated or justified in part by the requirement that the defendant have an opportunity to move against the injunction immediately. The relief remains extraordinary even in circumstances such as are present here, where the relief was not sought *ex parte*, but rather on notice to the Respondents, albeit brief.

22 The factors to be considered in determining whether to grant *Mareva* relief include whether the moving party has established the following:

(a) a strong *prima facie* case;

(b) particulars of its claim against the defendant, setting out the grounds of its claim and the amount thereof, and fairly stating the points that could be made against it by the defendant;

(c) some grounds for believing that the defendant has assets in Ontario (although this requirement has been modified by more recent jurisprudence discussed below, such that it is perhaps better expressed as: some grounds for believing that the defendant has assets within the jurisdiction of the Ontario Court);

(d) some grounds for believing that there is a serious risk of defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied;

(e) proof of irreparable harm if the injunctive relief is not granted;

(f) the balance of convenience favours the granting of the relief; and

(g) an undertaking as to damages.

(See *Aetna Financial Services Ltd. v Feigelman*, [1985] 1 S.C.R. 2 ("Aetna") at paras. 26, 30; *Chitel v. Rothbart*, 1982 CANLII 1956 (ONCA) at para. 60; and *Lakhani et al v. Gilla Enterprises Inc.* et al, 2019 ONSC 1727 at para. 31).

23 A strong case that a defendant has committed fraud against the plaintiff can be important evidence in support of the relief sought. The "reluctance" of the common law toward allowing execution before judgment has recognized exceptions, including circumstances where the relief is necessary for the preservation of assets, the very subject matter in dispute, or where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute. (See *Aetna*, at para. 9).

24 The test as to whether a strong *prima facie* case exists has been expressed by the courts as the question of whether the Plaintiff would succeed "if the court had to decide the matter on the merits on the basis of the material before it" (See Petro-Diamond Inc. v. Verdeo Inc., 2014 ONSC 2917 at para. 25).

25 The following elements are required for the tort of civil fraud: a false representation by the defendant; some level of knowledge of the falsehood of the representation by the defendant (i.e., knowledge or recklessness); the false representation caused the plaintiff to act; and, the plaintiff's actions resulted in a loss: Bruno Appliance and Furniture, Inc. v Hryniak, 2014 SCC 8 at paras. 17-21.

26 Applying the test to this case, I am satisfied that the *Mareva* injunction should be granted.

27 At the outset I observe two obvious factors relevant here.

28 First, the injunction is extremely limited in scope and applies only to the Yacht (and its engines which have distinct serial numbers and are separately registered although obviously affixed to the vessel itself) or to proceeds of sale therefrom. The order has no application to any other assets of the Respondents. It follows that issues that are in some circumstances relevant to the granting and scope of *Mareva* relief, such as access to funds for living and/or legal expenses, are not relevant here and were not argued as an issue by any party.

29 Second, as noted, this injunction was brought on notice, and I heard submissions from counsel to the Respondents. The fact that notice was given is relevant to my analysis of the serious risk of the assets being removed from the jurisdiction and the balance of convenience.

30 The purpose of a *Mareva* injunction is to freeze exigible assets when found within the jurisdiction of the Court. Such assets include personal property such as a vessel: *Total Traffic Services Inc. v. Kone*, 2020 ONSC 4402.

31 The basis for *Mareva* relief will be more readily justified where the rights of the moving party are specifically related to a physical asset in question — in this case, the Yacht.

32 The evidence relied upon by the OTE Group as to the underlying allegations of fraud are found in the two affidavits on which they rely (Affidavit of Scott Hill sworn March 12, 2023, principally at paras. 21-30, and Affidavit of Miles Hill also sworn March 12, 2023 at paras. 4-5).

33 That evidence is to the effect that the Respondents transferred funds or permitted and authorized the transfer of funds from OTE accounts, inappropriately and without the right to do so, and used those funds to purchase the Yacht, in part through the alleged misuse of the signing authority of Page at OTE Logistics. The OTE Group received no benefit or consideration for these fund transfers. It appears the Respondents further fraudulently executed and forged signatures on documents to Essex, the party that provided financing for the Yacht.

34 The Respondents filed no evidence on this motion, perhaps not surprisingly given that they had received only two days-notice. In submissions, counsel for the Respondents submitted not that the transfers of funds did not occur, but rather that they were not improper, or at least they did not constitute *prima facie* evidence of fraud, since they could be said to be distributions of profits to which the Respondents were entitled.

35 I cannot accept the submission, however, in the complete absence of any evidence to corroborate the suggestion. The books and records of the OTE Group are incomplete and lacking. There is no evidence before me of resolutions, meeting minutes, correspondence or any documents demonstrating or even suggesting that these transfers were in fact, or were even intended to be, distributions of profit or income. There is also no evidence of any corresponding distributions, at the same time or in the same amount, to the other partners who presumably would have been entitled to the same distribution.

36 Finally, there is no evidence that the partnership had, at the time of the impugned transfers, sufficient profits to fund such distributions in any event.

37 Even if the Respondents were entitled to distributions of profit that the relevant time, it does not follow that they are somehow entitled to simply take funds and apply them for their own uses.

38 In short, I am satisfied that the moving parties have established, with sufficient particulars, a strong *prima facie* case.

39 I am also satisfied as to the requirement for jurisdiction. The individual Respondents are residents of Ontario and this Court has *in personam* jurisdiction over them. Moreover, the earlier requirement that a moving party establish that a respondent have assets in Ontario before *Mareva* relief could be granted (whether restricted to Ontario or beyond) no longer exists. Rather, this Court has discretionary jurisdiction to grant a *Mareva* junction where circumstances merit, even absent any evidence of assets in Ontario: Associated Foreign Exchange Inc. et al v. MBM Trading, 2020 ONSC 4188 at para. 54.

40 As observed by the Divisional Court in *SFC Litigation Trust (Trustee of) v. Chan*, 137 O.R. (3d) 382, 2017 ONSC 1815:

[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 dependent, 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*, R.S.O. 1990, c. C.43 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 (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 [page390] 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] B.C.J. No. 2652, 100 B.C.L.R. (2d) 335 (S.C.)], a case considered by Weiler J.A. in in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564, [1995] O.J. No. 1855 (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 (No. 2)*, [1989] 2 W.L.R. 276, [1989] 1 All E.R. 1002 (C.A.), at para. 6, as follows:

> 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 Fastfrate Transport Inc.*, at para. 142, as follows:

> 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, [1980] 1 W.L.R. 1259 (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*, B.C.S.C., November 24, 1994 (unreported, Vancouver Registry No. C908539) [now reported 100 B.C.L.R. (2d) 335, [1995] 3 W.W.R. 116], 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 at p. 346, [1987] 2 W.W.R. 331 (C.A.), where McLachlin J.A. said: [page391]
>
> ...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. 147:

> 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. 154, 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.

41 In this case, the individual Respondents are, as noted, Ontario residents. The Yacht was originally owned by 256, the company owned or controlled by them. The evidence before me is to the effect that the exact whereabouts of the Yacht at the time of the hearing is unknown, although the evidence is clear that it was in Florida recently, and counsel for the Respondents admitted, as noted above, that it has recently left Florida and is apparently en route to the Bahamas.

42 In the circumstances, I conclude that the Yacht is reasonably connected to this jurisdiction and the injunctive relief should be granted in respect of it.

43 As noted above, while there is no clear evidence in the record before me as to when the Yacht left port in Florida as against when on Monday two days prior to the hearing, the Respondents received notice of this motion, all parties are in agreement that the Yacht did in fact leave port in Florida and was at the time of the hearing believed to be headed for the Bahamas. That fact serves to heighten dramatically the concern and urgency of the moving parties and their fear that attempts are being made to place the asset beyond the reach of this Court.

44 The Respondents submit that nothing can or should be taken from the fact that the Yacht has left port and specifically, no inference should be drawn as to any intent or effort to hide the asset.

45 In my view, and as submitted by the OTE Group, the objective facts support my conclusion that there is a serious risk that the asset will be removed from the jurisdiction (in the sense of the jurisdiction and reach of this Court) and/or will be dissipated.

46 The Yacht was, and apparently still is, listed for sale although it has been listed for sale in at least two locations (Palm Beach, Florida and Bimini, Bahamas. It has been delisted from Canadian registries. It has been renamed, and listed on the websites of the Boat Brokers as being for sale in Hollywood, Florida. Its GPS locator, whether intentionally disabled or simply malfunctioning, is not active, with the result that the exact location of the vessel cannot be determined.

47 I am satisfied there is a risk of dissipation of assets. Different jurisdictions are, on the face of the evidence, involved. Proof of the risk of removal/dissipation may be inferred from the surrounding circumstances of the responding parties' misconduct. (See Ontario Professional Fire Fighters Association v. Atkinson et al, 2019 ONSC 3877 at para. 6-8, quoting with approval from Sibley v. Ross, 2011 ONSC 2951 at paras. 63, 64 and *Amphenol Canada Corp. v. Sunadrum*, 2019 ONSC 849).

48 In my view, and notwithstanding the able submissions of counsel for the Respondents, I have little difficulty in concluding that there is a risk of removal or dissipation of the asset here and such is easily inferable from the circumstances.

49 I similarly conclude that the moving parties have established irreparable harm for the purposes of this motion and if the Yacht cannot be located or attached, or if it is sold and proceeds cannot be traced, any judgment that may be made will likely be frustrated. The probability of irreparable harm increases as the probability of recovering damages decreases: Christian-Philip v. Rajalingam, 2020 ONSC 1925 at para. 33.

50 In the same way, I am satisfied that the balance of convenience overwhelmingly favours the moving parties. The harm to them if the injunctive relief is not granted would likely be irreparable, but the harm to the Respondents if this relief is granted, on an interim and very limited basis, is minimal. The Yacht is for sale anyway. The injunctive relief is limited in scope to the Yacht (and the engines) and does not extend to other assets of the Respondent.

51 Finally, pursuant to Rule 40.03, I am persuaded that the requirement for an undertaking, although provided by the moving parties here, should be dispensed with in the circumstances. The case put forward by the OTE Group is strong, and the OTE group is insolvent and in ongoing CCAA protection from its creditors. In my view, it is appropriate to dispense with the requirement for an undertaking as to damages where, as here, the case of the moving parties is strong and they are insolvent: Sabourin & Sun Group of Cos. v. Laiken, [2006] OJ No. 3847 at para. 16.

52 While it is not determinative of the test as to whether the injunctive relief sought should be granted, I draw additional comfort from the Second Report of the Court-appointed Monitor dated March 13, 2023.

53 The Monitor, independent of the parties and, as has often been described, the "eyes and ears of the Court", fully supports the relief requested by the OTE Group, for the benefit of stakeholders including creditors.

54 The Monitor's own review of the evidence of the OTE Group supports the conclusion that the Yacht was purchased substantially using funds wired directly from the bank accounts of the OTE Group and further that 265 caused OTE Logistics to guarantee a chattel mortgage held by Essex, secured on the Yacht (para. 13).

55 The third party entity from which the Yacht was purchased, Pride Marine Group, was one of the parties from whom the Monitor sought information and documentation pursuant to its investigatory powers granted by this Court. In response to that request, Pride provided a copy of the purchase contract for the Yacht, signed by Page, together with a breakdown of the payments for the Yacht as well as Pride bank statements showing funds received by Pride from accounts belonging to both OTE Group and 265 during the period from September 22, 2022 August 12, 2021. The Monitor concludes at paragraph 15 that the purchase price of the Yacht was substantially funded by the OTE Group with wire transfers totaling USD $3,218,500.

56 I observe that as reported by the Monitor, it is the intention of the OTE Group to seek to appoint the Monitor as foreign representative to seek recognition of these proceedings outside Canada and particularly to commence Chapter 15 Proceedings in the United States to recognize and enforce orders made by this Court. The Monitor observes that the Yacht, or proceeds of sale with respect thereto, may be a significant source of recovery for the OTE Group and its Creditors.

57 The scope of the injunctive relief sought has been described above. The moving parties have provided a draft order, blacklined as against the Model Order of the Commercial List. The relief, though narrow in scope, is consistent with the nature and scope of relief granted by this Court in circumstances such as I have found are present here.

58 The draft order contains the usual comeback clause, such that any party may return to this Court to vary or rescind the order on notice at any time.

59 For all of the above reasons, I granted the order at the conclusion of the hearing of this motion, and directed the Respondents to, in turn, direct and facilitate the return of the Yacht to Florida forthwith.

60 As to a return date of this motion before me, I offered to the parties alternative dates well within 10 days of the date of the order I have made. Due to personal and professional commitments of counsel, and the collective desire between and among them to have ongoing discussions with a view to having all or part of this matter possibly proceed on consent, they requested that they be given an opportunity to caucus amongst themselves and agree on the next return date. I agreed.

61 Subsequent to the hearing of the motion and the granting of the order, the Commercial List Office advised me that the parties have scheduled a hearing before me on Tuesday, March 28.

Motion granted.

TAB 13

2002 BCSC 1098, 2002 BCSC 1307
B.C. S.C. [In Chambers]

Netolitzky v. Barclay

2002 CarswellBC 1844, 2002 BCSC 1098, 2002 BCSC 1307, [2002] B.C.W.L.D. 991, [2002] B.C.J. No. 1796, 115 A.C.W.S. (3d) 692, 23 C.P.C. (5th) 137

RONALD KORT NETOLITZKY, KEEWATIN CONSULTANTS INC., C.H. GOLF INC., OLIVER GOLD CORPORATION, SANTOY RESOURCES LTD. and NO. 150 CATHEDRAL VENTURES LTD. (PLAINTIFFS) AND JOHN JAMES BARCLAY, J.J. BARCLAY & ASSOCIATES LTD. and KEEWATIN CORPORATE ENGINEERING INC.(formerly KEEWATIN ENGINEERING INC.) (DEFENDANTS)

Dillon J.

Heard: April 22-24, 2002
Judgment: August 1, 2002 *
Docket: Vancouver S017050

Counsel: *M.K. Woodall*, for Plaintiffs
J. Sullivan, *J. Krupa*, for Defendants

***Dillon J.*:**

INTRODUCTION

1 This court issued an *ex parte* Mareva injunction on December 13, 2001 to restrain the defendants from disposing of any assets until final disposition of this matter or further order of the court. Monthly living expenses of John Barclay could be paid to the maximum of $2,500 per month. All defendants were required to provide an affidavit of assets in specific terms and their location within three days of service of the order. The defendants were restrained from removing any assets from the jurisdiction and could apply to set aside the order within 48 hours. The defendants now seek to set aside the order. The plaintiffs want the order to remain at least until an affidavit of assets is provided and seek an independent Mareva injunction if the December order is vacated.

2 On December 19, 2001, the parties agreed that the defendants could use $25,000 for a legal retainer and agreed to an extension to January 7, 2002 for providing the affidavit of assets. On January 9, 2002, the parties agreed to increase the monthly allowance to $5,000. Draft orders were sent by the plaintiff's solicitor but were never returned by the defendants. Affidavits of assets have not been provided.

3 The defendants attempted to bring their application before the originating judge on February 22, 2002 but were unable to do so. The matter was adjourned upon the terms that the defendants be permitted to expend $25,000 in legal fees, monthly living expenses for Mr. Barclay were increased to $7,500, and $13,500 of assets could be transferred for payment of RRSP's. When continued attempts to appear before the originating judge were unsuccessful, the matter proceeded on March 20, 2002. At that time, there was opposition to admission of the plaintiff's accountant's report and it was apparent that the matter would require more days than were scheduled. As a result, the matter was again adjourned until April 22, 2002 upon the conditions, *inter alia*, that the $7,500 per month living expense continue until judgment on the applications and that further legal expenses of $25,000 be allowed.

FACTS

4 Ronald Netolitzky wholly owns all of the plaintiff companies except C.H. Golf Inc. ("C.H. Golf") in which he holds a 36% interest and Santoy Resources Corporation ("Santoy") in which he holds a significant interest. John Barclay wholly owns the defendant companies. Mr. Barclay provided bookkeeping, accounting and management services to Mr. Netolitzky and his companies for over twenty-five years. Mr. Barclay was trusted with greater and greater management powers such that he had the power to write cheques on behalf of some companies and had partial signing authority for others. He prepared accounting records, financial statements and tax returns for all the companies. He also assisted the auditors. He paid the invoices for the companies, including invoices prepared for his own services to the companies. At one time, Mr. Barclay had Power of Attorney on behalf of Mr. Netolitzky. Mr. Barclay was the person upon whom the companies relied to maintain financial records, make necessary payments, and provide financial information.

5 In December 2001, Mr. Barclay was removed as bookkeeper for Santoy because his work contained an increasing number of serious issues that were attributed initially to health problems. The new bookkeeper for the company immediately discovered a number of significant discrepancies in the financial records of the company indicating that Mr. Barclay had been paid sums in excess of authorized or otherwise explicable business activity. Cheques issued in September and October 2001 from Santoy to Mr. Barclay exceeded invoices from Mr. Barclay for services rendered by $40,486. When Mr. Netolitzky was informed of this situation, he and his solicitor confronted Mr. Barclay about the cheques on December 5, 2001.

6 Mr. Barclay was asked to produce the invoices for cheques issued to him for September 2001. The cheques exceeded the invoices or any agreed figure for salary or remuneration. Mr. Barclay was unable to explain payment in excess of his billing but did suggest that it might be an advance on fees. When Mr. Barclay was then confronted with figures for October 2001, Mr. Barclay responded, "I guess I was stealing from you". No explanation was offered for the excess of sums advanced in October 2001. When Mr. Barclay was asked how long this had been going on, he said that he did not know, that it could be for months or a year. He said that he did not know how much money was involved and said that he spent the money on "this and that". Mr. Barclay made other statements including: "I did not try or mean to defraud you" and "I will make restitution". He provided addresses for his Vancouver and Calgary homes, gave the name of his broker at Canaccord Capital Corporation, and said that he held RRSP's in Calgary at RBC Dominion Securities and NBO Nesbsitt Burns.

7 This was the evidence before the judge on December 13, 2001. However, the statement of claim went further with allegations that payments in excess of $249,000 had been fraudulently made to Mr. Barclay and $66,032 to Keewatin Corporate Engineering Inc. ("Keewatin Corporate").

8 Mr. Barclay did not deny in affidavits before this court that the meeting and conversation of December 5, 2001 occurred. He said, however, that he was in shock and was acting facetiously when he stated that he was stealing.

9 Mr. Robert Matthews, a financial consultant and chartered accountant, performed an accounting review of payments that Mr. Barclay caused to be made to his business, J.J. Barclay & Associates ("Barclay & Associates"), from the plaintiff companies. His evidence was not refuted. He examined the accounts of Keewatin Consultants Inc. ("Keewatin Consultants") and No. 150 Cathedral Ventures Ltd. ("Cathedral Ventures"), including Mr. Barclay's timesheets for work performed for the plaintiff companies, invoices rendered by the defendants, and cheques issued by these companies to the defendants. He performed a more limited review of the other plaintiff companies because he did not have access to invoices and cheques for these public companies. He did, however, review Mr. Barclay's computer records of hours recorded for each company and compared these to totals to be billed according to the same timesheets. The plaintiffs had access to the records stored in the computer used by Mr. Barclay at the offices of Oliver Gold Corporation ("Oliver Gold"). Based upon the information before me, I accept the accuracy of this computer information. It is not necessary to resolve the issue of ownership of this information in order to rely on it for purposes of this application as it is all relevant information in the hands of the parties and would be disclosed regardless of ownership. Nor do I doubt the reliability of the accounting information provided by Mr. Matthews as he performed a detailed review and supplied sufficient supporting documentation.

10 It is not necessary to detail the results of Mr. Matthews' review. But, before summarizing his findings, some other significant facts are to be noted. Mr. Barclay could sign cheques on behalf of the plaintiff companies, either alone or with a

second signature. Mr. Barclay had signing authority for Santoy along with either Mr. Netolitzky or Mr. Nichols. Mr. Barclay and Mr. Nichols authorized nearly all of Santoy's cheques except for the cheques for Mr. Barclay's services which were signed by Mr. Barclay and stamped with Mr. Netolitzky's signature. Mr. Netolitzky said that he never authorized his signature to be affixed with a stamp and also said that both he and Mr. Nichols were available to sign cheques if need be. Mr. Barclay could sign cheques for Keewatin Consulting and Cathedral Ventures on his own. With his capacity as accountant to the plaintiff companies, Mr. Barclay could pay to himself the invoices that he rendered. The hourly rate charged by Mr. Barclay was initially $60 per hour but increased over time to $70 per hour. Based upon these rates, the hours billed could be calculated based upon the invoices rendered which did not provide the hours billed. This hourly rate was not denied.

11 Mr. Matthews reported that, between April 1998 and December 2001, Mr. Barclay wrote cheques to Barclay & Associates or Keewatin Corporate from Keewatin Consulting and Cathedral Ventures in amounts that exceeded the invoices to those companies by $315,644.82. The differential between the cheques and the invoices were recorded as "inter-company receivables", a highly irregular practice because neither Barclay & Associates nor Keewatin Corporate were related to the plaintiff companies. These receivables were hidden within legitimate inter-company receivables and were not readily apparent. The "inter-company receivable" recorded to Keewatin Consulting from Keewatin Engineering for $66,032 is not known to have any foundation and the defendants suggested none.

12 This estimate of $315,644.82 is based upon a comparison between amounts invoiced and amounts paid. However, Mr. Matthews also did a calculation of amounts paid against hours recorded in Mr. Barclay's timesheets. Based upon the hourly rates as set out above, the dollar value for recorded time to Keewatin Consultants and Cathedral Ventures between 1998 and 2001 was $336,274.25. The total value of cheques caused by Mr. Barclay to be paid to the defendants over this time was $825,455.03, representing a difference of $491,180.78. In 2001 alone, the difference between hours recorded as worked and amounts caused to be paid was $212,485.75. Although there are some discrepancies in Mr. Matthews reconciliation of monthly hours recorded versus number of hours billed, the fact remains that there is apparently a significant difference that remains unaccounted for and which will doubtlessly be more fully addressed at the trial of this matter.

13 Mr. Barclay offered three explanations for the situation described by Mr. Matthews. First, he said that C.H. Golf owed him for 683.50 hours of work between 1995 and 2000 for which he was not paid and for which he expected to be compensated at the end of the C.H. Golf project. The value of that work is $44,427.50. Second, he said that he loaned C.H. Golf $158,487.57 from 1995-1997 that was to be paid at the end of the project. Third, he said that outstanding expenses of $27,777.14 were payable by C.H. Golf. None of these explanations are contained in the statement of defence or in a counterclaim and no amendments were sought.

14 None of these circumstances explain the cheques written from Keewatin Consulting and Cathedral Ventures in excess of invoices or the differential in hours recorded versus amounts paid for these two companies. C.H. Golf is a separate company.

15 Mr. Barclay said that the figure of 683.50 hours owed from C.H. Golf was cumulative and expressed in the October 2001 timesheets that he attached to his affidavit. However, Mr. Matthews reviewed the timesheets and could not correlate the time as suggested. Neither can I. However, Mr. Matthews calculated the time billed but not carried forward for all of the companies and then any unbilled hours from the time sheet for October 2001 for C.H. Golf. There is still an excess of time billed by 1641 hours. Another observation of Mr. Matthews should be noted. The timesheets of hours worked for Keewatin Consulting showed variable hours worked but the billings were invariable. Mr. Barclay billed for 100 hours regardless of hours worked in 6 of 10 months. For the rest of the time, the time billed exceeded the time recorded.

16 Mr. Matthews summarized the billings practices as having suddenly changed in 1999 so that Mr. Barclay consistently billed in excess of hours worked for the plaintiff companies after September 1999 and billing for Keewatin Consulting was for a fixed amount irrespective of hours worked. There was no response to Mr. Matthews' affidavit.

17 Mr. Barclay also said that C.H. Golf owed him a debt in the amount of $158,487.57 which was to be payable at the end of the project. However, there is no proof of a loan except for general ledger entries of Keewatin Corporate under the heading "Interco-C.H. Golf Ltd.". There is no explanation as to why Keewatin Corporate paid these amounts or an explanation of the

ledgers. Many amounts under this heading are recorded as having been paid to "Wm Stewart". If the cheques from Keewatin Consulting and Cathedral Ventures to Barclay & Associates were in payment of this debt, there would be entries to mark the amounts paid down; but, there is not. Further, Mr. Matthews said that it would not be acceptable for Keewatin Consulting and Cathedral Ventures to pay down a C.H. Golf loan, especially when Mr. Netolitzky is only a partial owner of C.H. Golf. Finally, Mr. Netolitzky said that he did not recall such a loan, would have remembered if one existed, and no such loan was recorded in the information delivered to him by Mr. Barclay on the debts of the company. He said that such a loan would have been totally out of character with the business relationship that he had with Mr. Barclay. In any event, Mr. Barclay said that the loan was payable at the end of the project and Mr. Netolitzky said that the project was not completed and was not expected to make a profit. Counsel for Mr. Barclay conceded that this loan, assuming it exists, could not account for monies paid by Keewatin Consulting and Cathedral Ventures in excess of invoices to those companies.

18 There is a letter in evidence that Mr. Netolitzky received from the auditors to C.H. Golf, which is addressed to Mr. Netolitzky, that seeks confirmation of a shareholders loan to Mr. Netolitzky in the amount of $158,497.67. Mr. Netolitzky never received this letter when it was written in November 2000. However, the letter was returned to the auditors with Mr. Netolitzky's name crossed out and replaced with "John Barclay, President" and a note signed "J. Barclay" at the bottom that says: "Please note: This money is just a loan. I am not a shareholder. The money is included with Keewatin Consultants because I do work for Ron Netolitzky and Keewatin Consultants. They have promised me a share of any profits." Mr. Netolitzky identified the handwriting on the letter as that of Mr. Barclay. There was no response to this information from Mr. Barclay. The inference to be drawn is that Mr. Barclay intercepted correspondence meant for Mr. Netolitzky from the auditors and provided an irregular explanation to the auditors that he has not repeated to this court.

19 Finally, there is a claim for outstanding expenses of $27,777.14. These expenses would have been submitted to Mr. Barclay himself for payment. There is no evidence that anyone else was aware of these outstanding expenses; there are no receipts; and only fax correspondence from Mr. Barclay in January 2002 claim this amount. The expenses are to C.H. Golf and do not account for any of the monies that were claimed at the initial injunction application or in the amounts claimed by Keewatin Consulting or Cathedral Ventures here.

ANALYSIS

20 Whether the injunction should be dissolved is to be approached as a hearing *de novo* with the acknowledgment that I should not substitute my view for that of the originating judge on the ground that I would have exercised my discretion differently (*Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District)* (1959), 27 W.W.R. 652 (B.C. S.C.), at 658 aff'd (1959), 28 W.W.R. 517 (B.C. C.A.)); *Westminster Credit Union v. C.J.A., Local 1251* (1984), 55 B.C.L.R. 369 (B.C. S.C.), at 373; *Hickman v. Kaiser* (1996), 28 B.C.L.R. (3d) 195 (B.C. S.C. [In Chambers]), at 197).

21 The defendants claimed that the plaintiff failed to fully inform the justice on December 13, 2001 of all relevant facts, particularly the outstanding $158,487.57 debt to C.H. Golf, the outstanding 683 hours worked for C.H. Golf, and the outstanding expenses for C.H. Golf. However, the defendant has not established the probability that these facts are true or that the plaintiff was aware of this information. If there was such a loan, it was payable at the end of a project that has not ended. Even if C.H. Golf owed the defendants money, that does not account for the monies taken from Keewatin Consulting and Cathedral Ventures. Mr. Barclay did not suggest to Mr. Netolitzky on December 5, 2001 that any monies paid were for a loan or that a loan had any relevance to his conduct. I do not find that there was non-disclosure or misleading information given to the originating judge.

22 It is recognized that a Mareva injunction is a harsh and exceptional remedy that should only be available in the clearest of cases (*Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), at 37; *Traff v. Evancic* (1995), 55 B.C.A.C. 235 (B.C. C.A.); *Reynolds v. Harmanis* (1995), 39 C.P.C. (3d) 364 (B.C. S.C.) at paras. 21-24). This requires that the plaintiff first establish a strong prima facie case (*Traff*, *supra* at para. 15). The plaintiff must also establish that the balance of convenience favours the granting of the injunction. The approach described by Huddart J. in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.), at 349-351 reconciles the traditional test for injunctive relief with the Mareva test in *Aetna* so that once a strong prima facie case is established, the interests of both parties should be balanced taking into account the particular relevant circumstances of the case, including: the nature of the transaction giving rise to the cause of action, enforcement measures

available in B.C., the amount of the claim, the history of the defendant's conduct, the relative strengths of the parties' cases, and evidence of irreparable harm either way. This provides a flexible approach that allows a judge to tailor a remedy to fit the circumstances. The ultimate question is whether it is fair and just that the plaintiff have the right to monitor the movement or expenditure of assets pending final disposition of this matter.

23 It is important to this case that the purpose of Mareva injunctions is not limited to prevention of dissipation of assets to avoid payment of a judgment. It is also available as a form of security (*Mooney*, *supra* at 350; *Delmas v. Orion 2000 Technologies Ltd.* (1997), 18 C.P.C. (4th) 239 at para. 253; *Adler, Coleman Clearing Corp. (Trustee of) v. Roddy DiPrima Ltd.*, [1996] B.C.J. No. 2660 (B.C. S.C. [In Chambers]); *Leaton Leather & Trading Co. v. Ngai* (1997), 32 B.C.L.R. (3d) 14 (B.C. S.C.), at 16). This purpose is significant here because the plaintiff does not allege that there is a risk of disposal or dissipation of assets. Rather, the plaintiff says that a prima facie case of fraud may give rise to an inference that assets are at risk.

24 Fraud is a recognized exception to the general hostility to prejudgment execution. In *Aetna*, *supra* at 12-14, Estey J. described fraud as the third exception to the general rule against execution before judgment. He said:

> However, the abhorrence which the common law has felt towards execution before judgment has always been subject to some obvious exceptions:
>
> . . .
>
> 3. to prevent fraud both on the court and on the adversary:
>
> In *Campbell v. Campbell* (1881), 29 Gr. 252, both the general rule and the exception to it on the basis of fraud, were succinctly stated by Boyd C. at p. 254-55, as follows:
>
> > 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.
>
> More recent cases in which the fraud exception have been applied include *Toronto (City of) v. McIntosh* (1977), 16 O.R. (2d) 257 (Ont. H.C.J.); and *Mills and Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.J.)

25 In *Mills v. Petrovic* (1980), 30 O.R. (2d) 238 (Ont. H.C.), at 238-239, the court said:

> There is no doubt that the law is clear that an interim or interlocutory injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment. Basically, the Courts will not grant execution before judgment. Counsel have advised me that in the many cases which state that principle, they can find none where the principle was applied in a case in which the claim against the defendant was for theft or fraud. It is my opinion that equity demands that there be an exception to that principle where there is substantial evidence supporting an allegation that the defendant has defrauded or stolen from the plaintiff. This case does not directly fall within the factual situations which were before Steele J. when he decided *City of Toronto v. McIntosh et al.* (1977), 16 O.R. (2d) 257, and *Robert Reiser & Co., Inc. v. Nadore Food Processing Equipment Ltd.* (1977), 17 O.R. (2d) 717, 81 D.L.R. (3d) 278, 25 C.B.R. (N.S.) 162. However, it does not appear to me to 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.

26 *Mills* involved a strong case in fraudulent conveyance that an employee had stolen $100,000 from her employer when she was engaged as an accountant. As such, it is a historically classic example of the fraud exception applied to fraudulent conveyances.

27 The fraud exception was discussed in relation to the Mareva injunction in *Caisse populaire Laurier d'Ottawa Ltee v. Guertin* (1983), 36 C.P.C. 63 (Ont. H.C.) where the plaintiff alleged fraudulent misrepresentation, breach of fiduciary duty and conspiracy. There was a real risk of disposal of assets because criminal charges were pending, the assets were liquid, and there was some evidence that cash deposits had been removed. The court said at para. 72:

> In my view, the plaintiff in the application before me has shown something more. An application such as this surely must turn on its facts. That was the view expressed by the Court of Appeal in Chitel, supra, at p. 521, in commenting on Mills & Mills v. Petrovic, supra. Their Lordships lamented that the facts of the Mills case were not set out in greater detail; they conceded that the facts may have justified the order given. It is not necessary for me to decide, as counsel urged upon me, that there is a line of authority which stands for the proposition that fraud is a special category of allegation that permits an injunction such as this to go. In my view, the relief appropriate here is a Mareva injunction. Item number (iv) of Lord Denning's guidelines, as approved by our Court of Appeal, requires that a "real risk" be shown. 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".

28 In *Osman Auction Inc. v. Belland*, 1998 ABQB 1095 (Alta. Q.B.) at para. 28, the court recognized that there is authority for the proposition that allegations of fraud are sufficient to satisfy a prejudgment attachment because the court could then conclude that the defendant is more likely to deal with his exigible property to the plaintiff's prejudice. However, as this case involved prejudgment attachment, there was no requirement to find a strong *prima facie* case.

29 In *Touch Nine Communications Inc. v. Beta IV Investment Group Inc.*, [1998] B.C.J. No. 2637 (B.C. S.C. [In Chambers]), there was no evidence of a risk of dissipation of assets but a strong *prima facie* case for fraud. The court inferred a real risk that assets in British Columbia would be removed or dissipated. The defendant had not filed any material outlining its financial status and made no assertion that it had assets in British Columbia sufficient to satisfy any judgment. There was also no evidence of dissipation of assets in *Insurance Corp. of British Columbia v. Leland*, [1999] B.C.J. No. 2073 (B.C. S.C.), but the court was prepared to give some measure of relief to someone who had been defrauded or stolen from. Risk of removal or alienation of assets was established merely by evidence strongly suggesting fraudulent criminal activity. In *Swamy v. Tham Demolition Ltd.* (2000), 81 B.C.L.R. (3d) 293 (B.C. S.C. [In Chambers]), the court recognized that a Mareva injunction could be granted even though there was no real risk of disposal of assets, but declined to grant an injunction on the facts of the case.

30 This matter has been considered in Ontario where Cullity J. in *663309 Ontario Inc. v. Bauman* (2000), 190 D.L.R. (4th) 491 (Ont. S.C.J.) carefully considered the present state of the law and concluded that *Mills* was to be restricted to its facts within fraudulent conveyances as decided in *Chitel v. Rothbart* (1982), 36 O.R. (2d) 124 (Ont. H.C.). He was, however, not completely confident in his interpretation of *Chitel*, especially because of a comment by Weiler J.A. in *R. v. Consolidated Fastfrate Transport Inc.* (1995), 24 O.R. (3d) 564 (Ont. C.A.), at 600 that an injunction could be obtained even where there is no evidence of any intention to deal with the asset enjoined in any improper manner. Although Cullity J. did not find that a fraud had been established against the plaintiffs on the facts of that case, he said 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.

31 I agree with Bauman J. in *Touch Nine Communications* that if a strong *prima facie* case of fraud against the plaintiffs has been established, an inference can be made that there is a risk that assets in British Columbia will be removed or dissipated.

CONCLUSION

32 The plaintiff has established a strong *prima facie* case of theft and fraud. The defendant has failed to meaningfully respond to the plaintiff's evidence that was supported by documentation and an accountant's analysis. The plaintiff has shown that the defendants have defrauded the plaintiffs of at least $40,486 over a two month period, more probably $315,644 over three years, and quite possibly $560,000. The amount established before the originating judge was $40,486. It is not within my discretion to determine that this amount was not significant enough to warrant a Mareva injunction without evidence of dissipation of assets. The originating judge obviously thought that it was. But, the case is even stronger now and there is no substantial defence or explanation offered. The magnitude of the shortfall is substantial. The defendants have been shown to have each benefited from the fraud that has been of long duration and involved substantial concealment and dishonesty. The inference can be drawn from the circumstances that there is a real risk of dissipation of assets.

33 None of the defendants have filed any material about their financial status despite an order to do so. None have asserted that there are sufficient assets in British Columbia to satisfy a judgment. No prejudice has been shown to the defendants as Mr. Barclay has been given a liberal monthly allowance for living expenses and legal fees and other details have been adjusted to allow for normal activity. The assets that were disclosed on December 5, 2001 are relatively liquid.

34 The balance of convenience favours the plaintiffs. The injunction shall continue on the same terms as set out on March 28, 2001 so that a monthly allowance of $7,500 to Mr. Barclay shall continue. The defendants are at liberty to apply for further release of funds for legal or other ordinary expenses. They are also at liberty to apply for variation of this order upon the condition that the affidavits of assets have been provided beforehand. The undertaking of the plaintiffs as to damages will continue and shall form part of this order. The plaintiffs are entitled to costs of this application and costs for March 28, 2001 on the scale of 3, payable in any event of the cause.

Application dismissed.

Footnotes

* A corrigendum was issued by the court on September 2nd, 2002, and has been incorporated herein.

TAB 14

2022 ONSC 628
Ontario Superior Court of Justice [Commercial List]

10390160 Canada Ltd et al. v. Casey et al.

2022 CarswellOnt 1116, 2022 ONSC 628

10390160 CANADA LTD., 1139950 B.C. LTD., 2545142 ONTARIO INC., 2659154 ONTARIO INC., 2576725 ONTARIO INC., 2593273 ONTARIO INC., 5001047 ONTARIO INC., AVONDA REALTY AND DEVELOPMENT INC., BEISTONE INC., CAN SUCCEED INTERNATIONAL INVESTMENT CORP., LIZ INVESTMENT INC., LIQIN WANG, ZHZH HOLDING LTD., BV TOWER INVESTMENT LIMITED PARTNERSHIP and BV TOWER INVESTMENT LIMITED PARTNERSHIP II (Plaintiffs) and DANIEL CASEY, HOMELIFE NEW WORLD REALTY INC., SIMON YEUNG, SAM YEUNG, CRESFORD (YORKVILLE) GP INC., CRESFORD HOLDINGS LTD., CRESFORD DEVELOPMENTS, 2611029 ONTARIO INC., 154290 ONTARIO LTD.

CRESFORD (ROSEDALE) DEVELOPMENTS INC., 9615334 CANADA INC., YSL RESIDENCE INC., CRESFORD CAPITAL CORPORATION, YG LIMITED PARTNERSHIP, VOX (YONGE WELLESLEY LTD.), 50 CHARLES STREET LIMITED, 50 CHARLES STREET LIMITED PARTNERSHIP, 42 CHARLES STREET LIMITED, 42 CHARLES STREET LIMITED PARTNERSHIP, 1000 BAY STREET LIMITED, 1000 BAY STREET LIMITED PARTNERSHIP, ROSEDALE DEVELOPMENTS INC., 59 HAYDEN STREET LIMITED, 62-64 CHARLES STREET LIMITED, CRESFORD EQUITIES LIMITED, CRESFORD FINANCIAL LIMITED, CRESPO, EAST DOWNTOWN REDEVELOPMENT PARTNERSHIP, 48 YONGE STREET INC. CRESBUILD.CRESFORD REAL ESTATE CORPORTATION

OAKLEAF CONSULTING LTD., OAK BRANCH TRUST, LONG BRANCH TRUST, 2103546 ONTARIO LIMITED, RED BIRCH PROPERTIES INC., WHITE BIRCH PROPERTIES INC., 2402193 ONTARIO LIMITED, 1594290 ONTARIO LIMITED, and CRESFORD EQUITY INC. (Defendants)

ERIC YIN WING CHAN, LINDA YEE HAN CHAN, 2638006 ONTARIO INC., 2504670 ONTARIO INC., PINE POINT INTERNATIONAL INC., 2595683 ONTARIO INC., and NEW WORLD INVESTMENTS 1988 LIMITED (Plaintiffs) and DANIEL CASEY, 154290 ONTARIO LTD., CRESFORD (ROSEDALE) DEVELOPMENTS INC., CRESFORD (YORKVILLE) GP INC., CRESFORD DEVELOPMENTS, 9615334 CANADA INC., YSL RESIDENCE INC., CRESFORD CAPITAL CORPORATION, YG LIMITED PARTNERSHIP, 48 YONGE STREET INC., VOX (YONGE WELLESLEY LTD.), 50 CHARLES STREET LIMITED, 50 CHARLES STREET LIMITED PARTNERSHIP, 42 CHARLES STREET LIMITED, 42 CHARLES STREET LIMITED PARTNERSHIP, 1000 BAY STREET LIMITED, 1000 BAY STREET LIMITED PARTNERSHIP, 62-64 CHARLES STREET LIMITED, ROSEDALE DEVELOPMENTS INC., 59 HAYDEN STREET LIMITED, CRESFORD EQUITIES LIMITED, CRESFORD FINANCIAL LIMITED, CRESPO, CRESBUILD, CRESFORD REAL ESTATE CORPORATION, CRESFORD EQUITY INC., 2103546 ONTARIO LIMITED, OAKLEAF CONSULTING LTD., RED BIRCH PROPERTIES INC., WHITE BIRCH PROPERTIES INC., 1594290 ONTARIO LIMITED, EAST DOWNTOWN REDEVELOPMENT PARTNERSHIP, LONG BRANCH TRUST, OAK BRANCH TRUST, 2492193 ONTARIO LIMITED and 2611029 ONTARIO INC. (Defendants)

Penny J.

Heard: December 10, 2021
Judgment: January 28, 2022
Docket: CV-21-00671326-00CL, CV-21-00664534-0000

Counsel: John J. Adair, Robert Stellick, for Plaintiffs in Action No.: CV-21-00671326-00CL
Shara N. Roy, Aaron I. Grossma, Sahar Talebi, for Plaintiffs in Action No.: CV-21-00664534
Jeffrey Larry, Daniel Rosenbluth, for Defendants in both Actions

***Penny J.*:**

1 The Plaintiffs in these two actions are investors in units of a limited partnership whose purpose was the development of a luxury condominium project at 33 Yorkville Avenue in Toronto.

2 In this motion, the plaintiffs seek a *Mareva* injunction against Daniel Casey, Oakleaf Consulting Ltd., Cresford Rosedale Developments Inc. ("Rosedale Developments"), East Downtown Redevelopment Partnership ("EDRP"), Long Branch Trust and Oak Branch Trust (these are collectively the "Mareva defendants"). This motion was first made on notice to the defendants on May 3, 2021, three months after the action was commenced.

3 To obtain a *Mareva* injunction, the moving party must establish:

> (1) a strong *prima facie* case, meaning, in this context, that the plaintiffs are clearly right, or even that they are almost certain to win;
>
> (2) the defendant has assets in the jurisdiction; [1]
>
> (3) there is a serious risk that the defendant will remove or dissipate its assets before judgment can be obtained;
>
> (4) the plaintiff will suffer irreparable harm if the injunction is not granted (in the context of a *Mareva* injunction this is usually the same as item 3 above, in the sense that the inability to enforce any judgment obtained at trial due to the removal or dissipation of assets *is* the irreparable harm); and,
>
> (5) the balance of convenience favours granting the injunction, in the sense that the harm suffered if the injunction is not granted will exceed the harm that will be suffered if it is.

The moving party must also give a meaningful undertaking as to damages. See e.g. *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (C.A.); *Borelli v. Chan*, 2017 ONSC 1815, 137 O.R. (3d) 382 (Div. Ct.), at paras. 17-20, 60.

4 The main issues in dispute on this motion are the existence of a strong *prima facie* case and risk of dissipation. For the reasons that follow, I am not satisfied that either threshold has been met in the circumstances. The motion is dismissed.

Background

5 What has been referred to as the "Cresford group" or just "Cresford" consists of the corporate defendants other than Homelife (which is unrelated).

6 As of 2018, Cresford had five active condominium projects under way in Toronto:

i. Clover Project: a two-tower development owned by the Clover on Yonge Inc.;

ii. Halo Project: a 39-storey tower owned by 480 Yonge Street Inc.;

iii. Yorkville Project: a two-tower development owned by 33 Yorkville Residences Inc.;

iv. YSL Project (sometimes "YG"): owned by 9615334 Canada Inc. and YSL Residences Inc.; and

v. CASA III: a condominium project owned by 50 Charles Street Limited.

7 Each project was owned by a separate special purpose legal entity which held legal title to the land and took steps to develop and build the project. The special-purpose entity was the general partner of a limited partnership which beneficially owned the project.

8 The directing mind of Cresford is Mr. Casey. He is the president and sole director of each of the Cresford companies, with control over the decisions and affairs of each company. He is also the sole trustee of the two Trusts, the beneficiaries of which are Casey's wife and children.

9 Corporate beneficial ownership and control of the Cresford group resides with Oakleaf and the two Trusts. Oakleaf owns (through a holding company) 100% of the shares of the key holding and operating companies within the Cresford group. The Trusts own 100% of Oakleaf.

10 The key operational companies (in addition to each project company) were EDRP and Rosedale Developments. EDRP was the manager of the Cresford companies. Its function was to manage the projects, pay employees, receive management fees, and perform related functions. Rosedale was the financial arm and financial clearing house for the Cresford group.

11 The plaintiffs' claims are for breach of contract, breach of fiduciary duty, knowing assistance in a breach of trust, negligent misrepresentation and unjust enrichment.

12 For the purposes of this motion, the plaintiffs focus on the following core allegations:

- All Cresford companies were completely dominated and controlled by Casey.

- Casey caused the Cresford companies to engage in a "shell game" in which money was wrongfully moved from one project to another on an as-needed basis, contrary to the provisions of the limited partnership agreements and alleged representations made, and in breach of the defendants' duties to the plaintiffs/unitholders. All of the projects are now under some form of receivership or court supervision, including the Yorkville project. As a result, the unitholders' investment in the Yorkville project appears to be entirely without value.

- Casey operated the Cresford group in complete and total disregard for the corporations' separate legal personality and his and his companies' fiduciary duties. This course of conduct was for the benefit of the three entities that own Cresford's interest in the projects — Oakleaf and the two Trusts.

- Finally, Casey and the entities he controls have engaged in asset dissipation in order to defeat his creditors.

13 The *Mareva* defendants take the position that, with the possible exception of the claim against Casey on his personal guarantees, no strong *prima facie* case has been established against any of the remaining defendants. They further take the position that there is no evidence of removal or dissipation of assets with intent to defeat judgment creditors (or at all).

The Main Issues

14 The two main issues in dispute at the hearing of the motion were:

(1) whether a strong *prima facie* case has been made out against any *Mareva* defendant (other than Casey) and;

(2) whether intentional acts of dissipation have been established sufficient to warrant granting the extraordinary remedy of a *Mareva* injunction.

Analysis

Strong Prima Facie Case

15 The first issue arises from the requirement, in order to grant the extraordinary remedy of a *Mareva* injunction, that the moving party satisfy the court that it has a strong *prima facie* case. Strong *prima facie* case means, in this context, that the plaintiff must show that it is "clearly right" in its allegations made against the responding party in the action or that it is "almost certain to succeed at trial" in respect of those allegations: SLMsoft.Com Inc. v. Rampart Securities Inc. (Bankruptcy), 2004 CanLII 6329 (Ont. S.C.) at para. 14, leave to appeal refused (2005), 78 O.R. (3d) 521 (Div. Ct.).

16 The plaintiffs advance basically two arguments in support of their claim that their investments in the Yorkville project were wrongfully diverted to other purposes: a) a number of intercompany transfers appearing in Cresford ledgers and bank statements; and, b) the findings of this Court in receivership proceedings involving the Yorkville and YSL projects.

Intercompany Transfers

17 At the heart of the plaintiffs' allegations is the assertion that Cresford improperly caused money invested by the plaintiffs in the Yorkville project to be diverted to other projects in an ultimately unsuccessful effort to keep those other projects afloat when Cresford ran into financial difficulties.

18 The plaintiffs acknowledge that, prior to receiving disclosure of Cresford's financial records in the course of this motion, their only evidence with respect to intercompany transfers came from Cresford's former president, Maria Athanasoulis (who, the plaintiffs concede, was not particularly involved in the companies' financial affairs).

19 More damaging to the reliability and credibility of Ms. Athanasoulis' evidence than her admitted lack of familiarity with Cresford's financial affairs, however, are the further revelations that, in 2019 while employed as Cresford's president, Athanasoulis was working with a third party investor group on a potential acquisition of Cresford's YSL project. Athanasoulis resigned from Cresford in January 2020 at a time when those negotiations were ongoing. Immediately after Athanasoulis' resignation, two of Cresford's key secured lenders received a letter purportedly authored and signed by Cresford's CFO, David Mann. Each letter contained allegations of wrongdoing against Cresford, including allegations of "financial fraud" and a "fraudulent plan". Athanasoulis commenced an action against Cresford shortly thereafter, alleging extensive improprieties against the Cresford defendants. Cresford investigated the origins of the two letters purportedly from Mr. Mann who denied having written or sent them. Cresford determined that Athanasoulis was the real author of these letters. In the face of the evidence uncovered by this investigation, Athanasoulis admitted in her cross-examination on this motion that she had surreptitiously authored and sent these two letters, forging Mann's signature in the process.

20 In any event, one transaction was originally identified in Athanasoulis' evidence — a journal entry where $2 million was transferred from the Yorkville project to Rosedale and then on to the YSL project. According to Athanasoulis, "there would be no legitimate business reason for that transfer of $2 million from 33 Yorkville to YSL." In Cresford's responding affidavit, Mann testified there was nothing improper about this transfer and that it represented repayment of an intercompany loan Rosedale Developments had advanced to the Yorkville project at an earlier stage of the development when full financing was not yet in place.

21 This transaction was then subject to additional examination by independent accounting experts. Other than an arithmetic error in calculating the total amount owed, the expert evidence confirmed that funds substantially in excess of $2 million were owed by the Yorkville project to Rosedale Developments at the time the $2 million transfer was made.

22 In their factum, however, and with the benefit of production of additional financial records following the cross examinations, the plaintiffs now argue that there are "dozens" of "impugned" intercompany transfers. These are set out in a chart at para. 31 of the plaintiffs' factum, listing 11 intercompany transfers identified from the Yorkville project's ledger. Unfortunately, the record is devoid of further evidence on these transfers beyond the plaintiffs' lay attempt at matching up certain entries taken from the Yorkville project's ledgers and Rosedale Developments' bank statements between April 2018 and January 2020. What these entries show is that the Yorkville project made 11 transfers to Rosedale Developments and that Rosedale Developments, soon after, then made transfers to other Cresford projects in sometimes similar amounts.

23 Cresford relies on Mann's evidence generally, to the effect that these were all repayments of loans advanced by Rosedale Developments at an earlier stage of the development, and that there is no contrary evidence. There is no challenge to this evidence, as far as it goes.

24 The plaintiffs respond to this, however, by arguing that there is also no evidence documenting any of these "loans" or how Cresford knew or was able to confirm specifically how much was owed to whom when the transfers were made from the Yorkville project's account to Rosedale Developments. This is why the plaintiffs refer to these transfers as Cresford's "shell game" which wrongfully diverted funds away from the Yorkville project in violation of contractual and other alleged duties the plaintiffs plead were owed to them by the *Mareva* defendants. Indeed, the plaintiffs go so far as to say, in their factum, that the existence of a legitimate debt to be repaid is "largely irrelevant," and "what is important about Cresford's 'loan theory' is that Cresford did no contemporaneous analysis" to determine the existence of the payable at the time of the transfer.

25 There are several problems with this argument. First, the allegation of the absence of contemporary analysis pre-transfer is effectively speculation. This allegation was not put to Mann or any other witness. We simply do not know what, if any, transaction by transaction analysis was done or, if not, why not.

26 Second, it is not clear why this would matter. If, as the available evidence seems to suggest, there was more intercompany debt owed to Rosedale Developments than the amount of any transfer out of the Yorkville project at any given time, what difference would the lack of specific contemporary analysis actually make? And, to the extent there is a suggestion that the transfers exceeded the amount of any legitimate intercompany loans, that has not, in any event, been proved to the high threshold required on a *Mareva* injunction.

27 The elevated threshold for the merits test in a *Mareva* injunction matters here. The absence of loan documentation and any apparent lack of due diligence and monitoring and recording about the state of intercompany obligations, together with the suggestion that these transfers, and the financial state of Cresford's projects generally, were kept, for example, from its secured lenders, raises strong suspicions, even perhaps a triable issue about the propriety of these transfers. However, the evidence and the manner in which it has come before the court does not permit the conclusion that the plaintiffs' claims, with the possible exception of the claims on Casey's personal guarantees, are "almost certain to succeed".

28 Finally, it must be acknowledged that the entities with which the plaintiffs had direct contact and contractual ties are the 33 Yorkville LP and its general partner. These entities are not *Mareva* defendants. The *Mareva* defendants (leaving aside Casey and his personal guarantees) are all "upstream" entities with which the plaintiffs had no contact and, at the time of their investments, effectively no knowledge.

29 The plaintiffs' theory of liability against these upstream entities in particular, in negligent misstatement, breach of fiduciary duty, knowing assistance and unjust enrichment, all appear to stem from Casey's overall control of the Cresford group of companies, including the two Trusts. The issues of negligent misstatement and unjust enrichment were not really the subject of evidence on this motion at all. The focus seems to be on the allegations of knowing assistance in a breach of trust.

30 The leading authority on knowing assistance claims against related parties is van Rensburg J.A.'s dissenting reasons in DBDC Spadina Ltd. v. Walton, 2018 ONCA 60, 419 D.L.R. (4th) 409, rev'd 2019 SCC 30, [2019] 2 S.C.R. 530, which were endorsed by a unanimous Supreme Court of Canada on appeal from the majority judgment of the Court of Appeal.

31 Justice van Rensburg would have dismissed the related party claims in that case because the "participation" element had not been established. Noting that the authorities require "specific harmful conduct" by the stranger to the trust, van Rensburg J.A. explained that the plaintiffs did not point to any independent conduct by the related companies establishing their "participation" in the principal's breach of fiduciary duty except to repeat the same allegations made against the principal. These related corporations under the control of the principal may have "participated" in the general sense in the fraudulent scheme when money was moved to and from their accounts, and been "conduits" or "been used by [Walton] in the overall fraud", but "that does not equate to their participation in the dishonest breach of fiduciary duty": see *DBDC Spadina*, at paras. 217-21.

32 *DBDC Spadina* stands for the proposition that "something more" is required for a knowing assistance claim beyond the mere receipt of funds or being used as a conduit in the overall breach of trust. The mere fact that Cresford entities may have been subject to the same directing mind, it seems to me therefore, is, standing alone, insufficient to establish an independent basis for the claim of knowing assistance in a breach of trust. In this case, as noted above, there is insufficient evidence to establish, to the standard required for a *Mareva* injunction, a basis for concluding the plaintiffs are almost certain to succeed in their claims against the *Mareva* defendants (other than Casey on his personal guarantees) on this basis as well.

Findings of the Court in Other Proceedings

33 The plaintiffs rely on certain findings in BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.,2020 ONSC 1953, 78 C.B.R. (6th) 299, the March 30, 2020 decision of Justice Koehnen appointing a receiver over Cresford's Clover, Halo and Yorkville projects. The test on an application for the appointment of a receiver is whether it is "just and convenient" to do so.

34 After becoming aware of the Athanasoulis claim against Cresford, the secured creditors of these projects retained PwC to conduct an investigation. PwC reported that it had found evidence that significant cost overruns had been concealed from the creditors, contrary to the financial performance and management covenants contained in the loan documents. This consisted of: a) instead of injecting its own funds, Cresford borrowed money from a third party and used that loan as "equity" in the project; b) the projects maintained two sets of books — the first set, used to support advances under the loans, showing costs that were consistent with the construction budgets which had been presented to the lenders, and a second set recording increases over the approved construction budgets which were not shown to the lenders; and, c) to help hide the increased costs, Cresford sold units to suppliers at substantial discounts to their listing prices.

35 Despite having more than three weeks to respond to the allegations of improper financial practices reported by PwC, the debtors failed to do so, remaining "completely silent about the allegations" at the return of the application. In these circumstances, Koehnen J. concluded "I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management".

36 The plaintiffs also rely on the findings of Justice Dunphy in YG Limited Partnership and YSL Residences (Re), 2021 ONSC 4178, 93 C.B.R. (6th) 109. In that case, YSL sought approval of a proposal in bankruptcy which was opposed by limited partnership unit holders in the YSL project. The issue in that case was whether the proposal was reasonable and calculated to benefit the general body of creditors under s. 59(2) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), and whether the proposal met the common law requirement of having been made in good faith. Justice Dunphy rejected YSL's proposal in bankruptcy, finding:

- The YSL general partner was in breach of its fiduciary duties to the limited partnership by advancing a bankruptcy proposal that would involve a breach of the YSL limited partnership agreement and see substantial payments to Cresford in advance of any payments to the unit holders, i.e., payment of $38 million to non-arm's length parties related to the YSL general partner.

- The YSL general partner tried to keep relevant information from the YSL LP investors and was looking for a solution, not to meet its obligations to the partnership but, rather, "to secure the optimal outcome" for the Cresford group of companies generally, such that "good faith took a back seat to self-interest".

- Intercompany advances between the YSL project and various other Cresford companies recorded on the general ledger of the YSL limited partnership were "sporadic," "non-interest bearing without any defined term or maturity date," and were not evidenced by any loan documents. In the circumstances, for the purposes of any proposal under the BIA, those transfers had to be considered contributions of equity by the Cresford companies, not debt.

37 In both cases, the legal framework and the test for granting relief were different. The allegations, facts and circumstances were also different. Koehnen J.'s decision appointing a receiver involved allegations of concealing significant cost overruns from

the secured creditors. In this case, the plaintiffs do not say that the allegations vis-à-vis the secured lenders in the receivership case also involved breaches of obligations owed to the unit holders. Rather, the unit holders' allegation is that their investment dollars were diverted to other entities and projects in contravention of obligations owed to them. There was no evidence about this before Koehnen J. Further and in any event, it is clear from Koehnen J.'s reasons that the findings he made were without the benefit of any evidence from Cresford responding to PwC's investigation report.

38 Dunphy J.'s decision involved a different project altogether and different investors in limited partnership units. The breaches of duty found against the general partner of YSL arose out of the nature of the proposals made by YSL in its NOI proceedings which, Dunphy J. found, would, if approved, have involved a breach of the limited partnership agreement. Dunphy's J.'s findings about intercompany transfers were not that the transfers themselves were improper (that issue was not put before him) but that these alleged obligations between YSL and Cresford related parties ought not to take precedence over *bona fide*, arm's-length equity holders in terms of recoveries under the proposal. Dunphy J. essentially sent YSL back to the drawing board to come up with a better, more equitable proposal. That, I understand, was done and a revised proposal was made addressing Dunphy J.'s concerns. This proposal was approved by the court on July 16, 2021.

39 Read and considered in proper context, the findings of the court in these other proceedings do not constitute strong *prima facie* evidence that Cresford improperly diverted investor funds from the Yorkville project to other projects and Cresford entities for improper purposes. As with the earlier evidence, these decisions raise suspicions and may contribute to there being a triable issue but do not rise to the level necessary to support the stringent merits test for a *Mareva* injunction.

Conclusion on Strong Prima Facie Case

40 In summary, the central issue in this case will be whether Cresford's financial collapse and the resulting loss of the unit holders' equity in the Yorkville project, was caused by breaches of contractual or other duties allegedly owed by Cresford to the unit holders. At the heart of the alleged wrongful conduct is the so-called "shell game" engaged in by Cresford through the intercompany transfers. Were these transfers improper or justified? Answering that question will involve careful and detailed forensic analysis of the transfers, the sources and destinations of the funds and whose money was being transferred, when, where and why.

41 Unfortunately, that analysis has not been done, even on a preliminary basis for the purposes of this motion. This is because, as explained above, the scope of these allegedly improper transfers only came out in the plaintiffs' factum. There is essentially no evidence (that is, first hand fact or expert forensic evidence) about these transfers apart from a listing of a selection of entries from various ledgers and bank statements which have been produced in the context of this motion. For the same reason, there has been no cross-examination about the circumstances and purpose of these now-impugned transactions. While it may be said that these intercompany transactions raise suspicions warranting further investigation, and even a triable issue, the high threshold required for the grant of a *Mareva* injunction has not been reached.

Intention to Remove or Dissipate Assets to Defeat Judgment

42 Even if I were wrong about the merits test and was prepared to accept that a strong *prima facie* case of improper diversion of investor funds out of the Yorkville project had been made out, there is a more fundamental impediment to the grant of a *Mareva* injunction in this case.

43 The *sine qua non* of the *Mareva* injunction is the requirement that there be evidence of an intention to put assets beyond the reach of the court for the purpose of defeating any judgment that might ultimately be granted in the plaintiff's claim. This requirement has been variously described in decisions of Canadian courts commencing with Chitel v. Rothbart(1982), 39 O.R. (2d) 513 (C.A.) and Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2. As stated by Estey, J. in Aetna Financial,at pp. 24 and 27:

> 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.

. . . . .

In summary, the Ontario Court of Appeal recognized *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*...

[Emphasis added.]

44 The Court of Appeal has explained that "the purpose of the defendant is the decisive question. In other words, it is only if the purpose of the defendant when removing assets from the jurisdiction or the dissipating or disposing of them is for the purpose of avoiding judgment that a *Mareva* injunction should be issued": *R. v.* Fastfrate(1995), 24 O.R. (3d) 564 (C.A.), applied in RBC Dexia Investor Services Trust v. Goran Capital Inc., 2016 ONSC 1138, at para. 11(b).

45 While the risk of dissipation can, like other facts, be inferred from the circumstances of the impugned conduct, the overriding consideration is always whether the defendants are dealing with their assets in such a way as to put them out of the reach of the plaintiffs if the claim is successful: Sibley & Associates LP v. Ross, 2011 ONSC 2951, 106 O.R. (3d) 494, at paras. 62-64; HZC Capital Inc. v. Lee, 2019 ONSC 4622, at para. 83.

46 The plaintiffs rely on the following circumstances in support of the necessary proof of dissipation that must be shown (or inferred):

(a) Cresford's attempts to "strip" assets out of the projects through court supervised receivership /insolvency proceedings;

(b) Cresford's failure to disclose that it will receive about $5 million from the sale of YSL assets under the revised and now approved proposal in the YSL NOI proceedings;

(c) the overall context of the alleged "shell game" in which Cresford moved money about without regard to the legal separation of its various corporate entities;

(d) the purchase of a house in Toronto for Casey's son; and

(e) the transfer of two boats and two parcels of Ontario land owned by Casey personally to a corporation owned or controlled by him.

47 I am unable to agree that these allegations amount to the necessary proof of an intention to place assets beyond the reach of the court.

48 The fact that Cresford tried to bargain for certain benefits in the context of receivership/insolvency proceedings, and was unsuccessful is doing so, cannot be regarded as evidence, circumstantial or otherwise, of an intention to place assets beyond the reach of the court. This argument stands the "dissipation" requirement on its head; the court had and asserted jurisdiction over the very assets in question. There was nothing secret about what Cresford was doing. The court was not prepared to countenance any "sweet" deals for Cresford and rejected Cresford's attempts to obtain such benefits.

49 The plaintiffs acknowledge that the $5 million allocation to Cresford under the YSL proposal is not being paid to Cresford at all but is earmarked for payment to certain YSL creditors — specifically to third-party sureties for that project. The sureties are a group of arm's-length third party creditors which have crystallized claims in relation to bonds and insurance policies they issued to secure the deposits made by purchasers of condominium units. Those claims have been identified and described in the various Receiver's reports filed with the court. The total amount of these claims is estimated to be in excess of $35 million.

50 The sureties' claims include a claim under an indemnity agreement with Rosedale Developments, Cresford Holdings Limited, Casey, and 33 Yorkville Residences Inc. Other than 33 Yorkville Residences Inc., which is in receivership, each of those indemnitors is a defendant to this action.

51 The evidence is that the sureties are bona fide arm's-length creditors with clear entitlements under their indemnity agreements. The sureties tendered an affidavit on this motion from Terry Michalakos. Mr. Michalakos confirmed that Cresford agreed from the outset to assign its entire interest in YSL proceeds to the sureties in order to settle the sureties' claims under the indemnity agreement. The sureties will, of course, be prejudiced if the assignment of these proceeds is restrained as a result of this motion.

52 I am unable to regard payment in reduction of a crystalized debt and indemnity as a dissipation of Cresford assets or as giving rise to an inference that Cresford is trying to place assets beyond the reach of the court.

53 I have already reviewed the evidence concerning the alleged "shell game". The problem with the plaintiffs' argument in the context of the dissipation requirement is that, even if it were true, there is absolutely no evidence that any of these transfers involved taking funds out of the jurisdiction or otherwise dissipating assets with the intention of defeating future judgment creditors. The evidence is, so far as it goes, that these payments were made in an effort to keep various other Cresford projects afloat.

54 The Yorkville project is in receivership. PwC is the court-appointed receiver. PwC has filed reports with the court. There is no evidence that PwC has ever come across evidence that Cresford was stealing investors' money from the Yorkville project. Indeed, counsel for the plaintiffs specifically wrote to counsel for PwC to ask about this very issue. The response, obviously qualified by the scope of PwC's mandate, was that no transactions were identified that warranted further investigation. The relevant passage of the response states:

> Investigation of Payments: The Receiver conducted an initial review of the 33 Yorkville cost ledgers. No transactions were identified by the Receiver in the course of that review that, in the Receiver's view in the context of the receivership and in light of the Receiver's mandate and directions received from creditors, warranted further investigations. No specific investigation was made of Rosedale Developments Inc., which is not subject to the receivership.

55 The necessarily qualified nature of this response is by no means a complete defence to the plaintiffs' allegations. However, the fact that an officer of the court, appointed to report to the court on the financial affairs of the Yorkville project, has found no transactions warranting further investigation, is not supportive of the plaintiffs' claims either to a strong *prima facie* case or that assets have been improperly placed beyond the reach of the court.

56 And finally, the evidence that Casey caused a home to be purchased in Toronto for his son, or that Casey transferred relatively modest assets to a company controlled by him is, on its face, not evidence of dissipation. These are and remain assets in the jurisdiction. They are known. If, at the end of the day, it is proved there were transfers for no or inadequate consideration, they are in any event liable to be set aside. As noted earlier, the core purpose of the *Mareva* injunction is to protect against defendants who intend to remove assets from the jurisdiction or otherwise render assets unavailable for execution. Here, the transfers complained of largely relate to the movement of funds between defendants. They do not, in any event, render the assets unavailable for execution if the plaintiffs are successful at trial.

Conclusion

57 For these reasons, the motion for a *Mareva* injunction is dismissed.

58 I feel compelled to say a word about document production — in particular, financial and other records relating to transfers by, to, or between any of the party defendants. As noted earlier, this case will in large measure turn on an assessment of the source and destination of the Yorkville project's funds and whose money was being transferred, when, where and why. This will require careful and detailed forensic accounting evidence about the transfers in question. It is obvious, therefore, that full and immediate document production of all relevant transfers involving all the defendants will be critical to this exercise.

59 There has been a suggestion that the defendants have been less than forthright in producing, or have refused to produce, financial records of some of the defendant entities. I do not know whether that is true; the question was not before me on this motion.

60 What I want to emphasize is that the quality and extent of the evidence has been a material factor in my disposition of this motion. The quality and extent of the evidence, in particular documentary evidence, will continue to be highly material as this matter progresses toward trial.

61 I say all this to make one simple point. Prompt and comprehensive disclosure of the defendants' financial records is critically important. The defendants have virtually all the information relevant to this aspect of the case; the plaintiffs have almost none. Obviously, a party cannot produce a document that does not exist or which is not within the party's power, possession or control. Short of that, however, prompt and complete disclosure of all relevant financial information must be the operating principle at this stage of the proceedings. It is to be hoped that issues concerning document production in this case will not have to come before the court again.

Costs

62 The parties have agreed that the successful party will be awarded all inclusive, partial indemnity costs of $94,497.62. It is so ordered.

Footnotes

1 In *Borelli v. Chan*, 2017 ONSC 1815, a majority of the Divisional Court held that in certain circumstances, this requirement could be waived. This is not an issue here.

TAB 15

2022 ONSC 3466
Ontario Superior Court of Justice

Neville v. Sovereign Management Group Corp.

2022 CarswellOnt 8757, 2022 ONSC 3466

RICHARD NEIL NEVILLE, SACHA PLOTNIKOW, NORCANA SERVICES LTD. and BRIAN MACKENZIE DUNN (Plaintiffs) and SOVEREIGN MANAGEMENT GROUP, CORP., SOVEREIGN HOLDING GROUP INC., SOVEREIGN MARKETING ENTERPRISES INC., NEXTGEN ASSET MANAGEMENT INC., EUROFIRST TRADING, LTD., RONALD KOPMAN, IRA HOWARD MORRIS, and JOSEPH MERRILL (Defendants)

Perell J.

Heard: June 8, 2022
Judgment: June 8, 2022
Docket: CV-22-00681526-0000

Counsel: John J. Pirie, Michael Nowina, Ben Sakamoto, for Plaintiffs
Dihim Emami, for Ontario Securities Commission
Ira Howard Morris, Defendant, for himself

***Perell J.*:**

A. Introduction

1 The Plaintiffs Richard Neil Neville, Sacha Plotnikow, Brian MacKenzie Dunn, all of whom reside in Fort St. John, British Columbia, and Norcana Services Ltd., which is the wholly-owned corporation of Mr. Plotnikow, bring a motion — on notice - for a *Mareva* injunction against the Defendants Joseph Merrill, Ronald Kopman, Ira Howard Morris, Sovereign Management Group Corp., Sovereign Holding Group Inc., Sovereign Marketing Enterprises Inc., Nextgen Asset Management Inc., and Eurofirst Trading Ltd.

2 The motion was served on all the Defendants save Mr. Merrill and Eurofirst Trading.

3 For the reasons that follow, the motion is granted on an *ex parte* basis as against Mr. Merrill and Eurofirst Trading and on an on-notice basis against the other Defendants.

B. Facts

4 On *February 25, 2016, Sovereign Management* was incorporated. Its registered address was 57 Millerdale Road, Richmond Hill. Its sole director is *Ira Morris*, whose address was also 57 Millerdale Road. (In 2022, the adult resident of 57 Millerdale Road advised a process server that he had purchased the property in July 2021 and the resident said he had no knowledge of the Defendants.)

5 On *December 18, 2017, Nextgen Asset Management* was incorporated. Its registered address was 57 Millerdale Road, Richmond Hill. Its sole director is Ira Morris, whose address was also 57 Millerdale Road.

6 On *July 28, 2021, Sovereign Marketing* was incorporated. Its registered address was 57 Millerdale Road, Richmond Hill. Its sole director is *Ronald Kopman*, whose address was also 57 Millerdale Road. The same day *Sovereign Holding* was incorporated. Its registered address was 100 King Street West, 2600, Toronto. Its sole director is Ira Morris and his address was

100 King Street West, 2600, Toronto. However, Sovereign Holding's address is false; 100 King Street West, 2600, Toronto is the address for the Canadian Investor Protection Fund.

7 The Defendants used the business names "Sovereign MEI" and "Sovereign Trust Metals". However, Canadian corporate searches have not revealed corporations with these names.

8 There is no record of Eurofirst Trading being an incorporated entity.

9 In April 2018, Brian Dunn met Joseph Merrill, who held himself out as a Senior Trading Strategist and Senior Commodity Strategist for Eurofirst Trading. This contact led to Mr. Dunn opening a SovereignPro trading account.

10 In December 2020, Brian Dunn introduced Sacha Plotnikow to Mr. Merrill. Mr. Plotnikow also opened a SovereignPro trading account.

11 In October 2021, Brian Dunn introduced Richard Neville to Mr. Merrill, and Mr. Neville also opened a SovereignPro trading account.

12 Mr. Merrill orally and with various online materials and documents represented that the plaintiffs' funds would be deposited in SovereignPro trading accounts and invested in options, futures, or forex. One of the defendants' websites "sovereignmei.com" states:

> Sovereign MEI is one of Canada's leading leveraged precious metals brokers, investing in Gold, Silver, Platinum and Palladium. Our customers, whether institutional or private, take advantage of our extensive, up-to-the-minute high quality information, research, and proprietary analysis. In such rapidly moving markets there is no room for error. This is why we are committed to giving all our customers our undivided attention every step of the way. We extend a highly personal service to every customer. This combination of service, technology, flexibility and experience makes our service second-to-none.

13 None of the plaintiffs signed any written agreements or completed written forms to create their SovereignPro accounts. Rather, they spoke with Mr. Merrill over the phone.

14 The plaintiffs transferred a total of $313,086.90 CAD and $522,749.30 USD to the defendants *between September 2018 and April 2022* to bank accounts for Sovereign Marketing, Sovereign Management, Sovereign Holdings, and Nextgen at branches in Richmond Hill, Ontario.

a. Mr. Neville transferred $407,000 USD to the defendants between October 14 and December 9, 2021. The most recent available report on his purported investments states that they have a liquidation value of $1,847,171.00 USD.

b. Mr. Plotnikow and Norcana transferred $191,995.50 CAD and $5,008 USD to the defendants between February 1, 2021 and March 31, 2022. The most recent available report on his purported investments states that they have a liquidation value of $1,012,929.60 USD.

c. Mr. Dunn transferred $121,091.40 CAD and $110,741.30 USD to the defendants between September 17, 2018 and April 18, 2022. The most recent available report on his purported investments states that they have a liquidation value of $714,740.00 USD.

15 In early *May 2022*, access to the Plaintiffs' account information was shut down and the Plaintiffs were unable to contact the Defendants. On May 3, 2022, the Plaintiffs noticed that the defendants' website was down. On *May 4, 2022*, they made numerous attempts to contact Mr. Merrill and were unsuccessful.

16 On *May 5, 2022*, Mr. Merrill advised each of the Plaintiffs by email that "[a]s you probably know the site(s) are down" and that "the servers are going through unexpected maintenance" that "should take a few days".

17 The Plaintiffs continued to attempt to contact Mr. Merrill and the corporate defendants by phone and email, but they were unsuccessful. Mr. Merrill's phone number and email address have now been disconnected or discontinued.

18 On *May 5, 2022*, Mr. Neville reported his concerns about recovering his funds to the RCMP.

19 On *May 13, 2022*, the Plaintiffs learned that the Ontario Securities Commission ("OSC") had charged Messrs. Morris and Kopman with fraud and trading securities without registration in *June 2021*.

20 The OSC alleges that individuals invested money with Morris and Kopman's companies under the promise that their funds would be used to trade options and foreign exchange instruments. The OSC further alleges that the funds were not used in accordance with the investors' understanding of their investment. Instead, most of the funds were diverted to the benefit of Morris, Kopman and their associates. The allegations against Morris and Kopman implicate Nextgen, Sovereign Management, and Sovereign Marketing.

21 The Plaintiffs sent a letter to the defendants (via email to Kopman, Morris and Merrill) demanding the return of their investments in their SovereignPro accounts. They have not received a response to this demand.

22 On *May 24, 2022*, the Plaintiffs commenced this action by Notice of Action.

23 On *June 6, 2022*, the Plaintiffs filed a Statement of Claim.

24 In this motion, the Plaintiffs seek a *Mareva* injunction freezing the Defendants' assets. In support of their request for a *Mareva* injunction, the Plaintiffs have provided an undertaking as to damages.

25 As noted above, all of the Defendants with the exceptions of Mr. Merrill and Eurofirst Trading were served with notice of the motion for a *Mareva* injunction. There is some reason to believe that neither of these Defendants exist or that they are the imposters of the other Defendants.

26 Mr. Morris appeared as a self-represented litigant at the return of the motion. Having filed no responding material, he was not in a position to oppose the *Mareva* injunction motion. He advised the court that he had sought but been unable to retain a lawyer.

27 I reviewed the proposed *Mareva* injunction Order with Mr. Morris.

28 I advised the parties that I was granting the motion subject to issuing formal Reasons for Decision and reviewing the form and content of the Order.

C. Discussion and Analysis

29 Section 101 of the Courts of Justice Act [1] provides the court with the jurisdiction to grant interlocutory injunctions including *Mareva* injunctions. Section 101 states:

> *Injunctions and receivers*
>
> 101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory Order may be granted or a receiver or receiver and manager may be appointed by an interlocutory Order, where it appears to a judge of the court to be just or convenient to do so.
>
> *Terms*
>
> (2) An Order under subsection (1) may include such terms as are considered just.

30 For a *Mareva* injunction, the plaintiff must satisfy the requirements for an interlocutory injunction as set out in in RJR–MacDonald Inc. v. Canada (Attorney General) [2] and typically a plaintiff must also establish: (1) a strong *prima facie* case; (2) irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial; (3) the balance of convenience favours granting an interlocutory injunction; (4) the defendant has assets in the jurisdiction; and (5) that there is a serious risk that the defendant will remove property or dissipate assets before judgment. [3] Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction.

31 The risk of removal or dissipation of assets can be established by inference and the defendant's prior fraudulent activities and improper conduct and the circumstances of the fraud itself including concealment, deception, evasion, and clandestine behaviour may support an inference that the defendant will remove or dispose of property. [4]

32 A *Mareva* injunction is an extraordinary remedy because as a general policy of civil procedure, a remedy that allows prejudgment execution against the defendant's assets is not favoured, but where there is a strong case that the defendant has defrauded the plaintiff the law's reluctance to allow prejudgment execution yields to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct. [5]

33 A strong *prima facie* case is one that will probably prevail at trial or is likely to succeed at trial. [6] In the immediate case, the Plaintiffs have established strong *prima facie* cases of fraud, conspiracy, breach of trust, breach of fiduciary duty, knowing assistance, and conversion.

a. To defraud a person is to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled. [7] The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages. [8]

b. The elements of a claim of civil conspiracy are: (1) two or more defendants make an agreement to injure the plaintiff; (2) the defendants: (a) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff, or (b) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (3) the defendants act in furtherance of their agreement to injure; and, (4) the plaintiff suffers damages as a result of the defendants' conduct. [9]

c. The elements of a claim for breach of trust are: (a) a trust relationship; and (b) a breach of the terms of the trust. [10]

d. The elements of a claim for breach of fiduciary duty are: (1) a fiduciary relationship: (2) a fiduciary duty; and (3) breach of the fiduciary duty. [11]

e. The elements of a claim for knowing assistance are: (1) the plaintiff is the beneficiary of a trust or fiduciary relationship; (2) the trustee or fiduciary fraudulently or dishonestly breaches his or her equitable duty; (3) the defendant has actual knowledge of the misconduct; and, (4) the defendant assists in the fraudulent or dishonest design. [12]

f. The elements of a claim for conversion are: (1) the plaintiff has an immediate right to possession of personal property; (2) the personal property is identifiable or specific; and (3) the defendant takes, uses, or destroys the goods or interferes with the plaintiff's right of possession. [13]

D. Analysis and Discussion

34 For all practical purposes, the motion proceeded as an *ex parte* application as against the Defendants Mr. Merrill and Eurofirst Trading, and as an unopposed motion as against the other Defendants.

35 In the circumstances of the immediate case, it is just and convenient to grant a *Mareva* injunction against all the defendants. The Defendants have not returned the Plaintiffs' money nor provided any information to suggest that the investment funds are currently secure or available. The Ontario Securities Commission is alleging serious misconduct. The uncontradicted evidence on the motion suggests that the Plaintiffs have been defrauded and that the Plaintiffs have strong *prima facie* cases for the pleaded causes of action. There are strong reasons to infer that assets will be dissipated if they have not already been dissipated. A review of the uncontested evidence shows that all the factors that would justify a *Mareva* injunction are satisfied in the immediate case.

E. Conclusion

36 For the above reasons, the motion for a *Mareva* injunction against all the Defendants is granted with costs to the Plaintiffs in the cause. I shall review the Order for issuance in accordance with these Reasons for Decision and with the changes to the draft Order discussed during the hearing of the motion.

Footnotes

1 R.S.O. 1990, c. 43.

2 [1994] 1 S.C.R. 311.

3 SFC Litigation Trust (Trustee of) v. Chan, 2017 ONSC 1815 (Div Ct.); United States of America v. Yemec(2005), 75 O.R. (3d) 52 (C.A.); *DeMenza v.* Richardson Greenshields of Canada Ltd.(1989), 74 O.R. (2d) 172 (Div. Ct.); Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2; Chitel v. Rothbart(1982), 39 O.R. (2d) 513 (C.A.).

4 Riar v Khudal,2020 ONSC 6238 at para 11; Electromart (Ontario) Inc v Fabianiak, 2016 ONSC 5266; Sibley & Associates LP v. Ross, 2011 ONSC 2951 at paras 63–64.

5 2092280 Ontario Inc v. Voralto Group Inc, 2018 ONSC 2305 (Div. Ct); SFC Litigation Trust (Trustee of) v. Chan, 2017 ONSC 1815 (Div Ct); Aetna Financial Services Ltd v. Feigelman, [1985] 1 SCR 2.

6 Modry v. Alberta Health Services, 2015 ABCA 265 at para. 37.

7 Scott v. Commissioner of Police for the Metropolis, [1974] 3 All E.R. 1032 at p. 1038 (H.L.).

8 Bruno Appliance and Furniture Inc. v. Hryniak, 2014 SCC 8; Parna v. G. & S. Properties Ltd.(1970), 15 D.L.R. (3d) 336 at p. 344 (S.C.C.); Derry v. Peek (1889), 14 App. Cas. 925 (H.L.).

9 Pro–Sys Consultants v. Microsoft, 2013 SCC 57; Dale v. Toronto Real Estate Board, 2012 ONSC 512; Normart Management Ltd. v. West Hill Redevelopment Co(1998), 37 O.R. (3d) 97 (C.A.); Knoch Estate v. John Picken Ltd.(1991), 4 O.R. (3d) 385 (C.A.); Hunt v. T & N plc, [1990] 2 S.C.R. 959; Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452.

10 OPFFA v. Paul Atkinson et al2018 ONSC 1207 at para. 92.

11 Galambos v. Perez, 2009 SCC 48 at para. 37; Hodgkinson v. Simms, [1994] 3 S.C.R. 377; Lac Minerals Ltd. v. International Corona Resources Ltd, [1989] 2 S.C.R. 574; Frame v. Smith, [1987] 2 S.C.R. 99; Canadian Aero Services Ltd. v. O'Malley, [1974] S.C.R. 592 at p. 616.

12 Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v Garcia, 2020 ONCA 412; Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805; Air Canada v. M & L Travel Ltd.[1993] 3 S.C.R. 787; Gold v. Rosenberg, [1997] 3 S.C.R. 767.

13 BMW Canada Inc. (Alphera Financial Services Canada) v. Mirzai,2018 ONSC 180 at para. 21; Kayani v Toronto–Dominion Bank, 2014 ONCA 862 at paras 27–28; UBS Wireless Services Inc. v. Inukshuk Wireless Partnership,[2008] O.J. No. 1704 (S.C.J.); 373409

Alberta Ltd. (Receiver of) v. Bank of Montreal, 2002 SCC 81; Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996] 3 S.C.R. 727; McLean v. Bradley(1878), 2 S.C.R. 535.

TAB 16

2023 ONSC 3625
Ontario Superior Court of Justice

Carbone et al v. Boccia et al

2023 CarswellOnt 9083, 2023 ONSC 3625

Albert Carbone and Cathy Horvath (Plaintiffs) and Salvatore Boccia, Rosanna Boccia, 215 Holding Corp., Jane Doe, David Shpilt, John Doe, and Doe Corp. (Defendants)

Chalmers J.

Heard: June 2, 2023
Judgment: June 5, 2023
Docket: CV-22-00683894-0000

Counsel: H. Richards, D. Milton, for Plaintiffs
No one, for Defendants

***Chalmers J.*:**

Overview and Factual Background

1 In early 2021, the Plaintiffs, Albert Carbone and Kathy Horvath were introduced to the Defendant, Salvatore Boccia. He was seeking investors for his cannabis business, Sustainable Growth Strategic Capital Corp. Mr. Boccia stated that the company was producing cannabis creams and oils for pain relief. The Plaintiffs were told that Sustainable was owned by 215 Holding Corp. The president and sole director of 215 Holding Corp. is Mr. Boccia's mother, the Defendant, Rosanna Boccia.

2 In February/March 2021, Mr. Boccia took steps to convince the Plaintiffs that Sustainable was a valid and legitimate business. He produced several documents, including a contract to sell his product to a Veterans organization in Nova Scotia.

3 The Plaintiffs provided several payments to Mr. Boccia. On February 12, 2021, the Plaintiffs provided a cheque in the amount of $60,000. On March 21, 2021, a cheque in the amount of $290,000 was paid to the Defendants. The Plaintiffs also made two loans to the Defendants in the amount of $175,000 on March 23, 2021 and $250,000 on May 2, 2021. The Plaintiffs were assured that the two loans would be repaid by the end of May 2021.

4 The loans were not repaid. The Plaintiffs contacted the Defendants for the repayment of the loan. Despite request, none of the funds were returned to the Plaintiffs or accounted for in any way. The Plaintiffs brought an action in fraud, fraudulent misrepresentation, conversion and unjust enrichment as against Mr. Boccia, his mother, 215 Holding Corp. and any unidentifiable parties.

5 The Plaintiffs brought a motion for a *Mareva* injunction and *Norwich Order*. The motion was heard by Justice Morgan. By endorsement dated November 30, 2022 (2022 ONSC 6528), he granted the injunction and *Norwich Order*.

6 In the course of enforcing the order, the Plaintiffs determined that David Shpilt was involved in this matter. As noted above, one of the documents produced to the Plaintiffs to convince the Plaintiffs that Sustainable was a legitimate business was the contract with the Veterans Association. The Plaintiffs were advised that a short-term loan was required to fulfill the contract. When the loan was not repaid despite request, Mr. Carbone attended at the Sustainable address. There he met Mr. Shpilt. Mr. Shpilt assured Mr. Carbone that Sustainable was a legitimate business.

7 When the loan continued to be unpaid notwithstanding the ongoing requests, the Plaintiffs carried out further investigations into the Veterans contract. The contract was purportedly executed on behalf of the association by Fabian Henry. Mr. Henry was contacted. He denied knowing anything about the contract. He denied signing the contract and stated that it was a forged document.

8 The Plaintiffs conducted a r. 39 examination of Mr. Shpilt. He admitted on the examination that he drafted the forged documents. The exchange on the examination was as follows:

> Q. There was never a Veterans Contract, correct?
>
> A. Well, I mean, there was the piece of paper, the contract there, right?
>
> Q. It was a forgery. There never was an actual deal with Fabian Henry?
>
> A. I guess there wasn't a deal with Fabian Henry. . . .
>
> Q. Well, there was no . . . Fabian Henry did not sign a contract, correct?
>
> A. I guess not, no. . . .
>
> Q. Okay. So, did you create this contract and hand it to Sal?
>
> A. I am trying to find the . . . as we speak, I am trying to find the . . . I don't think they are backed up, the discussions around this. So, let's say yes, I . . . I created this . . .
>
> Q. Not "let's say". I want to know, yes or no. This is not a hypothetical.
>
> A. Yes, I created this contract.

9 The Defendants had suggested that the actual company the Plaintiffs were investing in was Farma C, which was a company operated by Mr. Shpilt. On the r. 39 examination, Mr. Shpilt admitted that Frama C. never bought or sold any product and in fact never operated anything.

10 On the examination, Mr. Shpilt was asked if he has any knowledge of where the Plaintiffs' invested funds went. The evidence was as follows:

> Q. It is fair to say you don't know where a single dollar of Al Carbone's money went, correct?
>
> A. I can speculate, and I can . . . I can surmise that, you know, dollars went towards rent. That is what I would...you know, just, objectively speaking, just know that the rent and the other costs of the facility were paid with some money. I don't know if it was Al who knows, whatever.

11 Pursuant to the *Norwich Order*, the Plaintiffs obtained information as to the distribution of the Plaintiffs' funds. It was determined that the initial payment in the amount of $60,000 was deposited at the Royal Bank of Canada. The rest of the funds were deposited to 215 Holdings Corp.'s account at the Bank of Nova Scotia, ("BNS") (No. 81372 01874 10). As of March 1, 2021 the balance in the BNS account was nil. Between March 2, 2021 and May 3, 2021 there were only four deposits made into the account. Three of the deposits were from the Plaintiffs totaling $715,000. During this timeframe, Mr. Shpilt received a wire transfer of $5,000 on April 1, 2021 and $90,000 on May 3, 2021 from the account. He also received additional transfers totaling $15,520 in wire transfers. A total of $110,520 was received by Mr. Shpilt.

12 Based on the banking information received in compliance with the *Norwich Order*, I am satisfied that Mr. Shpilt's evidence that he did not know where the money went is untrue, at least to the extent of the payments he received in March and May 2021.

13 On January 30, 2023, the Plaintiffs brought a motion on an *ex parte* basis to add Mr. Shpilt as a Defendant to the action. Justice Pollak ordered that the motion be brought on notice to the proposed Defendant. Notice was provided to Mr. Shpilt. The Plaintiffs and Mr. Shpilt attended at civil practice court on February 22, 2023 to obtain a date for the motion. Justice Ramsay ordered that the motion to add Mr. Shpilt as a Defendant and to amend the pleadings be brought before an associate judge before the motion for the *Mareva* injunction and *Norwich Order* is heard.

14 On April 12, 2023, the Plaintiffs were successful in obtaining an order to add Mr. Shpilt as a Defendant and to amend the Statement of Claim. The Plaintiffs now bring this motion for a *Mareva* injunction and *Norwich Order*. The motion is brought on notice to Mr. Shpilt. He did not respond to the motion and did not attend the hearing.

Analysis and Discussion

Mareva Injunction

15 A *Mareva* injunction is an injunctive order that restrains the defendant from dissipating assets or from conveying away his or her own property pending the court's determination in the proceedings. A *Mareva* injunction is sometimes called a "freezing injunction" or a freezing order.

16 For a *Mareva* injunction, the plaintiff must establish the following: (1) a strong *prima facie* case; (2) irreparable harm if the remedy for the defendant's misconduct were left to be granted at trial; (3) the balance of convenience favours granting an interlocutory injunction; (4) the defendant has assets in the jurisdiction; and (5) that there is a serious risk that the defendant will remove property or dissipate assets before judgment. Absent unusual circumstances, the plaintiff must provide the undertaking as to damages normally required for any interlocutory injunction: Neville v. Sovereign Management Group Corp, 2022 ONSC 3466, at para. 30.

17 A strong *prima facie* case is one that will probably prevail at trial or is likely to succeed at trial. To defraud a person is to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled. The elements of a claim of fraudulent misrepresentation are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and (5) the plaintiff suffering damages: Bruno Appliance and Furniture Inc. v Hryniak,2014 SCC 8.

18 I am satisfied that the Plaintiffs have established a strong *prima facie* case as against Mr. Shpilt in fraud and fraudulent misrepresentation. He admitted on the r. 39 examination that he drafted the fraudulent Veterans contract and forged the signature of Mr. Henry. This contract was prepared by Mr. Shpilt for the purpose of having the Plaintiffs' loan $175,000. There is also evidence obtained pursuant to the *Norwich Order* that Mr. Shpilt received over $110,000 from the money the Plaintiffs paid to Boccia.

19 I am also satisfied that there is a serious risk that Mr. Shpilt will dissipate assets and as a result, the Plaintiffs will suffer irreparable harm. As noted in *Neville v. Sovereign Management Group Inc.*:

> The risk of removal or dissipation of assets can be established by inference and the defendant's prior fraudulent activities and improper conduct and the circumstances of the fraud itself including concealment, deception, evasion, and clandestine behaviour may support an inference that the defendant will remove or dispose of property: at para. 31.

20 As noted above, there is a strong *prima facie* case of fraud as against Mr. Shpilt. The assets that can be dissipated are liquid and easily transferrable. Also, he has demonstrated dishonest behaviour in forging the Veterans contract and misrepresenting the Plaintiffs that Sustainable was a legitimate business. He lied under oath about where the Plaintiffs' money went, and he accepted money from the 215 Holdings Corp.'s bank account.

21 If the order is not granted, there is a concern that the Defendant might dispose of or dissipate his assets which would result in the Plaintiffs losing the ability to execute on an eventual judgment. This is a form of irreparable harm: Noreast Electronics Co. Ltd. v. Danis, 2018 ONSC 879, at para. 37.

22 The balance of convenience favours granting the injunction. If the injunction is not granted the funds may be dissipated preventing the Plaintiffs from executing on an eventual judgment. Mr. Shpilt received notice of the motion however he did not attend court or provide any evidence setting out any harm that he will suffer if the injunction is granted: OPFFA v. Paul Atkinson,2019 ONSC 3877, at para. 19.

23 The Plaintiffs have provided an undertaking as to damages.

24 I am satisfied that the Plaintiffs have established the elements for a *Mareva* Injunction.

Norwich Order

25 Under a *Norwich Order*, a plaintiff may obtain discovery from a person including a person against whom there is no cause of action in order to identify a wrongdoer and to obtain information about wrongdoing so that the plaintiff may bring proceedings or at least consider whether to bring proceedings.

26 The requirements for a *Norwich Order* are: (1) the plaintiff must have a *bona fide* claim or potential claim against a wrongdoer; (2) the defendant to the *Norwich* proceeding must have a connection to the wrong beyond being a witness to it; (3) the defendant to the *Norwich* proceeding must be the only practical source of the needed information; (4) the interests of the party seeking the disclosure must be balanced against the interests of the defendant to the proceeding, including his or her interest in privacy and confidentiality, and any public interest that would justify non-disclosure; interests of justice must favour obtaining the information. The fundamental principle underlying the *Norwich Order* is that the party against whom the order is sought has an equitable duty to assist the applicant in pursuing its rights: GEA Group AG v. Ventra Group Co., 2009 ONCA 619, at paras. 75, 91.

27 The Plaintiffs must provide sufficient evidence of a valid, *bona fide* or reasonable claim against Mr. Shpilt. I am satisfied that the Plaintiffs have done so. As noted above, I find that the there is a strong *prima facie* evidence of fraud. The reasonable claim standard threshold is lower than the threshold of a strong *prima facie* case: Isofoton SA v. Toronto Dominion Bank, 2007 CanLII 14626 (ON SC) at paras. 46-47.

28 There is evidence of a relationship between the financial institutions and the fraud. The Bank of Nova Scotia received the Plaintiffs' money, and a portion of those funds was paid out to Mr. Shpilt's account with the TD Bank. I am satisfied that the *Norwich Order* is necessary to allow the Plaintiffs to trace their funds.

29 I am satisfied that the *Norwich Order* is the only practicable source of the information. Mr. Shpilt has previously agreed to produce documentation but failed to do so. Given the evidence of his involvement in a fraud, it is unreasonable to expect he will provide the information requested: *Isofoton SA v. Toronto Dominion Bank,* at paras. 46-47.

30 The Plaintiffs have agreed to indemnity the third party for the costs associated with complying with the order and also provided an undertaking as to damages to ensure the financial instructions can be indemnified for costs they may be exposed to because of the order.

31 Finally, the interests of the Plaintiffs in disclosure far over balances the interests of Mr. Shpilt including his interest in privacy and confidentiality. The public interest justifies disclosure and the interests of justice favours obtaining the information in the circumstances.

32 I am satisfied that the Plaintiffs have established the elements for a *Norwich Order*.

Disposition

33 For the above, reasons, the *Mareva* injunction and *Norwich Order* shall be granted as requested.

34 The Plaintiffs were successful on this motion and is entitled to their costs. I award costs of the motion to the Plaintiffs, payable by Mr. Shpilt fixed in the amount of $8,500. The costs are payable within 30 days of the date of this endorsement.

35 I have signed the draft Order.

TAB 17

Ontario Supreme Court
Rust Check Canada Inc. v. Buchowski
Date: 1994-09-24

Rust Check Canada Inc.

and

Buchowski et al.

Court File No. C29675/94

Ontario Court (General Division), Langdon J. September 24, 1994.

Daniel G. Pole, for plaintiff.

Marek Z. Tufman, for defendants, Buchowski, Anticorrosion Materials & Technologies Inc. and 739697 Ontario Ltd.

Robert H. Rogers, for defendant, Forsythe Lubrication Associates Ltd. (September 2, 1994 only).

LANGDON J.:—

Background

[1] Rust Check Canada Inc. (Rust Check) is the owner of a proprietary process (the system) whereby chemical rust preventative (the formula) is applied to motor vehicles. The system involves not only the initial application of a formula, but a regime of annual examinations and reapplications which are tied to a warranty program. Rust Check does not know the composition of the formula. The formula is manufactured for it by Lear Chemical Research Corp. (Lear) under exclusive agreements structured to provide secrecy. Forsythe Lubrication Associates Ltd. (Forsythe) packages and labels the formula manufactured by Lear, also under secrecy agreements. Rust Check also owns a distinctive trade mark. Rust Check markets its system through distributors in a number of territories. Each distributor is expected to establish a dealer network.

[2] On June 24, 1991, Rust Check entered into an agreement with the numbered company, of which the directing mind and will is Mr. Buchowski. At about the same time, an almost identical agreement was made between Rust Check and Mr. Buchowski personally. The distributorship agreement was quite comprehensive. It recited Rust Check's ownership of the system and trademarks and its right to control the same. It contained the covenant of the licensee not to contest Rust Check's ownership of its trade mark. It granted to the defendants a licence to use and sub-license the system in Poland and the exclusive right to sell, promote

and distribute Rust Check products there. Some important terms of the agreement obliged the distributor: (1) to purchase only Rust Check products and only through Rust Check; (2) to pay for all goods within 90 days of invoice, and, in default, give Rust Check Canada the right *inter alia* to refuse to sell products to the distributor; (3) to provide an irrevocable letter of credit for $50,000 U.S. to secure its obligations.

[3] The agreement contained termination provisions which stipulated that, upon termination for any reason whatever, the distributor would no longer represent himself as associated with Rust Check, would immediately cease to use proprietary marks or other *indicia* associated with the system.

[4] The agreement also contained a one-year non-competition clause after the effective date of termination. That clause specified that Rust Check would be entitled to injunctive relief in respect of any actual or threatened breach of the non-competition clause.

[5] Buchowski never posted a letter of credit as required. He did, however, sign and give to Rust Check a promissory note for $150,000. He never paid his accounts within 90 days. Rust Check tolerated lateness for about two years. When the relationship between Rust Check and Mr. Buchowski and his companies broke down, they owed Rust Check approximately $89,000 U.S.

[6] Mr. Buchowski did succeed in setting up a network of about 73 dealers in Poland.

[7] The breakdown of the relationship between Rust Check and Mr. Buchowski began in the fall of 1993 with a certain interpersonal incident between him and Mr. Del Grande which arose out of Mr. Del Grande's discovery that Mr. Buchowski was dealing in a competitive or competitor's product.

[8] Then in May, 1994, Rust Check required financing from its bank in order to finance an order destined for Korea. The bank declined further credit to Rust Check until its accounts receivable were paid down or better security (than Mr. Buchowski's note) was posted. Mr. Buchowski's running account was then about $112,000 U.S.

[9] Rust Check wrote to Mr. Buchowski explaining the pressure from the bank and stating that it was unwilling to make further shipments until arrangements were made to pay down the account. The account was never brought into good standing.

[10] Finally, on August 18, 1994, the company wrote claiming to terminate its arrangement with Mr. Buchowski. By letter of the same date he also wrote to terminate the agreement. *Obviously both parties believed until August 18th that their relationship was governed by the foundation agreements.*

[11] In the middle of August, 1994, a shipping employee reported to Mr. Del Grande information received from a truck driver that the driver had seen products bearing the Rust Check label in another warehouse. Mr. Del Grande spoke to this driver and by him was told that approximately 100 drums bearing the Rust Check trade mark and Polish labels were being filled at Forsythe. The product had not been ordered through Rust Check. Mr. Del Grande spoke to Mr. Buchowski. Mr. Buchowski refused to tell him who supplied or packaged the material. Forsythe admitted that it filled the drums containing the product labelled as Rust Check but refused to tell Mr. Del Grande where it got the labels or chemicals.

[12] In consequence, Mr. Del Grande formed the opinion, quite reasonably based on the information which he had, either that alleged proprietary formula had been supplied by an unauthorized manufacturer or, more likely, that counterfeit product was being passed off as Rust Check formula, perhaps so that Mr. Buchowski could continue in business without paying his account. Undoubtedly Mr. Del Grande's concerns were heightened by his earlier discovery of Mr. Buchowski's illicit dealings in competitive products.

[13] Mr. Del Grande knew, as a result of conversations that he had had with Mr. Buchowski, that Mr. Buchowski was about to depart for Poland and that the 100 drums were being shipped to Poland.

[14] He applied immediately for and received a temporary *ex parte* injunction, restraining the defendants from disposing, transferring or in any other way dealing with products or chemicals of Rust Check or under Rust Check trade marks, an order requiring preservation of records and an order for production of documents related to the statement of claim which he issued.

[15] The order for production was complied with.

[16] The plaintiff seeks to continue the injunction until trial. Mr. Buchowski moves to dissolve it.

The strength of the plaintiff's case

[17] There is no question the plaintiff's case is more than merely worthy of trial. The foundation agreement was made in June of 1991. It is unlikely, in the extreme, that the letter of June 1, 1992, the so-called "grant" will be viewed as an independent agreement or novation. Rather, it will more likely be interpreted in the context of the original foundation agreements as just one more item of correspondence. Mr. Del Grande has suggested, quite plausibly, that it was nothing more than a letter dressed up with the corporate seal in order to impress Polish authorities, thus to promote registration in Poland of the Rust Check trade mark. I do not decide this, or any other, ultimate issue but the likelihood of a particular result is clearly a factor in assessing the strength of the plaintiff's case.

[18] During extensive argument, the defendants did not point to the plaintiff having committed any act not authorized by the agreements.

[19] On the other hand, the plaintiff provided compelling and often unchallenged evidence of a number of actions by Mr. Buchowski and the numbered company which were quite clearly contrary to the terms of these agreements:

1. Failure to make payments for material supplied within 90 days. It is true that the plaintiff tolerated lateness for a considerable time. However, art. 14.01 of the agreement is clear that such tolerance did not have to continue. It may be that pressure from the plaintiffs own bank, concerning receivables, was the catalyst which motivated the plaintiff to exercise its contractual rights. There is nothing improper in such a motive. The plaintiff appears to have been within its rights to refuse to ship material to the defendants when the account was more than 90 days overdue.

2. The plaintiff makes a very strong case that Mr. Buchowski violated the foundation agreements when he asserted ownership in Poland of the plaintiff's trade mark by assigning it, in express contravention of art. 15, to a Polish company which he controlled. One must also be very suspicious of Mr. Buchowski's good faith when one considers Rust Check's Polish trade mark registration application was rejected as being "non-distinctive" in February, 1993, while registration of the identical trade mark was granted in Poland to Mr. Buchowski's Polish company on June 16, 1993. Mr. Buchowski was then the only Rust Check representative in Poland. He possessed the incalculable

advantage of speaking the language. One might infer from that as well a degree of familiarity with the business system.

3. In April, 1994, Mr. Buchowski approached a former Rust Check employee, now working for his own consulting company, and retained him to develop a competing product. There was reason to believe that this was not his first dealing in competitive products, violations of arts. 4.01 and 13.01 of the agreements. Worrall deposes that the reason stated by Mr. Buchowski was because of Polish government requirements relating to its chemical composition, and because of "continuing problems with delivery". About this time Rust Check declined delivery of further product to Mr. Buchowski until the receivables were paid down to contractual levels.

4. Worrall arranged for the competing product to be manufactured for Mr. Buchowski by Forsythe, a company which also manufactured Rust Check proprietary formula.

5. Mr. Buchowski also supplied "Rust Check" labels to Worrall. They were virtually indistinguishable from Rust Check's own and bore its trade mark. These labels were affixed to drums which contained Worrall's formula. They were sold in Canada to Mr. Buchowski or his company. He paid for them. They were shipped to Poland, where Mr. Buchowski had established his network of Rust Check dealers.

6. Mr. Del Grande only learned of the counterfeit Rust Check shipment by accident. When he approached Mr. Buchowski, the latter was evasive and unco-operative. He was, in fact, in the process of travelling to Poland to meet the shipment of counterfeit Rust Check material and of other competitive material which he had caused to be labelled with a competitive trade mark, "Rust Stop", which he owned. Such action on his part would have been a violation of the foundation agreement either before or after termination.

Irreparable harm

[20] The plaintiff contracted to the defendant the distributorship for Poland. The defendant has developed the market to the point where sales reached hundreds of thousands of dollars annually. Mr. Buchowski is the only person with on-site contacts who speaks the language. If he continues to sell counterfeit material, the plaintiff will not merely lose the revenue from sales, but, if the material should be deficient, its reputation. If the product sold as Rust Check

causes damage, the plaintiff could be liable. Rust Check may already have irrevocably lost its distinctive trade mark in Poland.

[21] I agree with plaintiff's counsel that an undertaking to account will not protect the plaintiff. Mr. Buchowski's dealings to this point bear more than an aroma of the underhanded. He has given no evidence of assets in this jurisdiction. He operates almost indiscriminately through a number of controlled corporations. He is operating in Poland through a Polish company which is beyond the reach of the court.

Balance of convenience

[22] Mr. Buchowski complains that he has 73 dealers to supply in Poland and that if he is enjoined from dealing in Rust Check products, irreparable harm may be done to him. However, he, as well as Rust Check, chose to terminate the foundation agreements and, by so doing, to cut off his only legitimate source of supply. The injunction therefore does nothing to him that he had not already done to himself. His only answer to the agreement which obliges him to buy only from Rust Check is the claim, which Mr. Worrall supports, of a parol variation to the written agreement authorizing Mr. Buchowski to get supplies from sources other than Rust Check if Rust Check was unable or refused to supply them. Not only is such a parol variation unlikely, as it would render the entire foundation agreement almost useless, but the support for that claim, being Mr. Worrall's testimony, is scarcely one which has much weight by virtue of being disinterested.

[23] The potential for irreparable harm to Rust Check has already been described.

[24] One of the few undisputed facts is that both parties elected formally to terminate the foundation agreements on August 18th. The agreements are quite specific that, upon termination, defendants are not to distribute plaintiff's products. Continuance of the injunction, therefore, would not only prevent passing-off but tend to enforce contractual obligations.

[25] Moreover, if Mr. Buchowski's claim is true that the distribution of Rust Check products has been, in effect, forbidden by reason of the failure of the formula to comply with "stringent Polish performance standards", then no harm is being done in prohibiting or restricting Mr. Buchowski's supply of such materials. They apparently cannot be legally or ethically distributed in Poland in any event.

[26] If there were any truth to Mr. Buchowski's claim that Rust Check formula offends Polish regulations or is environmentally or scientifically obsolete, it is difficult to understand why he troubled to place the Rust Check label on the counterfeit material or, indeed, why he so strenuously opposed being enjoined from further dealings in this useless product.

[27] I conclude that the balance of convenience overwhelmingly favours Rust Check.

The status quo

[28] It is difficult to ascertain whether there is a *status quo* to maintain. One could not possibly restore the situation to its condition before Rust Check cut off Mr. Buchowski's. Since then, not only have the parties chosen to terminate their relationship, but Mr. Buchowski has involved himself in a series of dealings which would make any continued dealings with Rust Check anathema. It would be simplistic to suggest that the most efficient resolution to the dispute now would be for Mr. Buchowski to pay the balance of his account, post a letter of credit and carry on as usual. I conclude that there is no *status quo* to maintain. The issues are irreparable harm and the balance of convenience.

The plea to dissolve the injunction

[29] Apart from the somewhat unlikely pleas of a parol variation to the original agreement and the effect of the "grant", Mr. Buchowski's attack on the injunction focuses not on the merits of the case but, rather, on procedural concerns. Mr. Buchowski complains of a number of areas in the material filed in support of the *ex parte* application as material non-disclosures which disentitle Rust Check to continuation of the injunction:

> 1. That Mr. Del Grande did not disclose the fact that there were virtually identical agreements between Rust Check and the numbered company, as well as Mr. Buchowski. Both parties appear to have proceeded throughout upon the basis that the two agreements were equivalent to one signed by both Mr. Buchowski and his numbered company. Such documentary evidence as exists suggests that Mr. Buchowski, himself, chose to operate under the agreement which was presented to the court. It does not appear to the court that this alleged nondisclosure was in any way material. If material, it arguably strengthens Rust Check's case.

2. That Rust Check did not disclose that it failed to get the trade mark registered in Poland. The evidence suggests that Mr. Del Grande was unaware that his patent attorneys had failed to get the trade mark registered. The letter communicating this fact to Rust Check was not addressed to Mr. Del Grande but to an administrative assistant.

3. Failure to disclose that counsel did not draw to the attention of the court the very limited contractual causes for termination in art. 9 of the agreement, headed “Defaults”. Article 9 of the agreement deals with termination other than for cause. It provides for a notice period when termination is due to insolvency or failure to meet sales targets. These are not the only provisions in the agreement that could lead to termination. Article 10 clearly suggests that there can be many bases for termination. In any event, Rust Check did place the full agreement before the court, hardly an act of concealment.

4. Rust Check did not disclose to the court the letter under seal, (the “grant” to Mr. Buchowski), of the rights to use the trade marks and system in Poland. During his cross-examination, Mr. Del Grande identified the document. He was not asked to explain why he had not disclosed it or what he thought its significance was in the scheme of things. Little or nothing more was said about it on his examination, although great emphasis was placed on it in argument. While the document clearly raises triable issues, it was not demonstrated that Mr. Del Grande knew about it when he made the affidavit. Mr. Del Grande then believed that Rust Check was actively pursuing registration of the trade mark in Poland. That application was not rejected until February, 1993, many months after the date of the letter. It seems very unlikely that Mr. Buchowski will be able to assert successfully that the “grant” constituted some sort of outright transfer of all Rust Check’s proprietary systems and trade marks to him. If he actually believed that such was the effect of the “grant”, why did he instruct his solicitors to solicit transfer of *ownership* of the European rights to the trade name, trade mark and system on January 8, 1993? Mr. Buchowski perhaps places an altogether disproportionate importance on the “grant”. In all the circumstances, I find nothing sinister in the failure of Mr. Del Grande to disclose this one of many items of correspondence.

5. In his affidavit Mr. Del Grande complained of two specific defaults: one, delinquent payments; and, two, failure to provide a letter of credit, without disclosing that a course of conduct had been tolerated, which might be taken as a waiver of those requirements. I think the short answer to that is twofold:

(1) Article 14.01 of the agreement provides that any previous waiver does not require its continuance.

(2) The affidavit disclosed delinquent payments late in 1993 of $114,193.35 “as a result [of which] Rust Check refused to supply product to Buchowski” in May, 1994, which led to a statement of claim for that sum being issued in August, 1994.

6. Mr. Buchowski complained that para. 8 of Mr. Del Grande’s affidavit suggested that an action had been commenced by him to enforce the agreement in 1993, when, in fact, the action was not commenced until approximately the time of the motion in August, 1994. There was no non-disclosure. A copy of the statement was attached as an exhibit at tab 3 and disclosed the issue date of the action as August, 1994.

7. Mr. Buchowski complains that Mr. Del Grande’s affidavit did not disclose that the Rust Check labels on the Polish shipment were materially different from standard Rust Check labels for shipments to Poland. The conspicuous part of the labels, namely, that bearing the Rust Check trade mark, is virtually identical on both labels. Differences are apparent only upon close scrutiny. They relate to details in the safety data sheets which are written in Polish and are appended and definitely subsidiary to the trade mark portion of the label. I consider that they were “likely to mislead… [a] casual and unwary customer” (Fleming on *The Law of Torts,* 6th ed. (Sydney: Law Book Co. Ltd.), at p. 673). They certainly misled the truck driver who observed them and he was alive to their significance. Moreover, it does not appear to me to have been established that Mr. Del Grande was aware that the labels affixed to the drums were in any way different from standard Rust Check labels.

8. Complaint was made about procedures adopted by the plaintiff after obtaining the ex parte injunction, notably, as to the manner in which the documents were served on Mr. Buchowski, and the fact that a statement of claim, claiming substantial damages from him, were served upon an examinee, Mr. Worrall, either immediately before or during a hiatus in his examination in these proceedings.

I have observed to both counsel that the heat generated by the friction between clients seemed to have scorched counsel. A reading of the correspondence between them suggested that both might have lost that quality of detachment which is indispensable to good advocacy. There can be no question about it that Mr. Pole made some serious

errors in procedural judgment, perhaps by attending personally at the time of service of documents and certainly by making any remarks which might have been interpreted by Mr. Buchowski as proffering advice. (In fairness to Mr. Pole, Anton Piller orders, which this was not, normally require that they be served and explained to the defendant by the plaintiff's solicitors.) Similarly, the service of documents upon Mr. Worrall at the time of his examination was clearly improper. On the other hand, it appears that any impropriety which may have occurred was without effect. Mr. Buchowski turned the documents over to his solicitors. He was not required to take any precipitous action. He returned from Europe and proceeded in accordance with the advice of his counsel. Similarly, Mr. Worrall has not sought to file corrected responses to questions asked of him after service of the documents.

Although these complaints are not wholly without merit, they refer to matters which post-date the granting of the order. To set aside an injunction which appears to have considerable substantive merit because of ineffective procedural irregularities, would resemble throwing the baby out with the bath water.

9. Paragraph 11 of Mr. Del Grande's affidavit stated that "I contacted Mr. Buchowski, who was at first reluctant to see me. I attended at his offices, but he had left prior to our arrival." Defence complains that the plain implication is that Mr. Buchowski was evading Mr. Del Grande. In fact, Mr. Del Grande had made an appointment to see Mr. Buchowski and arrived 20 minutes late for the appointment. Mr. Buchowski left a card with an apology. I am hard put to find any intention to mislead the court based on the way the matter was stated. It is true that there was some inaccuracy, but, again, considering the haste with which proceedings had to be launched, I consider the matter relatively trivial.

10. Mr. Del Grande did not advise, in his affidavit, that he knew that Mr. Buchowski claimed to have European rights to the trade mark. In para. 11 of his affidavit he deposed:

> I contacted Mr. Buchowski, who was at first reluctant to see me. I attended at his offices with my counsel, but he had left prior to our arrival. I later reached him by telephone. He admitted to me that he had arranged for product to be packaged for shipment to Poland, but he refused to tell me who had supplied the chemical to him or where it was packaged. He admitted making and applying Rust Check labels and planning to sell the product in Poland under the Rust Check name on his own

account in contravention of our AGREEMENT and infringement of out [*sic*] trade mark.

Mr. Del Grande's cross-examination contained the following:

463 A. …—he did violate our trademark. Oh, another thing too is, he told me the first time that he had trademark rights in Poland and all of Europe, that I heard from him on Friday evening at the same time.

…

465 Q. That was of some importance to you?

A. You better believe it.

466 Q. Okay.

A. That's why we got the [*ex parte*] order the next Monday morning.

467 Q. Yeah. Because he told you that he had trademark rights for Poland, right?

A. Well, just…

468 Q. And Europe?

A. What he did is he violated our agreement. Our agreement didn't allow him to do that.

469 Q. Well, was that… was that important? You felt that it was very important that he told you on that day that… that he had trade mark rights for Poland and Europe?

A. I thought it was important?

470 Q. Yeah?

A. I thought it… I thought it was very important from the standpoint that this guy had basically rep… misrepresented everything and he'd ripped our company off.

The substance of the complaint raised by Mr. Del Grande is that the sale of the product, both in Canada and in Poland, contravened the *foundation agreement.* Mr. Buchowski may have higher legal rights to the trade mark *in Poland* but, even if that be accepted, that does not mean that the foundation agreement was not violated. Indeed, Mr. Del Grande complains that if Mr. Buchowski obtained

ownership in Poland of the trade mark, it was accomplished in further breach of the foundation agreements.

11. The failure of the plaintiff to report immediately to the court that, immediately after the *ex parte* order, Mr. Del Grande learned of the receipt of $12,000 on account of the outstanding indebtedness. The evidence is quite clear that when the funds were received at Rust Check, Mr. Del Grande was at court. He did not learn of the receipt of the $12,000 until after the issuance of the injunction. The injunction was made returnable seven days following. Even with the $12,000 paid, the account was substantially in arrears. The violation continued. The change was one of magnitude only. I do not consider that this information was so vital that it ought to have been reported to the court before the return date.

12. Non-disclosure of the fact that Mr. Buchowski was also president of Rust Check Central Corp. (U.S.A.) and, as such, was and continues to be a licensed distributor of Rust Check products in the mid-Western United States. I do not see that fact as relevant to the issues in this action.

13. The failure of Mr. Del Grande to disclose that what motivated him to enforce his contractual rights was pressure placed on him by his bankers. There is nothing improper in such a motive. Indeed, Mr. Del Grande told Mr. Buchowski that this was the case in his letter of May 18, 1994. The contract gave Rust Check the right not to make further sales to the defendant if the receivables were more than 90 days old. In the circumstances, I do not consider that Rust Check was obliged to disclose the motive for its action. It would have been otherwise if the motive had been improper or oblique.

14. While the plaintiffs gave an undertaking at the time of the *ex parte* injunction to compensate in damages, they have not continued that undertaking. In fact, Mr. Del Grande and his counsel both indicated during the course of examinations that no such undertaking would be forthcoming.

[30] Rule 40.03 plainly requires an undertaking to abide by any order concerning damages. There is no reason why Rust Check cannot file one. A continuing undertaking will have to be filed as a condition of the granting of any continuation of this injunction.

[31] There cannot be any doubt that the disclosure made by the plaintiff on the *ex parte* application was imperfect. On the other hand, a great deal of the alleged non-disclosure was

either not relevant or marginally relevant. The undisclosed information that might be considered material was not of such importance that it would have changed the outcome. The alleged passing-off came to Mr. Del Grande's attention by happenstance. Mr. Buchowski and Mr. Del Grande's informant at Forsythe were both evasive about the matter when questioned. Mr. Del Grande had reason to believe that Mr. Buchowski was leaving upon the instant for Poland. It was necessary for Rust Check to move promptly. Such failure to disclose as was made out was solely the result of haste and not of any desire to mislead the court.

[32] I have already spoken about allegations by counsel of unprofessional conduct on the part of opposing counsel. I do not think that I should punish the client for the misconduct (excessive zeal?) of counsel. If any disciplinary action is to be taken, that is for another forum.

[33] In all of the circumstances, I have decided that the appropriate and just action is to continue the injunction until trial.

[34] Counsel are agreed that there is no need to continue the order respecting production of documents. Production was made. Now that the parties are engaged in litigation, there is a process for further production.

[35] Therefore, upon an undertaking being filed in writing under the corporate seal of Rust Check Canada Inc. that it undertakes to abide by any order which the court may make if it ultimately appears that the granting of this order has damaged the responding party and that the plaintiff ought to compensate the responding party, an order will issue restraining the defendants, their agents or associates from dealing in any way with products or chemicals manufactured according to the formulas, processes or know-how of Rust Check Canada Inc. and, further, restraining them, their agents or associates from dealing in any way with products bearing trade marks or product names owned by Rust Check Canada Inc.

[36] The motion to dissolve the temporary interim injunction is dismissed. Costs in the cause.

Motion granted; cross-motion dismissed.

TAB 18

1993 CarswellAlta 224
Alberta Court of Queen's Bench

Edmonton Northlands v. Edmonton Oilers Hockey Corp.

1993 CarswellAlta 224, [1993] A.J. No. 1001, [1994] A.W.L.D. 143, 147
A.R. 113, 15 Alta. L.R. (3d) 179, 23 C.P.C. (3d) 49, 44 A.C.W.S. (3d) 1086

EDMONTON NORTHLANDS v. EDMONTON OILERS HOCKEY CORP.

Moore C.J.Q.B.

Judgment: December 20, 1993
Docket: Docs. Edmonton 9303-22201, 9303-23024

Counsel: *L.A. Desrochers, Q.C.*, and *F.F. Slater*, for plaintiff (defendant by counterclaim).
C.D. O'Brien, Q.C., and *E.B. Mellett*, for defendant (plaintiff by counterclaim).

***Moore C.J.Q.B.*:**

1 The parties have filed cross-applications. The Defendants (the "Oilers") apply to discharge an interim injunction Order granted ex parte to the Plaintiff ("Northlands") on November 8, 1993. The Oilers also apply to strike a second action, commenced by Northlands on identical terms on November 19, 1993.

2 Northlands, by motion, seeks an Order dismissing the application filed by the Oilers to set aside the interim injunction, and further asks that the two actions be consolidated. In the alternative, if the injunction from the first action is dissolved, Northlands asks the Court to grant an interim injunction in the second action, similar to the one previously granted in the first action.

The Facts

The Parties

3 The plaintiff, Edmonton Northlands, is the lessee, under a lease agreement with the City of Edmonton, of a recreational facility known as the Northlands Coliseum.

4 The defendant is the owner of a member franchise of the National Hockey League, known as the Edmonton Oilers. Pursuant to the bylaws of the NHL, the location at which the Oilers are scheduled to play their home hockey games and playoff games is determined by the NHL Board of Directors prior to the commencement of a particular season.

The Licence Agreement

5 On September 15, 1984, Northlands entered into an agreement (the "Licence Agreement") with the Oilers, whereby the Oilers would play home hockey games and home playoff games in the Northlands Coliseum until the end of the 1988-89 NHL hockey season. The Licence Agreement was amended by a variation agreement, in writing, as of September 26, 1986. It is common ground that, except for extending the duration of the Licence Agreement until the end of the 1998-99 NHL hockey season, the variation agreement does not impact on the instant case in any material way.

Subsequent Negotiations

6 In 1990 and 1991, the Oilers entered into negotiations with Northlands with a view to amending the Licence Agreement, on terms more favourable to the Oilers. These negotiations ceased in November 1991.

7 On April 27, 1993, the Oilers publicly announced that it had received an offer from the City of Hamilton and Copps Coliseum to move the Oilers to that centre for the 1993-94 hockey season.

8 By early May 1993, negotiations had reopened between Northlands and the Oilers. During these negotiations, Economic Development Edmonton, a company operating under the auspices of the City of Edmonton, acted as facilitator.

9 The parties disagree as to whether or not the results of these negotiations created a binding agreement between them. The position of Northlands is simply that no contract was formed. On the other hand, the Oilers assert that, on May 13, 1993, the parties orally agreed to the essential terms of a contract, which set aside and replaced the written Licence Agreement.

10 Within a few weeks, negotiations apparently came to a impasse.

11 On September 16, 1993, the Oilers commenced an action against Northlands seeking a declaration that the Licence Agreement had been terminated, specific performance of the alleged oral agreement of May 13, 1993, and consequential damages in the sum of $135,000,000.

The "Standstill Agreement" of September 24, 1993

12 On September 20, 1993, counsel for Northlands advised counsel for the Oilers that Northlands was prepared to continue negotiations to resolve the differences between the parties on the condition that the Oilers discontinue the action of September 16, 1993, and the Oilers agreed to make payments, without prejudice, for their ongoing use of the Northlands Coliseum, in an amount equal to 12% of the gate ticket receipts.

13 On September 23, 1993, a draft letter was delivered by counsel for the Oilers to counsel for Northlands, setting out the basis upon which the action of September 16, 1993 would be discontinued and payments made to Northlands. The draft letter was returned that same day with handwritten notations requested by counsel for Northlands.

14 The changes requested by Northlands' counsel were incorporated into a letter dated September 24, 1993, delivered by counsel for the Oilers to counsel for Northlands. It is common ground that the conditions as outlined by this letter were accepted by Northlands.

15 Paragraph (d) of the letter reads as follows:

> d) Edmonton Northlands will take no steps to enforce any rights they may have *while negotiations are ongoing*, i.e. until one of the parties signifies in writing to the other that negotiations are terminated. [The emphasis is mine.]

The Ex Parte Injunction

16 On or about November 3, 1993 the Oilers filed a formal application with the National Hockey League to permit the Oilers to move after the present season. On that date, Mr. Peter Pocklington publicly announced the filing, and also announced the Oilers would commence playing home games in Minneapolis in the 1994-95 season.

17 Northlands appeared before me in chambers on November 8, 1993, ex parte, seeking an interim injunction enjoining the Oilers from playing hockey games in any location other than the Northlands Coliseum, or taking any steps preparatory to doing so. A nine-page affidavit, containing thirty paragraphs and supported by nine important exhibits, was placed before the court. The deponent was Mr. Colin Forbes, the General Manager of Northlands.

18 The Court granted an interlocutory injunction allowing either party to apply to vary the Order on 48 hours notice. The Order enjoined the Oilers from playing hockey at any location other than the Northlands Coliseum, and barred the Oilers from taking any steps preparatory to playing its home hockey games other than in the Coliseum.

19 It was subsequently discovered that, prior to the commencement of this action, Northlands had not given written notice directly to the Oilers that negotiations had been terminated.

Subsequent Litigation

20 The Oilers filed a Statement of Defence and Counterclaim on November 18, 1993.

21 The Oilers further applied by Notice of Motion, on November 18, 1993, returnable on December 6, 1993, for an Order discharging the injunction, and staying the first action and all proceedings thereunder.

22 Northlands commenced a second action, on November 19, 1993, by filing a Statement of Claim identical in form and substance to that of November 8, 1993. On November 19, 1993, Northlands served the Oilers with written notice pursuant to para. (d) of the September 24, 1993 letter, and also filed a Notice of Motion, returnable December 6, 1993, seeking an Order consolidating both actions, and continuing the injunctive relief.

23 The Oilers filed a Notice of Motion, on November 26, 1993, returnable December 6, 1993, petitioning the Court for an Order to strike out or stay the second action and all proceedings thereunder.

24 In November it was agreed that all matters be scheduled for December 6, 1993, to resolve all procedural and substantive interlocutory issues at that time.

The Procedural Matters

The Second Action

25 Northlands, out of an abundance of caution, commenced a second action on November 19, 1993 by filing a Statement of Claim identical in form and substance to that filed to commence the first action.

26 The courts of Alberta generally recognize a rule against multiple prosecution. It is trite law that commencing a second action while one is currently pending is an abuse of process: *German v. Major* (1985), 62 A.R. 2, 39 Alta. L.R. (2d) 270, 20 D.L.R. (4th) 703, 34 C.C.L.T. 257 (C.A.).

27 Since the same relief can be obtained in the first action, Northlands is not entitled to bring a second action while the first is still pending: *Great Pacific Contracting Ltd. v. Harwyn Properties* (1981), 29 B.C.L.R. 145, 21 C.P.C. 280 (S.C.).

28 In my view, the second action must be set aside. I note that counsel agreed there was no legal impediment to the use of the affidavit evidence produced for the second action, to resolve the applications on the first action, as all requirements as to notice were met.

The Alleged Breach of the Standstill Agreement

29 The Oilers claim that the first action taken by Northlands was brought in direct violation of para. (d) of the Standstill Agreement, and that no written notice of the termination of negotiations was received prior to the commencement of the action.

30 As a rule, when the court hears an application to set aside an ex parte order, it should hear the motion de novo as to both the law and the facts involved: *Gulf Islands Navigation v. Seafarers' International Union of North America (Canadian District)* (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.); *Burns & Dutton Concrete & Construction Co. v. Dominion Insurance Corp.* (1966), 57 D.L.R. (2d) 327 [55 W.W.R. 619] (B.C.C.A.).

31 Even if the order should not have been granted ex parte, the court may refuse to set it aside if the material shows that it would have succeeded on notice: *Rempel v. Althouse*, [1984] 5 W.W.R. 246, 34 Sask. R. 281, 45 C.P.C. 131 (Q.B.), per Batten C.J.Q.B.

32 The issue that arises before me now is whether the actions of Northlands are of such gravity and effect as to displace the general discretion of the court in these matters. Counsel for the Oilers urges the Court to hold that the ex parte application was brought without proper notice to the Oilers and without disclosure of all material facts, and as a result was brought in violation of a specific agreement.

33 The Oilers rely on a line of authority to be found in *Canadian Pacific Railway v. U.T.U., Local 144* (1970), 14 D.L.R. (3d) 497 (B.C.S.C.); *Gulf Islands Navigation v. Seafarers' International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216, 27 W.W.R. 652 (B.C.S.C.) ; and in *Griffin Steel Foundries v. C.A.I.M.A.W.*, [1978] 1 W.W.R. 35, 5 C.P.C. 103, 80 D.L.R. (3d) 634 (Man. C.A.), which suggests that such an omission is "fatal".

34 This thinking is best summarized in the following statement of Wilson J. of the British Columbia Supreme Court in *Gulf Islands*, supra, at pp. 653-54 (W.W.R.):

> I find there is some divergence of judicial thought as to the grounds upon which an *ex parte* order ought, upon notice, to be discharged. The area of divergence does not include such generally accepted fundamental concepts as this: That the *ex parte* order is obtained *periculo petentis* so that if there has not been made to the judge a full and frank disclosure of the relevant facts, the order will be voided. Sheppard, J.A. in *Kraupner v. Ruby* (1957), 21 W.W.R. 145, at 154, cites Scrutton L.J. in *Lazard Bros. & Co. v. Banque Industrielle de Moscou*, [1932] 1 K.B. 617, 101 L.J.K.B. 65, at 75, affirmed [1933] AC 289, 102 LJKB 191:
>
> > Persons applying *ex parte* to the Court must use the utmost good faith and if they do not, they cannot keep the results of their application.
>
> To emphasize the strictness with which this Rule is applied, I cite from *Re Gedye* (1832), 15 Beav 254, 21 LJ Ch 430, 51 ER 537:
>
> > All matters must be stated. If there is suppression the court will not enquire if it would have been entitled to make the same order but only if the matters omitted required full discussion and notice should be given.

35 I cannot agree that the discretion of the court could be circumscribed to such an extent. I share the view expressed by Nicholas Browne-Wilkinson V.C., who in *Dormeuil Frères S.A. v. Nicolian International (Textiles) Ltd.*, [1988] 1 W.L.R. 1362, [1988] 3 All E.R. 197 (Ch. D.), stated, at p. 1368 (W.L.R.):

> Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte obtained without due disclosure set aside; there is a discretion in the court whether to do so or not.

36 The judicial practice of invariably discharging ex parte injunctions, if obtained without full disclosure, cannot be allowed itself to become an instrument of injustice: *Lagenes Ltd. v. It's At (U.K.) Ltd.*, [1991] F.S.R. 492 (H.C.J.).

37 Counsel for the Oilers admitted that if the Oilers were to succeed in this action, there is nothing in law to stop Northlands from seeking another interlocutory injunction the very next day, free from any procedural impediments, to be heard only on the merits.

38 The retention and application of the court's discretion to resolve this matter here and now is entirely consistent with the *Judicature Act*, R.S.A. 1980, c. J-1:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

39 While Northlands did not give notice pursuant to the standstill agreement, the evidence before the court clearly establishes that negotiations had broken off, making the need for such notice somewhat redundant. The Oilers had taken the overt act of applying to the NHL to move the team, and had publicized this fact in the media. If the non-disclosure was material at any point in time, it certainly became immaterial having regard to the announced action of the Oilers in filing an application to move the

franchise and the public statements of the Oilers. The inadvertent breach was rectified immediately when discovered, and there is no evidence to indicate that the Oilers suffered any prejudice.

40 In my view, the non-disclosure was not material in its effect on the parties, or their relationship.

41 Even if the effect of the non-disclosure was material, that does not, under the circumstances, afford the Oilers automatic relief. While clearly there is an important duty on parties making ex parte applications and any breach of such a duty must be weighed in relation to the merits of the case. I adopt the observations of Mr. Justice Slade of the Court of Appeal, in *Brink's-MAT Ltd. v. Elcombe*, [1988] 1 W.L.R. 1350, [1988] 3 All E.R. 188, where he says, at p. 1359 (W.L.R.):

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486 as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantive merits of the case or on the balance of convenience.
>
> Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J. on 9 December 1986.

42 Clearly an alleged non-disclosure, even if material, will not be determinative of the issue: *Canadian Caterplan Ltd. v. 488570 Alberta Ltd.* (1991), 83 Alta. L.R. (2d) 115, 1 C.P.C. (3d) 197, 123 A.R. 316 (Q.B.).

43 Nor does inadvertently breaching the standstill agreement automatically disqualify Northlands from equitable relief, as a failure under the "clean hands" doctrine: *Snell's Equity*, 29th ed. by P. Baker & P. Langan, (London: Street & Maxwell, 1990), at pp. 654-55.

44 This is not a case where Northlands has intentionally misled the Oilers or the Court. Intention is not in issue. The crucial point is not whether notice should have been given, but whether negotiations were over or not. I have already determined, on the evidence before me, that negotiations were at an end. If the breach had any consequences at all, they were not shown to prejudice the Oilers in any way.

45 Jessel M.R. states, in *Besant v. Wood* (1879), 12 Ch. 605, at pp. 627-28:

> It is not every breach of a covenant upon his part which prevents a man coming to a Court of Equity to have covenants enforced. Take a simple instance. A man is a lessee, with a proviso that he may purchase on six months' notice. He does not pay his rent punctually, but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which performance is sought, but it must be some material and substantial breach as will enable the Court to say his conduct has been such that it ought not to interfere in his behalf at all.

46 In contrast with the deliberate, substantial, uncorrected and prejudicial breaches noted in *Canadian Pacific* and *Griffin Steel*, such an innocent and inconsequential breach as occurred in the instant case surely cannot handcuff the court in the exercise of its discretion. Otherwise this would be an undue circumscription of the discretion of the judge, and no substitute for dealing with the merits of the case, particularly where, as here, it was agreed that all of the interlocutory matters in issue, procedural and substantive, would be settled at this hearing.

47 As stated by Sir Nicholas Browne-Wilkinson V.C., in *Dormeuil Frères*, supra, at p. 1368 (W.L.R.):

> The real question at the time of the inter parties hearing should not be what has happened in the past but what should happen in the future.

48 I must agree with this statement. What is done is done. This procedural argument, relating to the breach of the standstill agreement, is dismissed. I move now to consider the substantive merits of the case.

The Substantive Issues

The Tod Affidavit

49 Northlands has filed two affidavits, one sworn by its General Manager (Mr. Colin Forbes) and a second affidavit by its President (Mr. Gerald Yuen). Both Mr. Forbes and Mr. Yuen have an intimate knowledge of the facts, providing a basis to address the substantive issues of the case.

50 In response, the Oilers have filed an Affidivit of Mr. Brian Tod, a solicitor for the Oilers. It was revealed that Mr. Tod has only been retained by the Oilers since September 16, 1993, and thus has no personal knowledge of any events before that time. Mr. Tod, in making the deposition, relied on advice received from Mr. Werner Baum, a person he has never met, and whose qualifications where unknown to him. Mr. Tod did not have access to any financial statements, budgets, or projections.

51 I have been invited to draw a negative inference from the fact that the Oilers have not filed an affidavit sworn by someone more directly knowledgeable of the facts.

52 If the Court is to draw a negative inference, it is based on the non-production of available evidence that could have been placed before the Court by the Oilers: *Kamitomo v. Pasula* (1983), 29 Alta. L.R. (2d) 375, 25 B.L.R. 60, 50 A.R. 281 (Q.B.).

53 Mr. Baum, the Vice-President of Finance for the Oilers, would himself have been a more obvious choice to swear an affidavit. Indeed, the preferred choice would have been to have an affidavit sworn by Mr. Peter Pocklington, the owner and controlling mind of the Oilers.

54 The type of affidavit filed here by the Oilers deprives Northlands of effective cross-examination: *Kennett v. Gill* (1969), 71 W.W.R. 1, 8 D.L.R. (3d) 386 (Alta. C.A.).

55 It is worth noting *Laurentide Mortgage Corp. v. J.D. Bond Construction Group Ltd.* (1984), 32 Alta. L.R. (2d) 206, 56 A.R. 237, where Master Funduk states, at p. 229 [Alta. L.R.]:

> As indicated in *Sage Publications*, supra, it does not follow that belief in affidavits is always proper. On substantive issues, such as whether or not a mortgage or guarantee were given, such as whether or not the plaintiff did make a loan to the defendant, such as whether or not there has been default, and such as whether or not a representation was made which induced the defendant to enter into a contract, it is appropriate for the defendant himself to give such evidence. It is inappropriate in such cases for the defendant to shelter behind a front man.

56 Clearly Mr. Tod was not privy on all matters of substance and a negative inference can be drawn that his affidavit evidence is insufficient and not effective to contradict the affidavit evidence tendered by Northlands.

The Tripartite Test

57 The prerequisites for granting an interlocutory injunction are as set forth by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] 2 W.L.R. 316, and later adopted by the Alberta Court of Appeal in *Law Society (Alberta) v. Black*, [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 347. In that case, Kerans J.A. states, at p. 758 (W.W.R.):

> The tri-partite sequential test of *Cyanamid* requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly, that he would suffer irreparable harm if no order was granted; and thirdly, that the balance of convenience considering the total situation of both parties favours the order.

Serious Issue to be Tried

58 Northlands need only show that the facts support a cause of action which is not "frivolous or vexatious". As Lord Diplock expressed in *Cyanamid*, supra, at p. 510 (All E.R.):

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

59 The claim Northlands is making is based on an anticipatory breach of the Licence Agreement by the Oilers. Specifically, Northlands claims that the Oilers have threatened to default on a clause in the Agreement requiring the team to play their home hockey games in the Northlands Coliseum.

60 Counsel for the Oilers say that the Licence Agreement was set aside by an oral agreement of May 13, 1993. They further state that if the Licence Agreement remains operative, a breach of the home games clause only gives Northlands the right to terminate the Agreement, and also that the clause is unenforceable as a restrictive covenant.

61 Counsel for both parties examined the Licence Agreement clause by clause to offer to the Court their alternative interpretations of particular sections, and the Agreement as a whole. The court was also treated to an equally thorough analysis of negotiations leading up to May 13, 1993, as to whether some accord was reached at that time to replace the Licence Agreement. On the evidence placed before me, I am satisfied that these are serious and complicated issues which must be referred to a trial judge for resolution.

62 The material before me clearly illustrates the existence of a long standing Licence Agreement, and the alleged breach of this Agreement gives rise to a real prospect of obtaining a permanent injunction at trial.

63 Suffice it to say that nothing in the material available to the court persuades me that Northlands does not have a real prospect of succeeding at trial. In light of the nature of the evidence placed before the Court, serious questions arise in my mind as to whether an oral agreement was formed on May 13, 1993. Clearly important issues have been raised, which should be addressed at trial.

64 Counsel for the Oilers state that an injunction would, in substance, compel the Oilers to carry on business, forcing specific performance of a contract (a mandatory injunction). They say such a mandatory injunction should never be granted in an interlocutory setting, where the terms of the contract cannot be fully interpreted and ruled upon.

65 Counsel for the Oilers also assert that the correct interpretation of the Licence Agreement is that the Oilers have a positive covenant to play hockey games in the Coliseum. In their view, a mandatory injunction should never be granted to compel performance of a positive covenant.

66 It is true that courts are generally loathe to grant injunctions that restrict contracting parties from exercising rights under contracts into which they have voluntarily entered. Indeed courts as a general rule should not and need not conduct ongoing supervision of the parties, and particularly where the court cannot supervise and enforce the whole of the contract, it should not specifically enforce performance of part of it: *S.B.I. Management Ltd. v. Carol Wabush Co-operative Society Ltd.* (1985), 51 Nfld. & P.E.I.R. 257, 150 A.P.R. 257 (Nfld. T.D.).

67 While courts are generally reluctant to grant injunctions restricting contracting parties from exercising their clearly stated rights, they do so notwithstanding. Injunctions are available to restrict parties from exercising rights under a contract, where there is a triable issue as to whether the contract itself is in good standing: *H & S Bookspan Investments Ltd. v. Axelrod* (1984), 47 O.R. (2d) 604, 45 C.P.C. 318 (H.C.).

68 I am of the view that the facts before me are similar to the situation faced by Mason J. in *Delta Hotels Ltd. v. Okabe Canada Investments Co.* (1990), 106 A.R. 185 (Q.B.). In that case, one party claimed a long standing contract was somehow replaced by a new and dubious collateral agreement. Mason J.'s approach is explained, at p. 192:

> Nor do I accept that by granting injunctive relief the court would be ordering specific performance of the Management Agreement or, in effect, be supporting Delta's breach of the Side Letter Agreement. Rather the court is being asked to grant a negative injunction to prevent a breach of the Management Agreement by Okabe. I am persuaded that Sachs, L.J., addressed much the same type of issue in *Evans Marshall v. Bertola*, supra, where at 1007 he stated:
>
> > It is true to say that specific performance of such an agreement will not be ordered, but it is no less plain that the court will grant negative injunctions to encourage a party in breach to keep his contract ...

69 The material before me clearly shows the existence of a long standing Licence Agreement, and the alleged breach of this agreement affords a real prospect of obtaining a permanent injunction at trial.

70 It was alternatively argued by Northlands that there is a line of authority which indicates that where there is a breach of a negative covenant in a contract, the injunction should be granted summarily without regard to irreparable harm or to the balance of convenience.

71 However, in Alberta the standard is clearly "an undisputed breach of a clear negative covenant": *Canada Safeway Ltd. v. Excelsior Life Insurance Co.* (1987), 55 Alta. L.R. (2d) 120, 82 A.R. 316 (C.A.).

72 In my view, the issues dictate the need for a trial.

Irreparable Harm

73 The principle of irreparable harm is set forth by Lord Diplock in *Cyanamid*, supra, as follows, at p. 509 (All E.R.):

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial ...

74 "Adequately compensated in damages" does not simply mean overcoming evidential difficulties to quantify a damage award. Otherwise, the test of "irreparable harm" would have no meaning. Our courts continually have to arrive at damage awards for non-pecuniary injuries with the aid of very little evidence.

75 The proper interpretation is as enumerated by Kerans J.A. of the Alberta Court of Appeal in *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*, *(*sub nom. *Ominayak v. Norcen Energy Resources Ltd.)* [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 36 Alta. L.R. (2d) 137, 58 A.R. 161, at p. 145 (Alta. L.R.) [quoting from *High on the Law of Injunction*, 4th ed. vol. 1, p. 36]:

> By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation *but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice*.

[The emphasis is mine.]

76 Equity is what is being sought. The equitable approach is summarized by Sachs L.J. of the English Court of Appeal in *Evans Marshall & Co. v. Bertola S.A.*, [1973] 1 W.L.R. 349, [1973] 1 All E.R. 992, [1973] 1 Lloyd's Rep. 453, at p. 379 (W.L.R.):

> The standard question ... "Are damages an adequate remedy?" might perhaps, in the light of the authorities of recent years be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

77 Northlands does not have to establish that damages will be inadequate, but merely that doubt exists as to whether damages will be adequate in the circumstances. This is well phrased by Hunt J. in *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.*, [1992] 5 W.W.R. 431, 3 Alta. L.R. (3d) 247 at 262 (Q.B.):

> That "doubt" about the adequacy of damages is the proper way to apply the second test seems to me to be logical given the very nature of an interim order. As discussed earlier in regard to the threshold test, it is not the function of a judge at this stage to decide the issues. That, indeed, would be impossible given the limited material that is available. Similarly, in considering irreparable harm, there will of necessity be many unknowns at this stage. *To expect an applicant to prove irreparable harm could detract from one of the basic purposes of an interim injunction*, namely, to preserve the status quo. As stated by Lord Diplock, the relevant question is doubt as to the adequacy of damages. [The emphasis is mine.]

78 I am mindful that doubt as to the adequacy of damages should not be mere conjecture, but must, on the evidence, be shown to have some real risk of occurring: *West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd.*, unreported, June 17, 1993 (Alta. C.A.) [reported 49 C.P.R. (3d) 539].

79 The affidavit filed in support of Northlands' application does not suffer from the inadequacies of evidence noted in *McDonald's*, supra. For the most part, the depositions have some solid foundation in stated fact.

80 The speculation that was noted in *McDonald's* is not present here. In the instant case, the long standing operation of the Coliseum and the experience of the deponent provide surrounding circumstances that give colour and context to his statements of belief. They have sufficient credence to avoid being labelled as conjecture.

81 Counsel for Northlands has drawn an analogy to several cases where injunctions have been granted to restrain entertainers from appearing elsewhere than originally contracted.

82 As counsel for the Oilers pointed out, the fundamental subject matter of the contract in each case was the personal services of the entertainer. Any argument that Northlands is buying personal services here is very tenuous.

83 In my view, the heart of this issue is whether the contract has an exclusive nature or not. If the subject matter of the contract involves an interest which is somehow unique, or has some exclusive property, this can constitute irreparable harm: *Oracle Resources Ltd. v. Dome Petroleum Ltd.*, [1988] U.A.J. 831 (Q.B.).

84 No evidence has been filed in support of the contention that the subject matter of the contract is unique or exclusive, and I do not think any analogy to the "entertainer" cases is appropriate in the determination of irreparable harm.

85 Where third persons, who are not parties to the proceedings, would be caused damage or inconvenience, it is appropriate that such evidence be considered in the determination of irreparable harm: *Copithorne v. Calgary Power* (1955), 17 W.W.R. 105 (Alta. C.A.).

86 It is for this Court to determine how far this proposition extends in the present case. Northlands has identified several groups of third parties who would be affected if an interim injunction were not provided.

87 Despite representations to the contrary, I do not believe the rights of the public to watch hockey games warrant such consideration in the instant case. As Ruttan J. of the British Columbia Supreme Court said in *Nili Holdings Ltd. v. Rose* (1981), 123 D.L.R. (3d) 454, at p. 465:

> ... I am not convinced the public interest has been unduly injured. Counsel directs her attention to too narrow a field. The persons affected are a relatively small group of devoted jazz listeners. We must consider the community as a whole when we are deciding whether or not a restrictive covenant is against their interests. To deny a community the services of a doctor or

a pharmacist or an artisan may create serious inconvenience for lack of necessary or even essential services. Entertainment of the type presented by the defendant does not fall into the category of such an essential service to the community at large.

88 Northlands referred to the significant impact on the company itself, on other vendors, and on employees. It is the uncontradicted evidence of Northlands that the loss of their lead tenant would naturally require the scaling back of operations, and an adjustment of staffing levels. They say an injunction is essential to protect Northlands' interests, since the loss of the Oilers is not merely the loss of a mere licensee, but the Coliseum's major tenant and customer draw.

89 Interference with a going concern constitutes irreparable harm, and the potential for loss of employment is a proper fact to consider: *Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69, [1991] 4 W.W.R. 83 (C.A.).

90 Counsel for Northlands also point to third party contracts that will be affected if no injunction exists. The Licence Agreement apparently worked satisfactorily for many years. There is no evidence which calls into question the continued operation of the Agreement from which the Oilers now wish to escape at any cost. It is evident that many commitments were entered into by Northlands, in reliance on the longevity of the Agreement. There will be an obvious disruption of trade, vending and other activities carried on at the Coliseum, caused by a sudden and abrupt change.

91 This is not conjecture, but a common sense assertion. If any conjecture is taking place, it relates to whether Northlands could ever recover its market position. Customers, once lost, may never come back.

92 Where a defendant's actions would impair the plaintiff's relationship with its customers, and irretrievably harm its business, no fair and reasonable redress may be available after trial: *Polesystems Inc. v. Martec Manufacturing Ltd.*, [1989] 5 W.W.R. 697, 67 Alta. L.R. (2d) 159, 96 A.R. 218, 27 C.P.R. (3d) 259 (Q.B.).

93 Counsel for the Oilers say that such contractual claims would be "special damages" which are too remote to claim against the Oilers, as they arise from contracts which post-date the Licence Agreement. That is precisely the point. These contracts, arising out of reliance on the lon gevity of the Licence Agreement, illustrate why damages will not be a fair redress.

94 The most notable of the contracts entered into over the duration of the Licence Agreement are advertising and sponsorship contracts negotiated on the basis of professional hockey being played in the Coliseum.

95 Irreparable harm can arise from injury which would lead to the "total loss of a clearly valuable marketing tool": *R.E. Newman Exploration Consultants Ltd. v. Veritas Geophysical Ltd.* (1989), 32 C.P.C. (2d) 28, 94 A.R. 188 (Q.B.); reversed in part (1989), 66 Alta. L.R. (2d) 317 (C.A.).

96 I am of the view that there is a real probability of irreparable harm to Northlands because of the difficulty and unfairness of attempting to quantify business losses arising by reason of Northlands being deprived of such a marketing tool. In this context, Northlands' interests are worthy of protection beyond mere money damages.

97 Northlands has accrued a significant amount of goodwill arising from the Licence Agreement, and would suffer harm through its breach, jeopardizing its ability to recover.

98 Damages may not be adequate where the injuries suffered would irrevocably injure the reputation, goodwill, or professional standing of a party: *Delta Hotels Ltd. v. Okabe Canada*, supra.

99 The loss of goodwill, the possible litigation arising from the contractual provisions in place, and the difficulty in determining damages over the possible term of the contract all support the position that Northlands should not be confined to a remedy in damages. Northlands' market position would be destroyed, to an extent that it might be very difficult to re-establish.

100 Counsel for Northlands state that if the interim injunction is not granted, the Oilers will move their assets to another jurisdiction, prejudicing the ability of Northlands to recover the damages that would be awarded at trial.

101 Further, one must consider the likelihood that, if damages were fully awarded, they would not or could not be paid, given the financial resources of the Oilers. This cannot be dismissed as mere conjecture, since the Oilers are presently in default on rent under a lease for office space to Northlands.

102 The risk that a damage award, when ultimately granted by the court, might not be collectible, is a valid concern to the Court in determining irreparable harm: *Cyanamid*, supra, at p. 510 (All E.R.); *Bowlen Holdings Ltd. v. R.A. Bradburn Enterprises Inc.* (1991), 2 C.P.C. (3d) 90, 126 A.R. 22 (Q.B.).

103 Weighing all the relevant factors, including the strength of the plaintiff's case, it would not be just if Northlands were confined to a remedy in damages. I very much doubt that money damages, even if they could be calculated, awarded, and collected, would be adequate to protect the reliance interests which have arisen from the expected continuation of the contract.

The Balance of Convenience

104 The Oilers say that during the course of the injunction, they will suffer operating losses, and a major depreciation in the value of the franchise.

105 As has already been alluded to, the evidence in the support of these assertions lacks credibility. More significantly, there is nothing, on the evidence before me, to suggest that any prejudice to the Oilers cannot be remedied by Northlands' undertaking for damages.

106 The "status quo" between the parties is continuing under the Licence Agreement, which has apparently served both parties well for a period extending back into the 1970's. Despite the fact that the Oilers want a better deal, there is no evidence before the court that the original Agreement is defective in any way.

107 Thus, the balance of convenience would not favour the Oilers as they are the party which acted to alter the balance of convenience of their relationship and so affected the status quo.

108 The Court is mindful of the comments of Kerans J.A., in *Ominayak v. Norcen Energy Resources*, supra, where he cautions that an interim injunction is emergent relief, with the claimant seeking a remedy without proof of his claim, before any real harm has occurred.

109 In the instant case, I believe that standard to be met. I am of the view that the need is emergent, and that the granting of the injunction was not premature.

110 The simple fact is that, on November 3, 1993, the Oilers filed a formal application with the National Hockey League to permit the team to move after the present season, and also announced publicly that the team would commence playing home games in Minneapolis in the 1994-95 season. In my view, this constitutes an overt act by the Oilers, which has seriously threatened the operations of Northlands, and prompted Northlands to seek an interim injunction.

111 The Licence Agreement outlines the lead times necessary for the scheduling of hockey games. Timetables are passing quickly and must be adhered to, or every other event the Coliseum could possibly host will be in limbo. Employees, contractors and advertisers will be adversely affected.

112 Another relevant issue is that the emergent nature of this situation was precipitated mainly by the Oilers' unilateral acts, akin to the situation in *Delta Hotels v. Okabe*, supra. Here, as there, the legal action and the application for injunctive relief are a direct and reasonable consequence of unilateral acts carried out by one party to escape a long standing contract.

113 Finally, I am of the view that, without the injunction, the relative positions of the parties will shift so radically that a trial judge could not reverse the situation.

114 The courts have granted interlocutory injunctive relief available to enjoin actions where the transaction in dispute would otherwise succeed since it could not be undone once completed: *Carlton Realty Co. v. Maple Leaf Mills Ltd.* (1978), 22 O.R. (2d) 198, 4 B.L.R. 300, 93 D.L.R. (3d) 106 (H.C.).

115 In summary, the balance of convenience favours leaving the injunction in place until trial. Any harm that could visit the Oilers before the trial of this issue is completely covered in the undertaking for damages. No other special consideration favours the setting aside of the injunction.

116 On the whole of the evidence before me, I am satisfied that, had notice been given to the Oilers prior to the commencement of the first action on November 8, 1993, and had both parties come before me at that time, the merits of the case would have favoured Northlands, and the interlocutory injunction would have been granted. As nothing has changed, I see no convincing reason why the injunction should not be kept in place until trial.

117 In my view, these issues should be tried quickly. This Court will cooperate with the parties in ensuring an early trial date. If the parties are unable to agree on all of the issues to be put before a trial judge then they may make further representations to the Court to settle the issues to be tried.

118 Costs are a discretionary matter and in my view should be determined by the trial judge.

Applications allowed in part.

TAB 19

2011 ONSC 6198
Ontario Superior Court of Justice

Maesbury Homes Inc. v. Hutchens

2011 CarswellOnt 12291, 2011 ONSC 6198, 209 A.C.W.S. (3d) 155

Maesbury Homes Inc., Lake Austin Properties, I, Ltd. and Ayres Rock, Ltd., Plaintiffs and Craig (Sandy) Hutchens, also known as Moshie Alexander, also known as Moishe Alexander, also known as Sandy Hutchens, also known as Craig Hutchens, also known as Sandy Craig Hutchens, also known as S. Craig Hutchens, also known as Moishe Hutchens, also known as Moshe Alexander, also known as Moishe Ben Avraham, also known as Moishe Ben Avrohom, also known as Moshe Ben Avrohom, also known as Ben Avraham also known as Fred Hayes, also known as Alexander MacDonald, 1719634 Ontario Inc. carrying on business as First Central Mortgage Funding in, First Central Holdings Inc., 308 Elgin Street Inc., Canadian Funding Corporation, Canadian Funding Limited, Northern Capital Investment Ltd., 2800 North Flagler Drive Units 106-107 LLC., Craig (Sandy) Hutchens, also known as Moishe Aledader, also known as Sandy Hutchens, also known as Craig Hutchens, also known as Sandy Craig Hutchens, also known as S. Craig Hutchens, also known as Moishe Hutchens, also known as Craig Alexander, also known as Moshe Alexander, also known as Moishe Ben Avraham, also known as Moishe Ben Avrohom, also known as Moshe Ben Avrohom, also known as Ben Avraham also known as Fred Hayes, also known as Alexander Macdonald, 1719634 Ontario Inc. carrying on business as First Central Mortgage Funding Inc., First Central Holding Inc., 308 Elgin Street Inc., Canadian Funding Corporation, Canadian Funding Limited, Northern Capital Investment Ltd., 2800 North Flgler Driver Units 106-107 LLC. and Tatiana Brik also known as Tatiana Utchens also known as Tanya Hutchens, 2129981 Ontario Inc. c.o.b. JBD Hutchens Family Holdings Inc. aka JBD Hutchens Family Holdings Inc., JBD Holdings, 101 Services Road Inc., 2141250 Ontario Inc. c.o.b. 29 Laren Street Inc., 2129974 Ontario Inc. c.o.b. 3415 Errington Avenue Inc., 1714530 Ontario Inc. c.o.b. 367-336 Howey Drive Inc., 2129982 Ontario Inc., c.o.b. 3419 Errington Avenue Inc., 1714529 Ontario Inc. c.o.b. 17 Serpetine Street Inc., 2154461 Ontario Inc. c.o.b. 720 Cambrian Heights Inc., 2126929 Ontario Inc. c.o.b. 331 Regent Streeet Inc., 2128417 Ontario Inc. c.o.b. 789 Lawson Street Inc., 2173061 Ontario Inc. c.o.b. 110-114 Pine Street Inc., 2128412 Ontario Inc., c.o.b. 15-16 Keziah Court Inc., 2141249 Ontario Inc. c.o.b. 193 Mountain Streeet Inc., 2128413 Ontario Inc. c.o.b. 625 ASH Inc., 2119821 Ontario Inc., c.o.b. 364 Morris Street Inc., 146 Whittaker Street Inc., Stantan Property Management Inc. and 1697030 Ontario Inc., Defendants

Grace J.

Heard: September 6 - October 3, 2011
Judgment: October 19, 2011
Docket: CV-11-421871

Counsel: Brian Shiller, for Plaintiffs

Scott C. Hutchison, Owen M. Rees, for Defendants, Craig (Sandy) Hutchens and related companies [*]

J. Zibarras, for Defendants, Tanya Hutchens and related companies [**]

***Grace J.*:**

1 308 Elgin Street Inc. ("Elgin") agreed to lend $320 million USD to the plaintiffs to refinance three Florida based real estate projects. [1] Commitment letters were issued, signed by Elgin, the borrowers and others in June, 2008.

2 In short order the plaintiffs paid fees totaling $1.807 million USD (the "fees"). [2] Most were paid to Elgin's principal Moishe Alexander also known as Sandy Hutchens ("Sandy Hutchens"). [3] No money was loaned. The fees were not returned.

3 On March 9, 2011 this action was started against Sandy Hutchens, his spouse Tatiana Hutchens ("Tanya Hutchens"), daughter Jennifer Araujo and companies connected to them.

4 The plaintiffs allege they were defrauded. After paying the fees they say they learned Elgin never intended to lend money. The statement of claim [4] seeks the return of the fees and much more including $100 million in damages, an accounting of monies received, an order allowing the plaintiffs to trace monies paid, injunctive relief and a certificate of pending litigation against various pieces of real estate.

5 They moved without notice for, among other things, a *Mareva* injunction preventing Sandy Hutchens and Tanya Hutchens from dealing with any property in their name(s) or any company controlled by them and for a certificate of pending litigation against almost two dozen pieces of real estate.

6 In granting the motion Perell J. wrote:

> The affidavit evidence shows a strong *prima facie* case of numerous fraudulent transactions involving the defendant [Sandy] Hutchens...and his corporations and family members. I am satisfied...that the plaintiffs have satisfied the test for an interim *Mareva* injunction and the test for the issuance of the certificates of pending litigation requested. The order shall go as asked...

7 Unless extended those portions of the order preventing dealings with property terminated on March 28, 2011.

8 A flurry of motions followed. These reasons deal with most of them. They are:

a) The plaintiffs' motion to continue and the motion of Sandy Hutchens and related companies (the "Sandy Hutchens defendants") to set aside the *Mareva* injunction (the "*Mareva* motion"). Each motion involves a request for incidental relief; [5]

b) A motion by the Sandy Hutchens defendants to dismiss the action on the basis the solicitor for the plaintiffs lacks authority to pursue it (the "lack of authority motion"); and

c) Motions by the Sandy Hutchens defendants and by Tanya Hutchens and related companies (the "Tanya Hutchens defendants") for an order requiring the plaintiffs to post security for costs (the "security for costs motions").

9 As the various motions crept forward Perell J's order was amended to permit limited dealings with specific assets. For the most part however, it has remained largely in place.

A. The Mareva Motion

10 Perell J. reviewed two volumes of factual material, a factum and a book of authorities before granting an order without notice. Four affidavits were filed. Two of the affiants played a role in the transactions in question: Paul Oxley as the "principal owner" of the plaintiffs and Martin Lapedus a former chartered accountant who provided various services to some of the Sandy Hutchens defendants. The other two affiants, Randy Guzar and Brent Hillier, had other dealings with some of the Sandy Hutchens defendants.

11 All four painted pictures of Sandy Hutchens and his business practices which were, to put it charitably, unfavourable. The essential thrust of the plaintiffs' position is this: Sandy Hutchens carefully cultivated an air of legitimacy which was inaccurate. Promised loans would never be made ostensibly because preconditions to advance were not met. However, none of the Sandy Hutchens defendants had the means of financing loans of any magnitude and had no intention of ever doing so.

12 They allege the commitments were a ruse to extract commitment fees.

13 There was little, if any, evidence concerning the dissipation of assets. However, the materials created the impression that dishonesty led to the risk assets would be dealt with in a way which made enforcement of any judgment impossible. [6]

14 Mr. Zibarras and Mr. Hutchison argue that the *Mareva* injunction cannot stand. Given the plaintiffs' decision to proceed without notice, they maintain the plaintiffs advocated their position too strongly. For reasons which follow I agree.

15 A party moving for an order without notice is justifiably held to an exceedingly high standard. Rule 39.01(6) requires "full and frank disclosure of all material facts" and provides that a "failure to do so is in itself sufficient ground for setting aside any order obtained".

16 There is a clear rationale for a rule requiring liberal, if not excessive, disclosure and an outline of facts and law which is not one-sided. As Sharpe J. (as he then was) wrote in *United States v. Friedland*

> The judge hearing an *ex parte* motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative. The opposite party is deprived of the opportunity to challenge the factual and legal contentions advanced by the moving party in support of the injunction. The situation is rife with the danger that an injustice will be done to the absent party. [7]

17 In this case that standard was not met. The motion judge was not told this proceeding would inevitably include an argument based on the applicable limitation period. [8] Perell J. was told that the Plaintiffs:

> ...were only in a position to ascertain that they were defrauded when they received copies of the ledgers and financial statements of various...defendant companies in January, 2011. [9]

18 Under section 4 of the *Limitations Act, 2002* [10] a two year limitation period applies. [11] It started to run on the date the claim was discovered. If the plaintiffs did not discover the claim until January, 2011 as they alleged, a limitations defence would not arise since the action was commenced in March, 2011.

19 However, there is more to the story than the plaintiffs disclosed.

20 Mr. Oxley's affidavit [12] did not reveal that he was aware of Sandy Hutchens' colourful past or that the plaintiffs had questioned the ability of Elgin to fund the proposed loans by early August, 2008. [13]

21 The motion judge was given no details about an action commenced by the plaintiffs against Sandy Hutchens' lawyers in Florida. [14] Specifically, Perell J. was not told the August 7, 2009 complaint alleged Sandy Hutchens was a "scam artist...who was for many years in the business of collecting substantial advance fees for loans that he never intended, nor was able, to fund" or that the Plaintiffs had alleged Sandy Hutchens and his companies were not "legitimate lenders". [15]

22 The motion materials did not disclose the fact the plaintiffs and their advisers "confronted" Sandy Hutchens' Florida based lawyers with those allegations "during the summer of 2008". Nor was Perell J. told the plaintiffs were advised of the withdrawal of services by that law firm in October, 2008. [16]

23 Had those facts been disclosed an obvious issue with respect to the timeliness of this proceeding would have arisen and been reviewed.

24 Perell J. had no reason to question the ability of the plaintiffs to pursue this action. Mr. Oxley disclosed that real estate projects "essentially have collapsed" and that "substantial equity" would be "inevitably lost to foreclosure" [17] as a result of Elgin's failure to refinance.

25 However, Perell J. was not given any more details. Nothing was disclosed about the scope of the security agreements signed by the plaintiffs. The motion judge would not have known they included "general intangibles" related to the mortgaged lands including causes of action. [18]

26 The motion judge did not know the status of the various foreclosure proceedings. He was unaware that three complaints had been filed, that two final judgments of foreclosure had been granted and another was imminent. [19]

27 Had those facts been disclosed an obvious issue with respect to the capacity of the plaintiffs to initiate proceedings would have arisen and been reviewed.

28 This Court was asked to rely on Mr. Oxley's personal undertaking as to damages. It was not told that Mr. Oxley was a party to the foreclosure proceedings nor told what effect the proceedings might have on his financial position.

29 Mr. Shiller submitted the *Mareva* injunction would have been granted even if Mr. Oxley had been fully forthcoming. He maintained the Plaintiffs could "never have properly alleged fraud...until February 1, 2011" [20] when Sandy Hutchens' former employee Martin Lapedus implicated him.

30 I disagree with Mr. Shiller on both points.

31 The argument that full disclosure would have yielded the same result was made and rejected by the Divisional Court in *Forestwood Co-operative Homes Inc. v. Pritz* [21] The Court held that a fact is material if it would have been weighed or considered by the motion judge in deciding the issues "regardless of whether its disclosure would have changed the outcome". [22]

32 I need not resolve the limitations issue on this motion. Suffice to say the omitted facts should have been disclosed to Perell J. They were not innocuous facts which had questionable relevance. They were important and went to the very foundation of the case the plaintiffs seek to make. Importantly, they were known to Mr. Oxley. A decision was made not to disclose them.

33 Mr. Hutchison submitted that the motion material that was before Perell J. made out an unchallengeable case of fraud. I agree. I also agree with him that the impression created was not a fair one.

34 The undisclosed information *may* have affected the result. The consequence of nondisclosure of material facts usually involves the loss of the benefit of the order obtained to the extent it granted a *Mareva* injunction. [23] That result should follow here.

35 I am also concerned by two other matters. As mentioned earlier four affidavits were in front of Perell J. Before the return of the various motions before me the plaintiffs indicated their desire to withdraw the affidavit of Mr. Guzar. They have lost contact with him and he was not presented for the cross-examination the defendants wished to undertake. While the plaintiffs suggest Mr. Guzar's affidavit was the least critical of the four relied upon, I am unable to say to what extent Perell J. was influenced by it. I can say Mr. Guzar's affidavit was part of a record which, in its entirety, satisfied Perell J. an order was appropriate despite the absence of notice. Its subsequent removal is more than trivial.

36 Furthermore Mr. Oxley and other non-resident affiants failed to attend on the dates scheduled for their cross-examinations. My disappointment with that development was undisguised.

37 There were four attendances before me prior to the commencement of argument on September 6, 2011. [24] The second attendance occurred on April 18, 2011. The parties negotiated a timetable which I approved.

38 Some of the time lines proved to be unworkable. Consequently the parties attended again on June 21, 2011. Submissions were made and the timetable was amended. Cross-examinations were to be completed by July 30, 2011.

39 Arrangements were made to cross-examine Mr. Oxley and two other non-resident affiants [25] on July 26 and 27, 2011. Notices of cross-examination were served.

40 On July 25, 2011 Mr. Shiller wrote to opposing counsel. He advised the non-resident affiants were unavailable on the dates scheduled because they were involved in "making a deal to restructure the projects." Mr. Shiller's offer to produce the witnesses by telephone or in person in August, 2011 was declined.

41 What flows from all of this was the subject of debate: the defendants submitted the affidavits signed by the non-resident affiants should be struck and the plaintiffs submitted I should find the defendants acted unreasonably in refusing to reschedule the cross-examinations.

42 To the plaintiffs I say this: parties are at liberty to amend a timetable established by order "by written agreement". [26] However, its terms stand absent agreement or order.

43 I chose the deadline for completion of the cross-examinations for reasons I articulated when I amended the timetable on June 21, 2011. Compliance was not optional. The fact is the affiants made a choice. Business considerations were more important than my order.

44 There are consequences for that decision. I see no reason to strike the affidavits of the non-resident affiants. However, I simply take Mr. Oxley's affidavits for what they are. Sworn statements containing exceedingly serious but entirely untested allegations. I am left with gaps in disclosure I believe to be serious and a principal of the plaintiffs who failed to attend a crossexamination arranged as part of an amended timetable his lawyer negotiated and this court approved. [27]

45 In all of the circumstances, paragraphs 1 and 3 of the order of Perell J. should be immediately set aside. As Sharpe J. said:

> 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. [28]

B. The Lack of Authority motion

46 The defendants allege that by reason of the previously mentioned foreclosure proceedings [29] the plaintiffs did not have the right to commence this action and do not have the right to continue it. [30]

47 Each party filed affidavits from Florida lawyers setting forth opinions on the matter. They conflict. As indicated to counsel I found the opinions to be of little assistance. Their supplementary affidavits were not a model of objectivity. However, I have a more fundamental concern.

48 The defendants rely on affidavits of Florida attorney Howard N. Kahn. The most troubling aspect of Mr. Kahn's affidavits is that he extracted phrases from the mortgage and security agreements he reviewed (the "security") but did not analyze their context.

49 Mr. Kahn concluded the security gave the secured creditors rights in respect of the causes of action being pursued in this proceeding. I respectfully disagree. The security gave the secured party rights in the real estate it described. It also gave the

secured party rights in other property, including rights of or choses in action *if* related to the underlying real estate. The security did *not* give the secured party an interest in rights or choses in action unconnected to that real estate. [31]

50 On the material filed I am not satisfied the claims arose from or related to a piece of real estate. The plaintiffs allege some of the defendants promised to make loans they had no intention of making. They maintain they were defrauded. The fact the promised — and allegedly fraudulent - loans were dependent on collateral in the form of real estate does not bring the causes of action within the scope of the security. They are not "related to the use, operation, sale, conversion, or other disposition...of the Land, Improvements, Tangible Property, or Rents" as one security agreement required. Nor do they seem to fit within the description of "general intangibles" set forth in other security agreements referred to almost in passing by Mr. Kahn. Once again the phrase was used in the context of the underlying real estate.

51 The orders made in the foreclosure proceedings do not seem to enlarge the scope of the security and therefore do not affect the rights of the plaintiffs to pursue this action.

52 The defendants say there is another reason for concluding this action was commenced without authority. They argue the plaintiffs were obligated to provide proof all necessary corporate steps had been taken to authorize the commencement of this action. [32]

53 I accept that rule 15.02 (1) allows a defendant to make such a request. However I do not know what Mr. Shiller was asked to do because a copy of the demand he received is not in evidence. I do not know, therefore, whether he was asked to provide a copy of a resolution, by law or document having similar force in Florida to establish a basis for the institution of this action. An order under rule 15.02 is not appropriate given the evidentiary gap.

C. The Security for Costs motions

54 The Tanya Hutchens defendants and the Sandy Hutchens defendants have filed estimated bills of costs to support their request that the plaintiffs be required to post almost $700,000 as security for the costs of this action. [33]

55 They have advanced their request because the plaintiffs are foreign. They have no assets in Ontario. They admit their foreign assets are insufficient to satisfy a costs award. [34] Given these admitted facts, an order for security for costs may be made. [35]

56 The question is whether it should be made in this case. That analysis:

> ...involves a balancing of interest of the parties which necessitates a review of the financial circumstances of the plaintiff, the possible effect of an order for security for costs in preventing a *bona fide* claim from proceeding and permitting frivolous matters to continue where there is no prospect of recovering costs of the litigation. There is a broad discretion...to determine what is just in the circumstances. [36]

57 I turn to those considerations now.

58 The plaintiffs allege they are impecunious. They argue their financial position was precipitated by the activities complained of in this lawsuit: loans which were to have been repaid and replaced with loans from Elgin were not, $1.807 million USD has been paid and not returned, proceedings for foreclosure followed. They submit this action will be stopped in its tracks if security is ordered because the plaintiffs lack the means to post security. Based on the nature of the proceeding and the material filed, they ask the Court to exercise its discretion to dispense with the necessity of posting security for costs.

59 I do not doubt the plaintiffs are in difficult financial circumstances. I am aware efforts have been ongoing to "restructure the projects" in Florida. However, I do not know whether there has been any success. [37] Even if restructured, it seems unlikely the financial fortunes of the plaintiffs will change significantly at least in the foreseeable future.

60 However, that does not complete the analysis. In order to establish impecuniosity a corporation must not only establish its own financial hardship but also the inability of its shareholders to raise money either by realizing on assets or borrowing. [38]

61 In his first supplemantary affidavit Mr. Oxley referenced the undertaking he had provided to the court when the injunction was sought. [39] With respect to his own asset position Mr. Oxley said:

> I can abide by an undertaking as to damages as I have various personal assets that I will sell should I be required to do so to satisfy such an award. [40]

62 A listing of assets was appended. It attributed a "net value" of over $91 million USD to corporate assets and a value of approximately $2.3 million USD to personal assets although some were said to be held jointly with his spouse and others were said to relate to "trusts".

63 The listing was unsatisfactory and raises many more questions than it answers. Amounts owing on the outstanding mortgages covering corporate real estate were not stated although foreclosure proceedings were obliquely mentioned. No personal liabilities were noted although it is clear from other material Mr. Oxley is subject to judgments in the State of Florida.

64 Suffice to say that while I have little doubt the asset listing is incomplete Mr. Oxley acknowledged personal assets were available and expressed his willingness to dedicate them to this action.

65 During argument Mr. Shiller seemed to suggest that Mr. Oxley's assets are no longer available. I am unaffected by that submission. An unqualified undertaking was given to the Court by Mr. Oxley as part of his successful effort to obtain the March 18, 2011 order. [41]

66 In his supplementary affidavit Mr. Oxley further undertook "to refrain from encumbering any of [the listed] assets without first seeking permission of this Honourable Court." Leave was neither sought nor given. Circumstances should not have changed.

67 I am of the view Mr. Oxley has the ability to raise money by selling assets or using them as collateral. He did not disclose the names or financial positions of any other non-principal owner of any of the plaintiffs. Given the onus that lies on the plaintiffs to establish impecuniosity, an adverse inference has been drawn. I assume they are able to provide funding for this action.

68 The merits of the case must also be considered. This action is in its infancy. Serious allegations have been made. As indicated earlier, most of them have not been tested because cross-examination of Mr. Oxley did not occur.

69 However, Mr. Lapedus was cross-examined at length. He alleges he came to learn that Sandy Hutchens had neither the intention nor ability to lend money to the plaintiffs.

70 I am left in this position. The plaintiffs are financially troubled. On the evidence its principal shareholder is not. Impecuniosity has not been established.

71 With respect to the merits of the action I will go no further than to say there are serious issues that should be tried. I cannot, however, say whether the plaintiffs' chance of success is "good". [42] Too little evidence is before me. Too much is challenged. Too much is unknown.

72 Weighing all of the matters I have mentioned I am of the view the defendants are entitled to security for costs. This action is filled with factual and legal issues. It has been and likely will be protracted. However, the allegations made are significant and it is important the plaintiffs be given the opportunity to seek a remedy in the jurisdiction where the defendants are located.

73 In the circumstances, security in the amount of $350,000 shall be posted as follows:

a) $100,000 by January 6, 2012;

b) $100,000 by April 13, 2012. If the defendants have not delivered affidavits of documents by March 30, 2012 this date shall be extended until thirty days after their delivery;

c) $100,000 by July 13, 2012. If Sandy Hutchens and Tanya Hutchens have not been produced for examination for discovery by June 29, 2012 despite reasonable efforts by the plaintiffs to conduct them, this date shall be extended until thirty days after the commencement of the examination for discovery of Sandy Hutchens *and* Tanya Hutchens; and

d) $50,000 by October 12, 2012.

74 If the parties cannot agree on the form of security to be provided they may attend to make brief oral submissions. If necessary, arrangements can be made through the motions office.

D. Incidental Relief Sought

75 The plaintiffs sought an order compelling Sandy Hutchens and Tanya Hutchens to submit to a far ranging examination concerning their assets (including bank accounts) and liabilities. [43] Such an order may have been appropriate had the *Mareva* injunction been continued. Given the current status of the action such an order is not proper. I make no comment about the scope of examinations for discovery or documentary discovery.

76 The Sandy Hutchens defendants seek an order discharging the certificate of pending litigation Perell J. granted. The Tanya Hutchens defendants did not bring a motion for that relief. Most of the parcels stand in the name of one of the Tanya Hutchens defendants. It appears one parcel does not. [44]

77 Notwithstanding the issues already discussed the certificates of pending litigation should remain. Claims to an interest in various parcels of land have been made. They are supported by the affidavit of Martin Lapedus, excerpts from general ledgers which he referenced and appended and bank statements obtained pursuant to portions of the order of Perell J. which are unchallenged. [45]

78 On the materials filed to date there appears to be a connection between fees paid by the plaintiffs and parcels of real estate against which certificates of pending litigation have been registered.

79 The remedies which the plaintiffs seek include an accounting of the fees paid, a tracing order and a declaration that the proceeds are subject to a constructive trust in their favour.

80 In *Hostmann-Steinberg Ltd. v. 2049669 Ontario Inc.* [46] a finding of material non-disclosure resulted in a *Mareva* injunction and certificate of pending litigation being set aside. However, Strathy J. noted the court had jurisdiction to continue an order made without notice even in the face of a deficient affidavit. [47]

81 In this case, Sandy Hutchens filed no response to the allegations made. [48] That is not intended to be critical. The defendants are permitted to attack an order made without notice for any reason including non-disclosure of material facts. However, a basis for complaint and for the relief claimed has been articulated and supported. I am not willing to set the certificates of pending litigation as well where, as here, the evidence that has been filed satisfies me they were appropriately issued.

82 Furthermore, the plaintiffs have already suffered the consequences of non-disclosure. The most significant aspect of the order they obtained has been lost. There are substantial issues to be tried relating to the fees paid and the manner in which they were utilized. Although I have discretion to set the certificates aside, I decline to exercise it. [49] The status quo with respect to the various parcels of real estate should be preserved for now.

E. Summary

83 For the reasons given:

a) The defendants' motion to set aside paragraphs 1 and 3 of the March 18, 2011 order of Perell J. is granted;

b) The defendants' motion under rule 15.02 is dismissed;

c) The defendants' motion for security for costs is granted in the amount and on the terms set forth in paragraph 73 of these reasons;

d) The motion by the plaintiffs for an order permitting them to examine Sandy Hutchens and Tanya Hutchens concerning their assets and liabilities and for production of banking records in advance of the discovery process is dismissed;

e) The motion by the Sandy Hutchens defendants for an order setting aside the certificates of pending litigation is dismissed.

84 Written cost submissions not exceeding five typed pages and to include a costs outline and supporting dockets [50] may be provided by the parties through Judges' Administration. Those of the defendants should be in hand by November 8, 2011 and those of the plaintiffs by November 25, 2011.

85 I trust the parties have made already submitted their request for case management to the Regional Senior Justice.

Footnotes

* They are 1719634 Ontario Inc., First Central Holdings Inc., 308 Elgin Street Inc., Canadian Funding Corporation, 1681071 Ontario Inc., Norhtern Capital Investment Ltd. and 2800 Norht Flagler Drive Units 107-107 LLC.

** Those are the corporate defendants not named in the previous footnote.

1 $80 million USD related to properties in Caribe Cove, $25 million USD related to Caleb's Club, Orlando and $215 million USD related to Grand Palisades, Lake Austin and Ayres Rock, Orlando, Florida.

2 According to paragraph 38 of the affidavit of Martin Lapedus sworn February 1, 2011, $1.948 million was advanced. However, Exhibit "O" does not support that figure.

3 Nothing appears to have been paid to Elgin directly. $1.25 million USD was paid to Sandy Hutchens. The balance was paid to Florida law firm Broad and Cassel ($530,000 USD), an individual named Jan Luistermans. ($14,500 USD) and a real estate appraiser ($12,500 USD).

4 The statement of claim has been amended.

5 For example, the Oxley companies seek an order permitting them to examine Sandy Hutchens and Tanya Hutchens about their assets and liabilities and requiring the production of banking records. The Sandy Hutchens defendants seek an order discharging the certificates of pending litigation.

6 For an instructive and helpful analysis of this aspect of the test for a *Mareva* injunction see the decision of Strathy J. in *Sibley & Associates LP v. Ross* (2011), 334 D.L.R. (4th) 645 (Ont. S.C.J.).

7 [1996] O.J. No. 4399 (Ont. Gen. Div.) at para.26.

8 The defendants take the position this action was commenced outside the two year period set forth in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 4.

9 That allegation is made in paragraph 22 of the statement of claim issued March 9, 2011 as later amended. The issue is not addressed at all in any of the four affidavits filed in support of the original motion. In paragraph 15 of his February 21, 2011 affidavit Mr. Oxley simply deposed that the plaintiffs "learned too late" about Mr. Hutchens' "true identity".

10 S.O. 2002, c. 24, Sch. B.

11 No one argued Ontario law did not apply.

12 It was sworn February 21, 2011.

13 On August 5, 2008 an agent for the Oxley companies sent an e-mail to various persons involved in the proposed lending transactions. Addressed to "Moishe" and copied to Mr. Oxley and others he said:
We have never made reference through challenging emails or aggressive demands to your past and your dealings, even after we have become privy to a lot of disheartening information...We simply want a resolution to the ongoing matters of evidence of ability to fund.
The e-mail went so far as suggesting "There is overwhelming doubt that you have the funds" to lend.

14 There is a brief reference to the proceeding in paragraph 38 of the affidavit of Martin Lapedus sworn February 1, 2011. There was no mention of the proceeding in the affidavit of Mr. Oxley.

15 The allegation is contained in paragraph 17 of the complaint in an action commenced by the Oxley companies against Broad and Cassel, P.A. ad two of its lawyers in the 15th Judicial Circuit Court in and for Palm Beach County, Florida bearing court file number 2009CA026812.

16 This allegation is made in paragraph 36 of the amended complaint filed by the plaintiffs in their action against Broad and Cassel.

17 That phrase is drawn from paragraph 33 of the Oxley affidavit.

18 Copies of the mortgages and security agreements were attached to the Affidavit of Howard Kahn sworn May 4, 2011.

19 As well an order appointing a receiver was made in the *Colonial Bank* action mentioned in footnote 31 below. The receiver's powers related to real and personal property described exhibit "A" to the May 14, 2010 order of Circuit Judge Waller as expanded by a September 30, 2010 order.

20 This excerpt is drawn from paragraph 166 of the plaintiffs' factum. February 1, 2011 was the date on which Mr. Lapedus swore his affidavit. In paragraph 22 of the amended statement of claim the plaintiffs say they learned of the fraud in January, 2011.

21 (2002), 31 C.B.R. (4th) 243 (Ont. Div. Ct.).

22 *Ibid.* at para. 26. See, too, *Bardeau Ltd. v. Crown Food Service Equipment Ltd.* (1982), 38 O.R. (2d) 411 (Ont. H.C.) and *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.) at para. 18.

23 The administration of justice falls into disrepute unless the benefit of non-disclosure is forfeited: *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.* (2000), 50 C.P.C. (4th) 300 (Ont. S.C.J. [Commercial List]).

24 Those were on March 28, April 18, May 20 and June 21, 2011.

25 Messrs. Fioretti and Iglesias.

26 Rule 3.04. That rule applies unless the order "expressly prohibits amendment by the parties."

27 It is worth noting that Mr. Oxley undertook "to move this case along expeditiously" in his June 8, 2011 affidavit.

28 *United States v. Friedland*, *supra* note 9 at para. 28.

29 *Colonial Bank v. Maesbury Homes Inc. et al.* in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County; *Marshall Investments Corporation v. Ayres Rock Limited et al.* in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida and *Beal Bank Nevada v. Lake Austin Properties I, Ltd. et al.* also in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

30 They rely on the opinion of Florida lawyer Howard Kahn as set forth in affidavits sworn May 4 and June 8, 2011.

31 The Oxley companies rely on the contrary opinion of Mario Iglesias set forth in an affidavit and supplementary affidavit sworn May 20 and June 10, 2011 respectively. The defendants asked that I strike those affidavits because Mr. Iglesias failed to attend cross-examinations arranged in accordance with the timetable I set on June 21, 2011. I have not relied on the affidavits of Mr. Iglesias in my analysis.

32 *Caribbean Cultural Committee v. Toronto (City)* (2002), 21 C.P.C. (5th) 274 (Ont. S.C.J.) at paras. 7-8.

33 The Tanya Hutchens defendants seek $300,234.29 and the Sandy Hutchens defendants seek $395,434.25.

34 The admission is made in paragraph 5 of Mr. Oxley's June 8, 2011 affidavit.

35 *Rules of Civil Procedure*, rule 56.01 (1); *Hallum v. Canadian Memorial Chiropractic College* (1989), 70 O.R. (2d) 119 (Ont. H.C.).

36 *Chachula v. Baillie* [2004 CarswellOnt 6 (Ont. S.C.J.)], 2004 CanLII 27934 at para. 18; *Cigar500.com Inc. v. Ashton Distributors Inc.* [2009 CarswellOnt 5241 (Ont. S.C.J.)], 2009 CanLII 46451.

37 In his August 31, 2011 affidavit, Mr. Oxley deposed that he had found a group willing to commit more than $55 million USD "into saving" the projects.

38 *Guirmag Investments Inc. v. Milan* (1999), 43 C.P.C. (4th) 113 (Ont. S.C.J.).

39 Rule 40.03 allows the court to dispense with the requirement. No such order was sought before Perell J.

40 The excerpt is taken from paragraph 5 of Mr. Oxley's June 8, 2011 affidavit.

41 There should be no doubt about the seriousness of the undertaking: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (Ont. C.A.) at para. 63.

42 Writing for the court in *Zeitoun v. Economical Insurance Group*, 53 C.P.C. (6th) 308 (Ont. Div. Ct.) at para. 50 Low J. said:
Where impecuniosity has not been shown, a legitimate factor in deciding whether or not it would be just to require security for costs is whether the claim has a good chance of success.

43 At one time they had also sought the appointment of a receiver with respect to the property of all of the defendants except Jennifer Araujo. That aspect was not pursued.

44 Certificates of pending litigation were registered against parcels in Thornhill, Innisfil and Sudbury, Ontario. Sandy Hutchens is shown as a registered owner of PIN 73588-0383 (LT).

45 Mr. Hutchison argued the evidence of Mr. Lapedus should be excluded because he owed and breached a fiduciary duty to the Sandy Hutchens defendants having served as their accountant. No authorities were cited. During his period of employment Mr. Lapedus performed various duties. At times he performed an accounting function but he no longer held any professional designation. During cross-examination he acknowledged he had an obligation to maintain the confidentiality of the financial information of the Sandy Hutchens defendants. However, absent authority to the contrary I do not accept that duty continues to apply when the employee, whether an accountant by training or not, has reason to suspect the employer is engaged in wrongful, perhaps illegal, conduct.

46 [2009] O.J. No. 2380 (Ont. S.C.J.)

47 *Ibid.* at para. 33.

48 An affidavit of Tanya Hutchens sworn March 27, 2011 was filed but it related to her request for a variation of Perell J.'s order and did not address the merits of the claim.

49 *Hunter's Square Developments Inc. v. 351658 Ontario Ltd.* [2002 CarswellOnt 2341 (Ont. S.C.J.)]; 2002 CanLII 49491 at para.56.

50 Privileged information may be redacted.

TAB 20

1982 CarswellOnt 1267
Ontario Supreme Court [High Court of Justice]

1982 CarswellOnt 1267, 26 C.P.C. 297 at 306, 38 O.R. (2d) 411, 67 C.P.R. (2d) 198

Bardeau Limited et al. v. Crown Food Service Equipment Limited et al.

Steele J.

Judgment: April 23, 1982

Counsel: *J.L. MacDougall*, Q.C. and *I.V.B. Nordheimer*, for all applicants except Stritzl, Salin and Gyongossy.
Colin L. Campbell, Q.C., for Salin, Stritzl and Gyongossy.
Charles Scott and *C. Lloyd Sarginson* for respondents.

Steele J. **(orally):**

1 This is an application to rescind or discharge my order of the 20th of April, 1982. The order was an *Anton Piller* type order, the purpose for which is set out in my written reasons for it.

2 At the present time the order has been executed on all of the defendants named therein, and inspection has been made at 101 Oakdale Avenue and at the residence and in the cars of the named personal defendants. The inspection was refused at the other premises.

3 In support of the present application for dissolution, the named defendants request that they be permitted to call evidence viva voce to rebut the allegations of malfeasance alleged in the affidavits that formed part of the material that was filed with the Court at the time of the granting of the order.

4 At the time of the giving of the order, perhaps erroneously, I was under the impression from counsel that the three personal defendants were the controlling force of the two named defendant companies. It has now been drawn to my attention that there is no clear evidence of any such ultimate control position by these three persons. From material filed, they are employees and shareholders of the named companies and are in some position of control.

5 There is no other evidence before me with respect to the actual control of the companies, and I have been asked to permit evidence to be called, presumably to rebut the positions that these individuals are in that type of control. In *Thermax Ltd. v. Schott Indust. Glass Ltd.*, [1981] F.S.R. 289 at 297, it is clear that who controls an actual named defendant company is a very material part in determining whether an "*Anton Piller*" type order should or should not be granted. I refuse to permit evidence to be called because I do not consider it necessary in view of other reasons that lead me to conclude that the order should be dissolved.

6 At the time that the plaintiffs applied for the order I was not advised of the action by *Bert Johnson Enterprises Ltd. v. Bardeau Ltd.*, relating to an alleged breach of a distribution agreement of similar products by Bardeau, and the counter-claim by Bardeau that the plaintiff in fact breached the agreement.

7 In the defence in that action, Bardeau alleged that Johnson solicited customers on behalf of Deltarex for the sale of steam kettles alleged to be an imitation of the steam kettle manufactured by Bardeau. Counsel in that case are the same as in the present case. While the issues in the two actions are not the same, the parties are, and they relate to the same products.

8 While my order was not directed to Bert Johnson Enterprises Limited, the order relates to evidence in the overall action that includes claims that industrial designs and patents belonging to Bardeau have been infringed by Johnson and certain other

defendants. I consider this to be a material fact that should have been disclosed. An applicant has a duty to disclose all material facts to the Court, as provided for in *Thermax Ltd. v. Schott Indust. Glass Ltd*. at p. 295, where quotations to previous cases are cited, to the effect that:

> It is the duty of a party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction. It is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward.

9 And secondly:

> So here if the party applying for special injunction abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant. I think therefore that the injunction falls to the ground.

10 Those citations and references relate to injunctions. An *Anton Piller* order is not, in a real sense, a normal injunction, but it is equitable relief and an equitable remedy, and therefore principles of equity are similar.

11 In my reasons on granting the order, I stated that the tests for granting an *Anton Piller* order were different from those of an injunction. I have not altered my view in that regard, for there I was referring to the test as stated 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 (Div. Ct.), which is not applicable to this case.

12 The present application is one of the first in Ontario of this nature. The remedy is a most exceptional one, and there must be an extremely hight standard of conduct on the part of any applicant bringing such an application, including full disclosure. Whether or not the applicant believes that the matters are of material consequence they must be disclosed so that the Court may determine their relevance.

13 In the present case a factor which was material was not brought to the attention of the Court. This undisclosed fact may or may not have altered the granting of the order, but weighed with all the other factors it was a factor that was material enough that it should have been disclosed.

14 While this disposes of the matter, I wish to comment on some points raised during argument. Firstly, it was suggested that counsel for the plaintiff should be criticized because they did not give notice to counsel for the defendant before applying for the order. While in a normal injunction it is proper for notice to be given to the defendant wherever possible, I do not criticize counsel in this case, because the very nature of the order is secrecy, and if notice had been given to the defendant's counsel, that counsel would have been placed in the unenviable position of attending Court on behalf of a client without instructions, and perhaps being ordered by the Court not to disclose the results to his own client.

15 I would like to add further, that by reason of my dissolving the order I did not hear evidence that the defendants wished to tender to rebut the allegations of malfeasance made against the personal named defendants, and therefore my reasons relating to the conduct of those persons should be considered in that light.

16 Another point that was raised was that the formal order taken out did not include the undertaking made on behalf of the plaintiffs with respect to damages. My reasons clearly stated that such an undertaking has been given to the Court. Under the provisions of R. 527, I believe that it was an accidental slip or omission in not having been included in the order, and I would have amended the order to so include it if it had not been dissolved. Submission on costs.

Application granted.

TAB 21

2018 BCSC 2347
British Columbia Supreme Court

Access Human Resources Inc. v. Earl

2018 CarswellBC 3537, 2018 BCSC 2347, 301 A.C.W.S. (3d) 158

Access Human Resources Inc. (Plaintiff) and Carey Suzanne Earl, CE Business Services (2016) Ltd., Douglas Brian Earl, Rodney Earl, Earl's Metal Arts Ltd., Alexandra Helen Terry and Shawn Eldon Terry (Defendants)

G.P. Weatherill J., In Chambers

Heard: December 11, 2018
Judgment: December 13, 2018
Docket: Kelowna S121362

Counsel: J. Craddock, S. Chambers, for Plaintiff
P.M. Johnson, for Defendants, Carey Earl and CE Business Services (2016) Ltd.
M. Danielson, for Defendants, Douglas Earl and Earl's Metal Arts Ltd.
S. Kelly, W. Thiessen, for Defendant, Rodney Earl
S. Shakibaei, D. Horvath, for Defendants, Alexandra Terry and Shawn Terry

***G.P. Weatherill J., In Chambers*:**

1 *THE COURT:* There are three applications before me brought by the defendants in this action seeking to set aside or, alternatively, vary an *ex parte Mareva* injunction order ("*Mareva* order") I granted in favour of the plaintiff on November 13, 2018.

The Parties

2 The plaintiff, Access Human Resources Inc. ("Access"), is a company carrying on business in Kelowna that provides support services to developmentally disabled youth and adults. Its director and sole shareholder is Mr. Cliff Andrusko ("Mr. Andrusko").

3 The defendant, Carey Suzanne Earl ("Carey"), is a bookkeeper and was employed as such by the plaintiff from November 2005 until she was terminated by Access in late October 2018.

4 The defendant, CE Business Services (2016) Ltd. ("CEBS"), is a company that was incorporated by Carey to provide accounting and bookkeeping services to *inter alia* the plaintiff. For a number of years, Carey provided bookkeeping services to Access through CEBS.

5 The defendant, Douglas Brian Earl ("Doug"), is Carey's husband. Doug is a metal fabricator and owns the defendant, Earl's Metal Arts Ltd. ("Earl's Metal"). Carey and Doug have two children, the defendant, Rodney Earl ("Rodney"), and Alexandra Helen Terry ("Lexi"). Lexi is Doug's stepdaughter.

6 Lexi, aged 25, is married to the defendant, Shawn Eldon Terry ("Shawn"), aged 30 (jointly, the "Terrys"). Lexi is an accountant of sorts and plans on becoming a CPA. Shawn earns approximately $52,000 per year working for a metal processing company. In the past, Lexi has worked for Carey, CEBS, and directly for the plaintiff. Lexi and Shawn were married on August 31, 2018. Their wedding was funded in part by $13,000 received from Carey and Doug and in part by money received from Shawn's parents. In October 2016, the Terrys purchased a home in Lake Country civically described as 10695 Russell Road, Lake Country. It is their only asset of substance. The down payment for that purchase was approximately $29,000 and came

RSPs and TFSAs that they owned. They also had some financial assistance from Shawn's parents for the closing costs. Their monthly mortgage payments are approximately $2,400. The Terrys have a 13-month-old son.

Background

7 Access alleges that between 2005 and 2018, Carey either directly or through CEBS took $2,743,093.35 while she was employed as its bookkeeper. Of that sum, it says only $378,615.15 was for legitimate wages or salary and the rest was stolen. Access says Carey used $1,161,476 to pay her credit cards and the balance of $1,203,002 is unaccounted for. Access' allegation is that the majority of these funds were misappropriated and paid either as illegitimate payroll expenses, credit card payments, or independent contractor expenses. It alleges that Carey improperly transferred Access' money into various accounts held by either her or Doug. Access further alleges that some of the misappropriated money was transferred to other family members, the Terrys and Rodney, and that some was used to purchase vehicles and property.

8 Carey has not denied misappropriating funds from Access, but denies the sum alleged. She says that much of the money can be accounted for as legitimate wages payable to Doug, Rodney, Lexi, and herself who were performing services for Access. The Terrys deny any involvement in or knowledge whatsoever of any misappropriation of funds from Access. They further deny that they have any intent to dispose of or dissipate their assets. Rodney has only recently retained counsel. His counsel was present at the hearing, but has not yet had time to prepare any affidavit or other material.

History of Proceedings

9 The notice of civil claim was filed on November 13, 2018. On the same day, Access applied for an *ex parte Mareva* injunction effectively freezing the defendants' worldwide assets including bank accounts, credit cards, loyalty reward points, credit card reward points, investments or other accounts, and requiring that the defendants provide affidavits identifying full particulars of any assets owned by them within 14 days. That application came on before me late in the day on November 13, 2018. In support of the *Mareva* order, Access relied on Mr. Andrusko's affidavit filed November 13, 2018. In that affidavit, Mr. Andrusko deposed that, although his investigation into Carey's defalcation was ongoing, he suspected she had stolen $1,536,988.60 between 2010 and 2018. Mr. Andrusko stated that it was possible that there was more. Needless to say, the allegations against Carey are extremely serious. At paragraph 17 of his affidavit, Mr. Andrusko swore the following:

> On or about October 26, 2018, I confronted the defendant, Carey Earl with the thefts and she admitted that she had stolen, misappropriated and/or embezzled funds from the plaintiff's accounts as outlined above. The defendant, Carey Earl, stated to me, "You are right, I stole from you. Do what you need to do and I will plead guilty at court." Following this, I requested that the defendant, Carey Earl, provide me with a repayment proposal and security on her personal property or real property. While the defendant, Carey Earl, agreed to do this, she never provided a repayment proposal or provided security on any of her personal or real property to me or the Plaintiff.

10 Mr. Andrusko further stated that if the *Mareva* order was not issued, he believed that he would be unable to recover the stolen/embezzled money.

11 On that basis, I granted the *Mareva* order with liberty to the defendants to apply to set the order aside on 14 days' notice. The *Mareva* order provided that the defendants could spend $1,500 each per month for living expenses.

12 The defendants apply to set aside or, in the alternative, vary the *Mareva* order on the basis that the test for granting such an extreme order was not met and on the basis that Access did not make full and frank disclosure to the court of all material facts. In particular, they contend that the court was not told that the defendants were employed by Access and that much of the money that Access alleges was stolen can be accounted for in legitimate wages payable to them. Further, they argue Access did not follow the mandatory model order prescribed by Practice Directive 47 issued by Chief Justice Hinkson in 2015.

Purpose of a Mareva Injunction

13 *Mareva* injunctions are harsh, extraordinary, and exceptional remedies that should only be available in the clearest of cases. At the root of a *Mareva* injunction is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach (*Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420 (B.C. C.A.), at para. 16, citing *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2007 BCCA 481 (B.C. C.A.), at paras. 44 and 45). *Mareva* injunctions are issued to freeze assets, restrain or prevent defendants from disposing of any assets until a final disposition of the matter. However, they are also available as a form of prejudgment security (*Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C. S.C.) at 349 to 351; *Netolitzky v. Barclay*, 2002 BCSC 1098 (B.C. S.C. [In Chambers]), at para. 23). The idea is that victims of fraud should be able to recover on their anticipated judgments if the court rules as much.

14 Before a *Mareva* injunction order will be considered, the plaintiff must first establish a strong *prima facie* case and, second, must establish that the balance of convenience favours the granting of the injunction (*Mooney* at paras. 349 to 351). This means that once a *prima facie* case has been shown, the interests of both parties should be balanced taking into account the particular circumstances of the case including the nature of the cause of action, the defendant's conduct, the relative strengths of each party's case, and the evidence of irreparable harm either way. The ultimate question is whether a *Mareva* injunction would be fair and just. In other words, should the plaintiff be able to freeze and monitor the movement or expenditure of the defendant's assets pending final disposition?

Full and Complete Disclosure

15 The law surrounding *Mareva* injunctions is well known. So is the law surrounding *ex parte* applications. On an *ex parte* application, the relevant principles are set out in *Pierce v. Jivraj*, 2013 BCSC 1850 (B.C. S.C.), at para. 37, as follows:

> 1) the applicant must make full and frank disclosure of all material facts;
>
> 2) a material fact is one that may affect the outcome of the application;
>
> 3) it is for the court to determine if the fact is material, not the applicant or his legal advisors;
>
> 4) the duty to disclose applies not only to known facts, but also to those facts that ought to have been known had proper inquiries been made;
>
> 5) the extent of the inquiries required depend on the circumstances of the particular case;
>
> 6) if material non-disclosure is established, the court may deprive the applicant of any advantage gained by reason of the breach of duty to disclose;
>
> 7) the failure to provide such full and frank disclosure will allow a court to set aside the order without regard to the merits of the application;
>
> 8) in deciding whether the Order should be set aside, the court must consider the importance of the non-disclosed fact to the issues which were to be decided by the judge at the *ex parte* hearing;
>
> 9) an innocent non-disclosure is an important consideration, but not decisive as to whether the breach is such that the Order is to be set aside; and
>
> 10) not every omission necessarily results in the order being set aside.

16 A litigant's duty when it comes to court on an *ex parte* basis is onerous. In particular, when the order sought is in the nature of a *Mareva* injunction, the standard is high (*Green v. Jernigan*, 2003 BCSC 1097 (B.C. S.C.), at para. 25).

17 The duty is to make full and frank disclosure of all material facts - meaning facts that might be expected to influence the granting or rejection of the application in question. Materiality is ultimately to be determined by the court in each particular

case. Where a lawyer is in doubt, he or she should err on the side of disclosure (*Kriegman v. Dill*, 2018 BCCA 86 (B.C. C.A.), at para. 43).

18 In short, the plaintiff must put all the cards on the table face-up. The facts that might possibly influence the granting or rejection of the application in question must be disclosed.

Setting Aside a Mareva Order

19 Whether a *Mareva* order should be set aside is to be approached as a hearing *de novo* (*Netolitzky v. Barclay*, 2002 BCSC 1098 (B.C. S.C. [In Chambers]), at para. 20).

20 Here, the defendants say the *Mareva* order should be set aside because Access failed to fully inform the court of all relevant facts, particularly the fact that a significant amount of the money alleged to have been stolen was money the defendants were legitimately entitled to receive from the plaintiff in wages, contract, or other payments. They say that Access was aware or ought to have been aware of this and that a reasonable investigation of its books would have revealed as much. They also say that the *Mareva* order should be set aside because Practice Directive 47 setting out the mandatory rules of *Mareva* injunction applications were not followed and thus the entire process should be voided.

Discussion

21 On the last point, while the defendants are correct, I am satisfied that Access' failings likely resulted from a deep concern that significant funds were stolen and that immediate steps needed to be taken to allow for an opportunity to recover what it could. Following Mr. Andrusko's suspicions, he confronted Carey in late October 2018. She apparently admitted her wrongdoing at that time. There is no doubt that time was short and the pressure was on Access' counsel to obtain an order as quickly as possible to preserve assets. I recall it was late in the day on November 13, 2018, when counsel sought to have the application heard. Given the significant amount of money involved, I do not doubt the urgency that was felt.

22 The defendants argue that, regardless, at no time during the November 13, 2018 hearing, did Access raise any sort of possible defences or explanations with respect to the transactions in the bookkeeping records, namely, that Doug and Lexi were employed by Access from time to time and were justly entitled to receive monies that were paid directly to them. Further, they argue that Access did not comply with the model order for preservation of assets form provided for in Practice Directive 47 which requires that an applicant seeking a *Mareva* order deviating from the model form must:

> (a) identify the difference by providing a black-lined copy of the order sought as compared with the model order; and
>
> (b) explain to the court the basis upon which it should grant relief on the terms other than provided in the model order.

23 The defendants say that this was not done. Instead, they argue Access advised the court that the model order was not something that needed to be followed and incorporated religiously and failed to identify the way the proposed order differed substantially from the model order. In particular, Access removed from the model order the requirement that the defendants be afforded either a fixed amount or a reasonable amount for legal fees to defend the matter. They point in particular to Footnote 3 of the model order that reads:

> This Order is not intended to limit a defendant in obtaining legal advice. Whether an amount is fixed or reasonable, and the ultimate amount if it is fixed, should depend on the entire context of the case and the evidence: [for example] a more complex case may require higher ... fees.

24 The *Mareva* order as presently worded precludes the defendants from spending any money on legal fees without Access' agreement. Further, the *Mareva* order requires each defendant to provide an affidavit giving particulars of their assets to Access' counsel within 14 days. The model order cautions against granting such an order on a without-notice application as the purpose of a *Mareva* injunction is not to obtain discovery. If an order for disclosure is found to be appropriate, the model order specifies two additional paragraphs be added, both of which were not included. Further, the defendants claim that the model order was varied from applying to set aside on giving no less than 24 hours' notice to 14 days' notice and such change was not explained.

25 On the earlier point, Doug and Earl's Metal's main complaint is that the court was not informed that he was formally contracted and employed by Access for about seven years, which accounts for why he received payments from Access. As an example, between 2015 and 2017, he was paid $142,428.11 as an employee. Earl's Metal argues that Mr. Andrusko must have known that Doug, the owner-operator of Earl's Metal, was employed by Access during this time and that he received payments for his work. Suggesting that Doug misappropriated that money from Access was plainly wrong. Further, they argue that an *ex parte Mareva* applications should not have been made in the first place because there was no emergency. They say Access exaggerated its case in order to secure the relief it wanted on the basis that, "It is easier to ask for forgiveness than ask for permission." They argue that such an approach cannot be condoned in an extraordinary without-notice application for harsh relief in the nature of a *Mareva* injunction.

26 Carey and CEBS' application is similar to Doug and Earl's Metal's application. They say that Access TelePayroll system is capable of providing much more information than has been disclosed including names and bank accounts. They point to several discrepancies in Mr. Andrusko's accounting where they say he has double-counted. They argue that had Mr. Andrusko taken the proper steps to use TelePay to investigate or track the deposits, he would have found that many entries that he claims are misappropriated were, in fact, a legitimate payroll deposit for employees. They argue that the fact that he admitted such evidence should militate toward setting aside the *Mareva* injunction.

27 Carey also says that the $1,500 per month that she was allotted in the *Mareva* order is woefully inadequate to allow her to pay her monthly debt obligations. She denies living a lavish lifestyle as suggested by Mr. Andrusko. Further, she says there is no evidence that would indicate any risk of her dissipating, selling, or removing assets from this jurisdiction. She says the *Mareva* order in its current form will create extreme hardship for her including the loss of a new employment opportunity whereby Doug and Carey are proposing to transport recreational vehicles from the United States to Canada.

Decision

28 In the circumstances, I do not think that the complaints against Access are egregious enough as to disentitle it to reasonable protection. I am satisfied that, similar to what occurred in *Green v. Jernigan*, the omissions to which the defendants take issue largely resulted from Access' perceived need to move quickly. There was no deliberate attempt to conceal information or mislead the court. It is not necessary to detail each aspect of Access' accounting. The evidence suggests a substantial amount of money has been taken from Access that cannot be accounted for by wages or other legitimate payments. Accordingly, I accept that any errors made by Access in not conforming to the model order in these circumstances should be considered irregularities that do not nullify the *ex parte* application or the *Mareva* order (Supreme Court Rule 22-7(1)).

29 I am satisfied, as well, that Access has shown a strong case of fraud against Carey and CEBS. Indeed, the evidence appears to be overwhelming. Given the real property in question is owned jointly by Carey and Doug and the evidence of significant misappropriated money deposited to joint accounts of Carey and Doug and Doug directly, there is a strong inference that assets are at risk and will be removed or dissipated.

30 Fraud is an exception to the general hostility to prejudgment execution (*Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.); *Netolitzky* at para. 27). Access has established a strong *prima facie* case that Carey and CEBS committed theft and fraud and transferred misappropriated money to Doug. The evidence was strong on November 13, 2018, when the *Mareva* order was issued. Since then, Access' further analysis has made the case even stronger. I am satisfied that these defendants appear *prima facie* to have each benefitted from Carey's fraud over a long period of time, in the order of 10 to 13 years.

31 These defendants do not suggest that they have sufficient assets in British Columbia to satisfy a judgment in the amount Access is claiming. If the *Mareva* order is removed and if Carey and Doug dissipate their assets, the chances of the plaintiff realizing on any judgment it may obtain would be remote. Therefore, respecting the *Mareva* order as it relates to Carey, CEBS, Doug, and Earl's Metal, I am persuaded, particularly because the misappropriation of monies from the plaintiff has not been denied and because Carey and Doug are husband and wife and share joint accounts and properties, that it is not in the interests

of justice that the *Mareva* order be set aside in its entirety. In other words, I conclude that the balance of convenience favours the *Mareva* order remaining in place as against Carey, CEBS, Doug, and Earl's Metal.

32 However, I am persuaded that the *Mareva* order should be varied to conform to the model order as it relates to Carey's and Doug's ability to fund legal fees, the disclosure requirements, and the payment of living expenses. Carey requests an order that she be able to access her T-Bill savings account at Interior Savings Credit Union for the purposes of providing a retainer to her counsel. Carey, CEBS, Doug and Earl's Metal will clearly need legal representation to help them navigate the legal waters of this case. As the notes to the model order suggest, *Mareva* orders are not intended to limit a defendant's ability to obtain legal advice. The evidence suggests that Carey and Doug maintain joint accounts. They state that the sum of approximately $14,000 is in Carey's T-Bill savings account. Carey and Doug are authorized to use those funds to pay a retainer for legal representation.

33 Respecting living expenses, Carey deposes that she cannot live off $1,500 per month for living expenses. The affidavit she filed in support suggests she prepared and attached a spreadsheet of living expenses. Unfortunately, the copy of her affidavit provided to me did not have that exhibit attached so I am unable to assess what her reasonable living expenses should be. However, she states she could live off an allowance of $2,500 per month which I am satisfied is reasonable. The *Mareva* order therefore is varied to authorize Carey and Doug to each spend up to $2,500 per month for living expenses or $5,000 per month total.

34 Respecting disclosure requirements, I am varying the *Mareva* order to comply with the model order. The following paragraphs are inserted:

> i) The Plaintiff's solicitor shall not disclose the Defendants' asset list or the information contained in it to any person including the Plaintiff, except for the purpose of this proceeding. Before making such disclosure counsel shall obtain a written undertaking from the persons to whom the disclosure is to be made in the form attached to this order as Schedule "C";
>
> ii) On or before February 1, 2019 or such later date as provided in a further order the Plaintiff's solicitor shall destroy all copies of the Defendants' asset list received [from the Defendants] and take reasonable steps to ensure that any copies released to anyone else are destroyed, except that the Plaintiff is at liberty to file with the Court a sealed copy of the Defendants' asset list, to be retained in the Court file so that it will be available on further court order.

35 The Schedule C referred to will be the Schedule C undertaking in the model order.

36 Respecting the Terrys and Rodney, I am not satisfied that the *Mareva* order should continue against them. There is no evidence that Lexi, Shawn, or Rodney had any direct knowledge of Carey's alleged fraud. While it is true that Access' tracing efforts may show that monies paid to them indirectly came from misappropriated funds, the evidence suggests that, to that extent, the money was relatively small in the grand scheme of things. Courts are loath to grant execution before judgment unless there is substantial evidence supporting an allegation that the defendant has participated in defrauding the plaintiff.

37 Here, Access does not allege that the Terrys or Rodney are guilty of fraud, but rather that they are the indirect recipients of misappropriated funds thereby creating a constructive trust over property that was purchased using those funds. At best, Access' evidence suggests that Carey and/or Doug used misappropriated funds from the plaintiff and gave it to the Terrys or Rodney, and that they unwittingly took that money.

38 I am persuaded that the *Mareva* order should be set aside against the Terrys and Rodney. I am not satisfied that Access has shown a strong *prima facie* case against them to warrant freezing their assets, particularly since Access has filed a CPL against the Terrys' property thus preserving that asset. I am satisfied that there is no evidence of a real risk of the disposal or dissipation of any of their assets.

39 Respecting costs, I allow Access one set of party-and-party costs against the defendants, Carey, CEBS, Doug, and Earl's Metal.

40 I allow the Terrys one set of party-and-party costs of their application to set aside the *Mareva* order against Access.

41 I am not allowing Rodney costs because, although he was represented at the hearing, he has not prepared material or responded in any other way.

42 Those are my reasons. Anything arising?

[SUBMISSIONS RE COSTS]

43 THE COURT: I am going to order that the Terrys are entitled to double costs from November 27, 2018 to today's date, and party-and-party costs prior to November 27, one set of costs.

44 MR. CRADDOCK: Thank you, My Lord.

[SUBMISSIONS RE CANCELLATION DOCUMENTATION RE DEFENDANT CAREY EARL'S TRIP]

45 THE COURT: I will leave that to counsel to do. It sounds like that has been handled.

46 MR. DANIELSON: My Lord, just a couple of things I was hoping to address.

[SUBMISSIONS RE AFFIDAVIT DISCLOSURE EXTENSION]

47 THE COURT: I will extend the deadline for a list of assets to the 21st of —

48 MR. DANIELSON: All right, thank you, My Lord.

49 THE COURT: — December at 4:00 p.m. Thank you, all.

50 MR. CRADDOCK: And that can apply to all the defendants, I suppose, Mr. Johnson, as well.

51 THE COURT: That is to the —

52 MR. JOHNSON: That is correct.

53 THE COURT: That is to the four remaining defendants.

54 MR. CRADDOCK: Thank you.

55 THE COURT: Thank you.

Applications granted in part.

TAB 22

2022 ONSC 1147
Ontario Superior Court of Justice

A.J. LANZAROTTA WHOLESALE FRUITS & VEGETABLES LTD. v. UNITED FARMERS

2022 CarswellOnt 2351, 2022 ONSC 1147, 2022 A.C.W.S. 2197

A.J. LANZAROTTA WHOLESALE FRUITS & VEGETABLES LTD. (Plaintiff) and UNITED FARMERS, 2773125 ONTARIO INC., 2773125 ONTARIO INC. o/a UNITED FARMERS, JANET MICHELLE BRUNTON and WAYNE D. KING (Defendant)

Fowler Byrne J.

Heard: November 24, 2021
Judgment: February 18, 2022
Docket: CV-21-00001073-0000

Counsel: Tyler H. McLean, for Plaintiff
Christopher Steinburg, for Defendants

***Fowler Byrne J.*:**

1 The Plaintiff, A.J. Lanzarotta Wholesale Fruits & Vegetables Ltd. ("A.J. Lanzarotta"), brought an urgent motion, without notice, seeking a Mareva injunction and a Norwich Order. On March 30, 2021, Justice Beilby granted the relief on a temporary basis, ordered that the motion and order be served, and that the matter return to court on April 8, 2021.

2 On April 8, 2021, the matter was before Justice Doi, who ordered that the injunction continue, ordered disclosure, and made the application returnable on April 23, 2021, so that the Defendants could apply for an allowance for living expenses. The Application was otherwise adjourned to a hearing *de novo* with respect to the Mareva injunction on September 20, 2021. The motion on April 23, 2021, was dealt with on consent.

3 The matter appeared before Justice Mandhane on September 20, 2021. On that day, the matter was adjourned to November 24, 2021. A further order was made that the orders of Justice Doi, of April 8, 2021, and April 23, 2021, remain in full force and effect.

I. Issues

4 The Defendants do not object to the continuation of the Norwich Order and the issue of interim living expenses has been decided. Accordingly, the issues to be decided by me are as follows:

a) Is the Plaintiff entitled to an interim and interlocutory injunction against the Defendants, restraining them from selling or otherwise disposing of its assets, including those listed in the Notice of Motion?

b) Should this injunction include property that the Defendants may not have an ownership interest in, but have power over, directly or indirectly?

II. Materials Relied on

5 Between the parties, approximately 4,000 pages of evidence were filed. The parties' original facta exceeded the page limit — one by almost twice, and the other by almost three times. In her wisdom, Justice Mandhane ordered that the parties file factums that comply with the Notice to the Profession, which capped the factum at 20 pages.

6 For this motion, the following documents were referred to:

a) The original motion record served by the Plaintiff, dated March 23, 2021;

b) The Responding Motion Record of the Defendants, dated June 7, 2021;

c) The Reply Motion Record, dated June 25, 2021;

d) The Affidavit of Jessica DiLeo, sworn June 24, 2021;

e) The Supplementary Motion Record of the Defendants, dated July 12, 2021;

f) The Second Supplementary Motion Record of the Defendants, dated August 12, 2021;

g) The Factum of the Plaintiff, dated October 19, 2021; and

h) The Factum and Book of Authorities of the Defendants, dated October 15, 2021.

7 In addition, counsel made available the transcripts from the cross-examinations on all the affidavits.

8 Finally, the parties relied on the motion record of the Defendants, dated April 21, 2021, wherein the Defendants sought living expenses, as well as the Plaintiff's responding affidavit, sworn April 22, 2021.

III. Background

9 The Plaintiff, A.J. Lanzarotta Wholesale Fruits & Vegetables Ltd., ("A.J. Lanzarotta'), is a full-service fruit and vegetable ("Produce") distribution end processing company located in Mississauga, Ontario, which concentrates on wholesale distributing.

10 The Defendants, Janet Michelle Brunton ("Brunton") and Wayne D. King ("King"), first met with the Plaintiff in August 2020, and indicated that they operated a business called United Farmers, and that they wished to purchase Produce to deliver it to clients in Northern Ontario and Canada. While the Defendants first paid for the Produce "cash on delivery", the terms of payment were soon extended to 15 days. Business picked up considerably and within months, the Plaintiff's receivable account climbed to $1,766,349.00.

11 The debt is not disputed. The issue on this motion is whether the Plaintiff is entitled to a Mareva injunction. In essence, the Plaintiff claims that Brunton and King defrauded them, lied to them about their end client in order to obtain the Produce on credit, and has hidden away or dissipated the proceeds of sale of almost $2 million of Produce. The Defendants claim that they have done nothing wrong, are simply behind in their payments, and hope to pay this receivable in full when they are paid by their own clients.

IV. Issue 1: Is the Plaintiff Entitled to a Mareva Injunction?

A. Law

12 The overriding consideration in determining the Plaintiff's entitlement to a Mareva injunction is whether the Defendants threaten to, or so arrange their assets, as to defeat the Plaintiff in any attempt to recover from the Defendants, in the event the Plaintiff prevails and obtains judgment: See Aetna Financial Services v. Feigelman[1985] 1 S.C.R. 2, at page 24.

13 To obtain a Mareva injunction, the moving party must:

a) Provide full and frank disclosure of all matters in his or her knowledge, which are material for the judge to know;

b) Show a strong *prima facie* case, providing particulars of the claim against the Defendants, stating the grounds of their claim and the amount thereof, and fairly stating the points made against it by the Defendants;

c) Provide grounds for believing that the Defendants have assets in the jurisdiction;

d) Provide grounds for believing that there is real risk of the assets being removed from the jurisdiction, or disposed of within the jurisdiction, or otherwise be dealt so that they will be unable to satisfy a judgment awarded to them; and

e) Provide an undertaking as to damages.

See Chitel et al. v Rothbart et al. 198339 O.R. (2d) 513 (C.A.), at para. 44.

14 As with all motions which seek injunctive relief, the court must consider whether the moving party will suffer irreparable harm and whether the balance of convenience favours granting the injunction.

1. Full and Frank Disclosure

15 The Defendants argue that the Plaintiff did not make full and frank disclosure in their motion.

16 As stated in Chitelat para. 18, if there is less than full and accurate disclosure in a material way or if the moving party misleads the court on a material facts in the original application, the court will not exercise its discretion in favour of the plaintiff and will not continue the injunction.

17 The moving party on an injunction must not only present its case in the best possible light, as if arguing a contested matter, but it is also incumbent on the moving party to make a balanced presentation of the facts, including advising the court of facts or law that may favour the opposing party: *Stans Energy Corp. v. Kyrgyz Republic*, 2015 ONSC 3236 (Ont. Div. Ct.) (Div. Crt.), at paras. 37-39.

18 A material fact is one that would have been weighted or considered by the motions judge in deciding whether it would have changed the outcome: *Stans Energy* , at para. 39 and 41.

19 A court has the discretion to continue an interlocutory injunction if the undisclosed facts are not material or the non-disclosure was unintentional. In deciding whether to exercise its discretion to continue an injunction in the face of non-disclosure, the court should consider the following:

a) the practical realities that there is often urgency or an emergency that explains why the motion is made without notice;

b) whether facts were intentionally suppressed or whether simple carelessness or ignorance was the cause of the non-disclosure;

c) the pervasiveness of the non-disclosure;

d) the difficulty of determining what is a material or an immaterial non-disclosure; and

e) the significance to the outcome of the motion of the matters that were not disclosed to the court.

O2 Electronics Inc. v. Sualim2014 ONSC 5050, at para. 75.

20 The Defendants rely on a few examples of the Plaintiff's failure to disclose all material facts.

21 First, the Plaintiff states that they first met King and Brunton in August 2020, while the Defendants point out that King first attended at the offices of the Plaintiff in January 2020 to make inquiries. Nothing transpired as a result of that earlier attendance. I do not find that is a material fact. This is not a fact that I would weigh in considering the appropriateness of the injunction.

22 Second, the Defendants state that the Plaintiff omitted the fact that it was desperate for the Defendants' business. This is the reason for the extended credit, not the alleged misrepresentations. I do not agree that the record substantiates that the Plaintiff was desperate for business. Yes, I agree that they wanted the business, perhaps even *really* wanted this business, but the

Plaintiff is an established wholesaler, with sales managers, credit managers, and has multiple other clients. They have been able to continue in business despite this rather large receivable. There is no evidence of "dire" financial circumstances or desperation when the business was first obtained. The only mention of desperation on the part of the Plaintiff was when the account remained outstanding for so long.

23 Thirdly, the Defendants claim that the Plaintiff failed to disclose that they wanted to poach the Defendants' clients and squeeze them out. Again, there is no evidence to support this allegation.

24 Fourthly, the Defendants state that the Plaintiff failed to disclose that the Plaintiff did not advise the Defendants of the debt until late October 2020. It was not until then that the Defendants stopped purchasing despite the Plaintiff's invitations to keep buying. I disagree that this is a material omission. Whether or not the Plaintiff failed to notify the Defendants of the debt is of no consequence. The Defendants received the invoices and can calculate the running payables themselves. It is not the Plaintiff's duty to constantly remind them of how much they owe. The fact that the Plaintiff continued to offer to sell the Produce to the Defendants after this debt accumulated is material, but only to support to the Plaintiff's argument that they believed the Defendants were able to pay, due to the representations made.

25 Lastly, it is argued that the Plaintiff did not disclose that the principles Tina Lanzarotta ("Tina") and Gus Lanzarotta ("Gus") were not concerned about the Defendants dissipating their assets if the injunction is lifted. This is a mischaracterization of the evidence given by Tina, who specifically stated that she was concerned that the assets have *already* been dissipated.

26 Accordingly, I find that the Plaintiff made the proper disclosure upon bringing this motion for injunctive relief.

2. Strong Prima Facie Case

27 The Plaintiff's claim is for damages the sum of $1,786,349, based on fraudulent misrepresentation. In the alternative, the Plaintiff claims breach of contract, unjust enrichment, breach of trust or constructive trust, and oppression.

28 The Mareva injunction covers the assets of Brunton and of King, if any are ever located. Accordingly, to find them personally liable, the Plaintiff must show that Brunton and/or King made fraudulent misrepresentations. For the purposes of this injunction, the Plaintiff must show a strong *prima facie* case of fraudulent misrepresentation on the part of Brunton and King.

29 Fraudulent misrepresentation is established if a Plaintiff can show, on the balance of probabilities that:

a) The defendant made a false representation of fact to the plaintiff;

b) The defendant knew the representation was false, did not believe it was true, or was reckless as to its truth;

c) The defendant intended that the plaintiff rely on the representation;

d) The plaintiff acts on the representation; and

e) The plaintiff suffers a loss in relying on the representation.

See Midland Resources Holding Ltd. v. Shtaif2017 ONCA 320, at para. 162, leave to appeal to S.C.C. refused, [2017] S.C.C.A. No. 246; McGee v. Samra2021 ONSC 2540, at para. 53–54.

30 A great deal of the affidavit evidence presented is contradictory and cannot be decided without a full trial. That being said, there is sufficient uncontradicted evidence before me, in the way of texts or admissions, to show that false statements were being made to the Plaintiff, with the full knowledge that they were false, or at least with reckless disregard as to their truth.

31 It is not disputed that King and Brunton represented that they purchased Produce and that the Produce was flown by plane to the northern indigenous communities. What is disputed is that King or Brunton represented that United Farmers, or 2773125 Ontario Inc., had a contract with the government to supply the Produce and that King personally flew the Produce to the north or that he owned the plane that did so.

32 These representations were critical to the Plaintiff because the existence of a government contract virtually guaranteed payment and thus would allow them to extend their line of credit with their bank and weather the storm until which time payment came through. The fact that the Defendants had their own plane to do the deliveries. gave them confidence that United Farmers was a legitimate business with assets behind it.

33 Brunton claims that she took care of the administration and financial part of the business, and that King was in charge of the actual delivery. Brunton claims to completely rely on what King has told her with respect to their client or clients and claims to have never met the key individual in their business, who is identified as John Dentt. As will be seen, I am satisfied on the evidence that King and Brunton knowingly misled the Plaintiff, and at a minimum, Brunton recklessly disregarded the truth of what she told the Plaintiff.

i. Existence of Government Contracts

34 In their evidence, King and Brunton have admitted to making misleading statements.

35 King admitted that he allowed himself to be identified as the "V.P." of United Farmers on the credit application to the Plaintiff, while the company had not yet been incorporated. He also stated that his business of providing Produce existed before meeting Brunton, but he allowed her to identify herself as the president of United Farmers as a sign of the role he wanted her to play.

36 In text communication on September 17, 2020, with Philip Corino, a sales representative with the Plaintiff, Brunton referred to the requirements of the government for billing:

> Brunton: Phil, I have some questions: How many Crown broccoli per pallet? How many super Colossal onions per pallet? How many Yukon gold jumbo potatoes per skid? How many canola oil per skid? How many vegetable oil per skid? Sorry to ask such dumb questions, but I have to break down everything and divide per reserve, hence the need to know the numbers per each skid and/or pallet. Thank you!
>
> Corino: Jan, these are excellent questions and until yourself band [sic] Wayne came along even I didn't know the answer to these.
>
> Brunton: it's the way the government is asking me to do these P.O.'s . . .

37 On September 18, 2020, Brunton sent an email to the Plaintiff which states:

> After discussions with our clients in the Ontario region, our ***Federal account*** would like us to furnish with them the following products (emphasis mine):

38 In an email dated September 24, 2020, Brunton sent an email to the Plaintiff which started off with:

> Hi everyone,
>
> After meeting with the Chiefs of the Reserves for Northern Ontario and Alberta, we have simplified our Standard Orders to reflect skid lots instead of individual products broken down into ten.

39 Brunton now admits that she never met with the Chiefs. She states this is written as it was told to her by King.

40 King has indicated that he may have mentioned that he had a contract to sell to First Nations in Northern Ontario, but he *actually* was referring to a verbal agreement with his cousin, John Dentt, and not to a contract with the federal government. Brunton states that she understood that when King said "we" verbally, he was referring to her, King and Dentt together. The Defendants have identified John Dentt as a "trustee" who had a contract or agreement to supply Produce to the indigenous communities of the north. They sold to Dentt, who in turn sold to these communities. The Defendants provided little or no independent evidence that this arrangement was disclosed to the Plaintiff until after a sizeable debt had amassed.

41 The evidence is clear that Tina Lanzarotta ("Tina") was asking for proof of government contracts when the receivable grew so extensive and payments slowed down considerably. At some point after a sizeable debt was incurred, the Plaintiff was advised of the existence of the "trustee" who obtained payment from the indigenous communities, who then remitted it to King.

42 Once the Plaintiff was made aware of the "trustee", it still required proof that there was a government contract at the centre of it all. On February 5, 2021, after numerous requests for proof of the government contracts, Brunton emailed Tina with the subject line "List of Billed Accounts for Reserves re United Farmers". It contained a list of accounts, but no contracts. Brunton wrote:

> List of Billed Accounts for Reserves re United Fanners
>
> 1. Department of Indian Affairs
> 2. Department of Indian Affairs - Northwest Territories
> 3. Department of Indian Affairs -Sault Ste. Marie North
> 4. Department of Indian Affairs-Yellowknife
> 5. Northern Affairs
> 6. Northern Affairs- Byng Inlet
> 7. Northern Affairs- Frobisher Bay
> 8 , Northern Affairs- Hudson Bay
> 9. Northern Affairs-Inlet Lake
> 10. Northern Affairs-Sioux Lookout
> 11. Northern Affairs -Six Nations
> 12. Northern Affairs -Thunder Bay
> 13. Northern Affairs — Wawa

43 As the account receivable had grown so considerably, the Plaintiff was seeking to extend their line of credit with their bank so that they could continue to operate until payment was received. While the Plaintiff received a list of clients, it was not what was required. Tina has provided the following text exchange between her and Brunton in or around February 24, 2021:

> Tina: Hi Jan, we are still trying to increase our line of credit. Our bank manager has asked my father again to confirm that the 1.7 million is related to a government contract. Can you please provide back up so we qualify. We really need your help/cooperation.
>
> Brunton: What back up? Do you mean the contract itself?
>
> Tina: I need something in writing from you or the trustee stating the amount owed/Contract and or government program funding. We have asked numerous times but no one has forwarded info. My dad does not want to confirm something to the bank without back up., We are very desperate to get this approved.
>
> Brunton: Okay, I will talk to Wayne about this.
>
> Tina: Appreciated.

44 Later that day, Tina followed up with Brunton to see the documentation was forthcoming.

> Brunton: I spoke again with the parties involved from our meeting two weeks ago. Our vendors are starting to pay us. Due to COVID they are behind. We receive the money from our vendors we will direct it to you right away. More vendors will be paying us as directed in our meeting two weeks ago. We will be forwarding funds by courier in a certified cheque.
>
> Tina: Understood but our bank manager wants my dad to confirm that the 1.7 is under a government contract. We will not get the extra funding if we can not confirm. Jan we have asked for this info for months. My dad needs something — the money is coming does not cut it with the bank.
>
> Brunton: I have been in contact with Wayne and the other parties of the meeting, and Wayne is consulting with his lawyer to supply the proper paperwork.
>
> Tina: You're the best! Talk tomorrow.

45 When nothing was forthcoming, the texts show that Tina asked for a copy of the statements that Brunton sent out for payment so that she could at least verify that money was owed to the Defendants, that could eventually be used to pay the Plaintiff. Brunton responded that she could not do that without King's consent, which she could not get.

46 What is compelling in this text exchange is that no where does Brunton try to clarify any misunderstanding or misconception of the nature of their business. No where does she try to clarify that she does not have a government contract, or that the government contract is with Dentt. She simply states that the matter is with King and that he is working with the lawyers.

47 Janet now claims that she was not aware of the exact nature of the contract between Wayne, Dentt, and the First Nations communities and was not even sure there was a contract. She now realizes there was an oral agreement between Wayne and Dentt for the company to supply fresh product to Dentt, who would then deliver it to First Nations customers.

48 What is also telling is the Defendants' argument that the party who has the contract, or some relationship with the Indigenous communities, is John Dentt. Brunton has never met Dentt. No representative of the Plaintiff has met Dentt, who King identifies as his cousin. It is alleged that Dentt visited the Plaintiff's place of business in September 2020 but inexplicably, never went into the office to meet anyone. In his examination, King was asked to bring all correspondence with Dentt. He indicated that there was none. The handwritten invoices by United Farmers from September 2020, indicate that customer is Department of Northern Affairs, with various locations, not "John Dentt". The accounting documents of 2773125 Ontario Inc. shows the customer as "Northern Affairs" with various locations, or "Department of Indian Affairs". There is no mention of Mr. Dentt being their actual customer.

49 King has indicated that he started working with Dentt in 2019. No where does he provide any documentary evidence of this previous employment relationship.

50 Investigations on the part of the Plaintiff show that Dentt is more than likely fictious. Surprisingly, the Defendants did not provide any independent evidence that John Dentt actually exists or was involved in any way.

ii. Ownership of a Plane

51 The Plaintiff also relied on representations made by King that he owned a plane and flew the Produce to the north. King denies owning a plane or that he ever told anyone he was a pilot. In fact, the Plaintiff's investigations reveal he neither owns a plane nor is he a pilot.

52 King's communications do not attempt to dispel the idea that he is a pilot. In text communication with Corino on October 4, 2020, he stated:

King: Just finished meeting at Jan's moms every thing is on the right track to finally streamline receivables have started to flow Tina will receive lots of payments this week every day starting Monday and the planes will be in the air starting 2am Tuesday morning hold to your pants its going to be busy for thanks giving

Corino: Great news. Let's get this thing going like a well oiled machine.

King: Or a well oiled out of date cargo with a lot of rust and that's just the pilot.

Corino: Haha . . . well rusted machine

King: Shipper Gus.

53 There is no mention was made of another individual being the pilot or that the Produce was being flown by Dentt.

54 In King's affidavit, sworn July 12, 2021, he states:

4. However, I did say on several occasions that "we" delivered the supplies by plane or that "we" flew the supplies up north to the reserves. I may have said "we" when planes or flying north came up in conversation as well. When I said "we" I was referring to the trustee, John Dentt, as well. Dentt and I are cousins and had been working together for over a year prior to starting business with the plaintiff. I viewed us as a team along with Jan and 277. Dentt's business leases the planes that fly the supplies up north.

5. I never intended to mislead anyone when I said these words. It was just easier to say "we" in casual conversation rather than always referring to the trustee and trustee's planes.

6. I believe this is what some of the plaintiff's affiants are referring to when they describe my comments about flying or owning planes.

55 Originally, King took the position that the plane or King Air was owned by Dentt. He then changed that evidence in his affidavit sworn July 12, 2021:

7. I would like to make a correction to my first affidavit, sworn June 7, 2021. In that affidavit, at paragraph 73, I stated that King Air is a company owned by Dentt and that the plaintiff's invoice to King Air was a result of Dentt buying a load of avocados that I did not want. This is not correct and is the result of a miscommunication between me and my lawyer.

8. Dentt does not own any company known officially or unofficially as King Air. Rather, at the time, Dentt said he would ask a competitor air transport company, known as King Air, if they wanted the plaintiff's produce that I did not want. Dentt called me back and said King Air would take it.

9. I believe that this may be the same King Air that the plaintiff located through a corporate record search contained in Tina's first affidavit. I believe the owners of King Air that I was dealing with were south asian and of Indian descent

iii. Reliance by Plaintiff and the Consequences Thereof

56 Upon viewing the written communication between the parties, it is clear that Brunton and King were representing that they had a contract with the government and that they were flying the Produce up north. Given that King has admitted that he may have said "we" went he did not mean to, and that Brunton now states that she really had no first-hand information of any of this, I have no difficulty in finding that King and Brunton purposively misrepresented these facts or were reckless with regards to the truth of the facts. I also find that it was the intention of the Defendants that the Plaintiff relied on these misrepresentations so that the Produce would continue to be supplied without payment.

57 I also find that the Plaintiff continued to supply Produce in reliance of these misrepresentations. As indicated in the texts from Tina, she has been asking for months for the government contracts, to show to their bank. The existence of the government

contract was key to them. They relied on the misrepresentation that the federal government was a party to the business in some way and agreed to provide Produce valued close to $2 million. As a result, the Plaintiff is out of pocket $1.7 million.

3. Assets in the Jurisdiction

58 While no assets belonging to King have been discovered in Ontario, Brunton has bank accounts and real property.

4. Risk of Assets Being Removed

59 The Plaintiff points to the fact that they have sold over $1.7 million dollars in Produce but the Defendants cannot account for the proceeds of their sale. The Produce sold is perishable. The Defendants would have had to dispose of it in short order. The Defendants' evidence is that they did dispose of the Produce and that it mostly was sold to Dentt in late 2020.

60 The Mareva requirement that there be risk of removal or dissipation of assets, can be established by inference, as well as by direct evidence. Inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances: Sibley & Associates LP v. Ross2011 ONSC 2951, at para. 63; 2092280 Ontario Inc. v. Voralto Group Inc., 2018 ONSC 2305 (Div. Crt.), at para. 22.

61 The facts as presented allow me to draw an inference that the Defendants will attempt to hide any monies that they may have to satisfy this debt. Their conduct between August 2020 and March 2021, show an active effort to mislead the Plaintiff as to who their real clients were and to provide any real accounting of when they expect to be able to satisfy the debt. They have provided no evidence as to the likelihood of Dentt getting paid, and then paying them. They have taken no steps to collect on their debt from Dentt or start enforcement proceedings. They have provided no evidence that the debt will actually be paid, and provided no evidence that Dentt even exists, let alone that Dentt acknowledges his debt to the Defendants. The books and records of United Farms and 2773125 Ontario Inc., such as they are, do not even show Dentt as a customer.

62 I also find that there is a risk that Brunton's real property assets may be transferred but for this injunction. The evidence of Brunton and her mother is that Brunton has no beneficial interest in the real property and that the property really belongs to Marilyn Brunton. It can just as easily be transferred back to Marilyn Brunton if this injunction is lifted, thereby frustrating any attempt by the Plaintiff to realize on their judgment.

63 I also infer the Defendants' intention to avoid payment of any judgment from the method in which they conduct business. They have no formal contracts and rely on oral agreements. As indicated in Brunton's email of February 5, 2021, invoices for the Produce are given to Dentt. When Dentt paid, he would give payment to King (which could be in cash, cheque, or money order) who would then put it in his bank and withdraw cash to give to Brunton. She would deposit the cash and pay the bills. It is unnecessarily complicated and makes the tracing of proceeds of sale very difficult.

64 The Defendants argue that there is no intent to defeat its creditors. They point to Brunton's efforts to continually communicate with the Plaintiff and let them know the status of matters. I do not accept this. The communications were misleading and Brunton either knew or was recklessly blind to their truth.

65 Accordingly, I find that the Defendants have arranged their business affairs in such as way as to defeat any effort by the Plaintiff to collect on their debt.

5. Undertaking

66 The Plaintiff has provided the requisite undertaking.

6. Irreparable Harm and Balance of Convenience

67 Irreparable harm, is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. The probability of irreparable harm increases as the probability of receiving

damages decreases: RJR–MacDonald Inc. v. Canada (Attorney General)[1994] 1 S.C.R. 311, at page 341; Christian–Philip v. Rajalingam2020 ONSC 1925, at para. 33–34.

68 This is not a situation where the Plaintiff can retake possession of the Produce and try to mitigate their losses. The Produce is gone. The only recourse they have is payment. King is basically judgment proof. Dentt is no better than a ghost. The only recourse the Plaintiff has, is Brunton who claims to not own anything beneficially.

69 In this case, I find that the Plaintiff will suffer irreparable harm if the injunction is lifted. The likelihood of payment is more unlikely now, than it was when the relationship began. If, in fact, Dentt does exist, it has now been more than 2 years since they gave him the Produce and they have commenced no action against him. It is also telling that no third-party action was ever started against Dentt.

70 The balance of convenience favours keeping the injunction in place. If payments of any kind are forthcoming, the Defendants can arrange for a partial or temporary release of the injunction to facilitate payment to the Plaintiff. Arrangements have already been made for Marilyn to open her own accounts and have access to her ongoing income. In the event Marilyn has an urgent need to have access to her real property, she can bring the matter back before the court and seek interim relief.

7. Conclusion

71 I am satisfied that the Plaintiff has proven all the elements necessary to support a Mareva injunction as against the assets of King and Brunton. Accordingly, the Mareva injunction shall remain in place.

V. Issue 2: What can be Frozen?

72 The Defendants argue that Brunton's assets that are own jointly with her mother, Marilyn Brunton, are actually only owned beneficially by Marilyn Brunton, and should not be subject of this injunction.

73 It is clear that Brunton is on title to three properties, which title was assumed prior to her going into business with King. We know that Brunton actually lives in one of the properties, pays the expense associated with it, and used its address as the business address for United Farmers and/or 2773125 Ontario Inc.

74 Originally, the real property that Brunton owns, was owned by her parents James Brunton and Marilyn Brunton. In September 2016 and October 2017, all properties were transferred to her parents and herself as joint tenants. These properties were so transferred before Brunton's business dealing with King. As evidenced by the will of her late father, her mother was the primary beneficiary of his estate, but had her mother not survived, the estate would go entirely to Brunton. Brunton produced the reporting letters associated with these transfers, and no where is it mentioned that this was done for estate planning purposes. No trust agreement was produced.

75 Brunton's mother, Marilyn Brunton, swore an affidavit indicating that she is the beneficial owner of all real properties and that Brunton was added for estate planning purposes. Marilyn Brunton's affidavit indicated that she added Janet to her bank accounts in May 2020, after the death of her husband and as an estate planning measure. She indicated that she is the only one that uses those accounts. She maintains two of the real properties and allows Brunton to live in one, as long as she covers the expenses associated with it.

76 One-half of the bank accounts have already been released to Marilyn. It is not possible to secure only one-half of a property held as a joint tenants. Whether or not Marilyn intended to gift these assets to Brunton, is very much dependant on her intention at the time of the transfer. This is a triable issue. While Marilyn Brunton and Brunton agree on her intention, this evidence has not been tested by an adversarial party on cross-examination. It is premature at this stage of the proceedings, to make a final determination of beneficial ownership of Marilyn Brunton and Brunton's jointly owned property.

77 Accordingly, the injunction will remain in place with respect to all property, whether solely or jointly held by Brunton, pending trial.

VI. Conclusion

78 For the foregoing reasons, I make the following orders:

a) On an interim and interlocutory injunction basis, 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:

1) 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;

2) instructing, requesting, counselling, demanding, or encouraging any other person to do so; and

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

b) The said restriction applies to all of the Defendants' assets, whether or not they are in their own name 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 his direct or indirect instructions;

c) This order may be registered against those properties listed in Schedule "A" to the Notice of Motion;

d) The Defendants may re-apply for an order, varying the existing April 23 rd , 2021, Order of Justice Doi on FOURTEEN days' 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;

e) The Toronto Dominion Bank, located at 2472 Lakeshore Boulevard West, Toronto, Ontario (the "Bank") 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 Bank, until further order of the Court;

f) All institutions and third parties forthwith disclose and deliver up to the Plaintiff any and all records held by them concerning the Defendants' assets, accounts and business records including the existence, nature, value and location of any monies or assets or credit, wherever situate;

g) An order that this Order will cease to have effect if any of the Defendants provide security by paying the sum of $1,766,349.71 into Court, and the Accountant of the Superior Court of Justice is hereby directed to accept such payment;

h) Anyone served with, or notified of, this Order may apply to the Court at any time to vary or discharge this Order, on fourteen (14) days notice to the Plaintiff;

i) This injunction shall continue until this matter is disposed with via Trial, or by further order of this Court;

j) The parties are encouraged to resolve the issue of costs as between them. If they are unable, the Plaintiff shall serve and file written costs submissions, limited to two pages, double space and single-sided, exclusive of Costs Outline, on or before March 11, 2022; the Defendants shall serve and file their responding submissions, with the same size restrictions, which submissions shall include a Costs Outline, no later than March 25, 2022; the Plaintiff may serve and file Reply submissions, limited to 2 pages, on or before April 1, 2022; and

k) The remainder of the motion is dismissed.

Application granted.

TAB 23

2020 ONSC 7404
Ontario Superior Court of Justice

Woods v. Jahangiri

2020 CarswellOnt 17665, 2020 ONSC 7404, 327 A.C.W.S. (3d) 438

ANNE WOODS (Plaintiff) and ABBAS PETER JAHANGIRI, VICTOR SRADJOV, SEEMA PODDAR, JOHN DOE, JANE DOE and DOE CORPORATIONS (Defendants)

Sanfilippo J.

Heard: November 30, 2020
Judgment: November 30, 2020
Docket: CV-18-603484

Counsel: Norman Groot, for Plaintiff
Robert Kligerman (agent), for Defendant, Abbas Peter Jahangiri
No one, for Defendant, Seema Poddar and Victor Sradjov

***Sanfilippo J.*:**

Overview

1 The Plaintiff, Anne Woods, brought this Motion today against the Defendant Abbas Peter Jahangiri (the "Responding Defendant"), without notice, for broad injunctive relief, primarily in the nature of a Mareva injunction.

2 I addressed first the issue of notice as the Plaintiff had not served the Responding Defendant. The Plaintiff initiated this action over two years ago, on August 16, 2018, claiming damages against Mr. Jahangiri in the amount of $327,000 based on alleged fraud, breach of trust, breach of fiduciary duty, conversion, conspiracy, unjust enrichment and breach of contract. She also claimed liquidated, special, punitive, aggravated and exemplary damages. I will not address the relief that the Plaintiff seeks against Victor Sradjov and Seema Poddar because it is not material to this Motion.

3 Mr. Jahangiri defended this action by statement of defence delivered on September 29, 2018 and continues in his defence of the claims advanced by Ms. Wood. He delivered his Affidavit of Documents, sworn September 13, 2019, and was examined for discovery by the Plaintiff on November 11, 2019. He is currently self-represented but has at times been represented in this Action by counsel.

4 The first issue that I heard today was whether the Plaintiff was required to provide notice of this Motion to Mr. Jahangiri. For reasons rendered in another Endorsement earlier today (*Woods v. Jahangiri*, 2020 ONSC 7401 (Ont. S.C.J.)), I determined that the Plaintiff must provide notice to Mr. Jahangiri of the relief sought in this Motion. I adjourned this Motion to 2:00 pm today to allow the Plaintiff an opportunity to provide notice to Mr. Jahangiri and to counsel retained on his behalf, and to allow Mr. Jahangiri an opportunity to participate and be heard on this Motion, either directly or through counsel.

5 At the continuation of this Motion, Mr. Robert Kligerman appeared on behalf of Mr. Jahangiri, not as litigation counsel but as Mr. Jahangiri's commercial and real estate lawyer. Mr. Kligerman confirmed that Mr. Jahangiri had been notified of this Motion but would not be attending. Mr. Kligerman asked, on Mr. Jahangiri's behalf, for an adjournment and made submissions regarding the relief sought by the Plaintiff.

6 For the reasons that follow, I grant Mr. Jahangiri's adjournment request on all aspects of this Motion except for the Mareva Order sought to preserve the net sale proceeds of the sale pending today of a property owned by Mr. Jahangiri and known

municipally as 81 Nelson Street, Hensall, Ontario ("the Hensall Property"). I order that these net sale proceeds be preserved by the lawyer acting for Mr. Jahangiri on that sale until December 8, 2020, on which day this Order shall expire unless extended by a further Order of this Court. The Plaintiff shall provide an undertaking as to damages. The remainder of the relief sought by the Plaintiff on this Motion shall be adjourned to the civil motion list of December 8, 2020.

I. THE RELIEF SOUGHT ON THIS MOTION

7 I set out in my earlier Endorsement the relief sought on this Motion and will reproduce it here for ease of reference. The Plaintiff seeks the following injunctive relief as against the Responding Defendant:

> (a) An interim and interlocutory Mareva injunction, restraining the Responding Defendant from disposing of or dealing with any assets, worldwide, that have a value up to $327,000, pending final disposition of this Action, or engaging in any transaction that has the effect of transferring assets out of Ontario, or instructing anyone from doing so on his behalf; and
>
> (b) As an ancillary order to the Mareva injunction, that the Responding Defendant prepare and provide to counsel for the Plaintiff, within seven days, a sworn declaration describing the nature, value and location of all his assets, worldwide; and
>
> (c) As an ancillary order to the Mareva injunction, that the Responding Defendant provide an accounting of the transfers affecting funds received from the Plaintiff; and
>
> (d) An Order that a non-party, the Toronto-Dominion Bank, produce and provide to counsel for the Plaintiff information and documents to confirm where three bank drafts provided by the Plaintiff to the Responding Defendant were deposited, including the specific institution, full bank account number and account holder name, in regard to three cheques drawn by the Plaintiff on her bank account at the TD Bank on April 30, 2016, June 13, 2016 and June 17, 2016; and
>
> (e) An Order requiring the Responding Defendant to appear before this Court, by video conference, within 10 days to respond to the Plaintiff's request to extend the terms of any Order provided.

8 Additionally, the Plaintiff sought, as alternative relief, an Order that her counsel termed a "Payplus Order", referred to as such further to terms provided in an unreported decision by that name. By this term, the Plaintiff intended an Order that this Motion be adjourned, and the Responding Defendant be ordered to provide an accounting and a sworn declaration describing the "nature, value and location of all assets, wherever situated in the world, whether in his own name or not and whether solely or jointly held". I saw no connection between this alternative relief and the urgency said by the Plaintiff to arise from the pending sale of the Hensall Property.

9 The moving party Plaintiff sought expansive relief, much broader than the issue that gives rise to the urgency and certainly well-beyond the scope of submissions that can be made in the time estimate committed to by the Plaintiff at Civil Practice Court for argument of this Motion: thirty minutes. The extensive evidentiary record showed that the recent development that grounds the Plaintiff's claim of urgency in the midst of this two-year action is that the Responding Defendant has contracted to sell the Hensall Property. The Plaintiff submitted that the sale of the closing of the Hensall Property is pending for today.

10 In these circumstances, I will address the Plaintiff's submission, made in urgent circumstances, that there is the potential for dissipation of the sale proceeds from the sale of the Hensall Property if a Mareva injunction is not issued. The remainder of the relief sought in this Motion is adjourned to December 8, 2020.

II. ANALYSIS

A. Principles Pertaining to the Interim Interlocutory Injunctive Relief

11 Section 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C43, sets out the Court's authority to grant injunctive relief:

> In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

12 *Rule* 40.01 provides that an interlocutory injunction may be obtained on motion to a judge by a party to a pending or intended proceeding:

> An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

13 The test for granting an interlocutory injunction is well known. The Supreme Court of Canada adopted it in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at p. 344, and developed it further in *R. v. Canadian Broadcasting Corp.*, [2018] 1 S.C.R. 196 (S.C.C.), at paras. 17-18. The Supreme Court stated that the Court must assess the following:

> (a) whether the moving party has demonstrated a strong *prima facie* case that it will succeed at trial;
>
> (b) the moving party must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (c) the moving party must show that the balance of convenience favours granting the injunction.

14 These inquiries are not a checklist. They are not "independent hurdles". Rather, "[t]hey should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief": *Catalyst Capital Group Inc. v. Moyse*, 2014 ONSC 6442, 122 O.R. (3d) 741 (Ont. S.C.J.), at para. 75, citing Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Canada Law Book, 2013), at para. 2.630.

15 In *2092280 Ontario Inc. v. Voralto Group Inc.*, 2018 ONSC 2305 (Ont. Div. Ct.), at para. 16, the Ontario Divisional Court set out 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 thereof, and the points that could fairly be made against it by the defendant;
>
> (c) The plaintiff must give grounds for believing that the defendant has assets in Ontario;
>
> (d) The plaintiff must give grounds for believing that there is a real risk of the assets being removed out of Ontario or disposed of within Ontario or otherwise dealt with so that the plaintiff would be unable to satisfy a judgment awarded to her;
>
> (e) The plaintiff must give an undertaking as to damages.

16 I analysed these requirements on the evidence filed as they pertain to the urgency said to arise from the pending sale of the Hensall Property.

B. The Evidence Supporting the Relief Sought

17 Ms. Woods testified by affidavit sworn November 23, 2020 (the "Woods Affidavit"). The Plaintiff also tendered the affidavit evidence of Daina Slenys, a law clerk in the office of the Plaintiff's lawyers. Each affidavit contained numerous exhibits. The evidentiary record on this Motion comprised some 472 pages.

(i) Strong Prima Facie Case

18 In *R. v. Canadian Broadcasting Corp.*, at para. 17, the Supreme Court instructed that a "strong *prima facie* case" necessitates that the motion judge must be satisfied that, "on a preliminary review of the case", there is a strong likelihood "on the law and the evidence presented" that at trial the moving party would be ultimately successful in proving the allegations pleaded.

19 Ms. Woods deposed that she is a seventy-year-old retired school teacher who met Mr. Jahangiri in 2009 through school-related activities. Ms. Woods stated that Mr. Jahangiri presented to her his charitable work in Haiti and the Dominican Republic. Ms. Woods deposed that in early 2015, Mr. Jahangiri represented to her that he had purchased beach front property in the Dominican Republic, to assist local children in need. Thereafter, he is alleged to have told Ms. Woods that she had an opportunity to purchase land of her own in the Dominican Republic.

20 Ms. Woods deposed that Mr. Jahangiri offered to sell to Ms. Woods property that Mr. Jahangiri owned in the Dominican Republic, representing the he had good title to the property, that he had built a home for special needs children on the property and that he owned some 22 other properties in the Dominican Republic. Ms. Woods deposed that Mr. Jahangiri promoted to her that through buying the Dominican Property, she would be able to live a dream retirement on the beach while assisting children in need.

21 Ms. Woods stated that she forwarded the following monetary transfers to Mr. Jahangiri through bank drafts issued by her banker, the Toronto-Dominion Bank: on April 30, 2016, the sum of $50,000; on June 13, 2016, the sum of $140,000; on June 17, 2016, the sum of $100,000. Ms. Woods deposed that on June 18, 2016, Mr. Jahangiri forwarded to her an email stating that for her investment of $290,000, she was the new owner of a Dominican Property, which he would hold in trust for her until the legal transfer was completed.

22 Ms. Woods stated that in October 2016, she transferred a further amount of $37,000 (bank drafts of $22,000 and $15,000) to Mr. Jahangiri "to make the Dominican Property suitable for my accommodation". This increased the amount of funds transferred by Ms. Woods to $327,000.

23 Ms. Woods stated that in January 2017, after months of requests, Mr. Jahangiri provided her with what he represented was an original copy of the title deed for the Dominican Property, dated January 18, 2017. Ms. Woods deposed that on investigation conducted in the Dominican Republic, she has been advised that she does not have an ownership interest in any property in the Dominican Republic. Specifically, Ms. Woods deposed that, further to investigations conducted on her behalf by local agents, she was advised on January 22, 2018 that she is not registered as an owner of any property in the central Registry of Titles in the Dominican Republic. Ms. Woods testified that on November 20, 2017, Mr. Jahangiri offered to transfer to her the Hensall Property to resolve her claim for the funds that she had provided to him for the purchase of a property in the Dominican Republic.

24 The Plaintiff has tendered evidence, in this record, that Mr. Jahangiri has admitted to the receipt of funds from Ms. Woods and has admitted to representing that he was holding property in the Dominican Republic in trust for Ms. Woods. The evidence in this record also showed that Ms. Woods has not received title to any property for the funds that she advanced in furtherance of acquisition of a foreign property interest.

25 On the motion record filed, I am satisfied that, upon a preliminary review of the evidence presented, the Plaintiff has demonstrated a strong *prima facie* case.

(ii) Irreparable Harm

26 "Irreparable harm" means harm to the moving party that cannot be monetarily quantified, or which cannot be cured, usually because one party cannot collect damages from the other: *RJR-MacDonald*, at p. 341; *Christian-Philip v. Rajalingam*, 2020 ONSC 1925 (Ont. S.C.J.), at para. 33. In *Amphenol Canada Corp v. Sundaram*, 2020 ONSC 328 (Ont. Div. Ct.), at paras. 37-39, F.L. Myers J. stated that "the defendants' ability to pay is very much a part of the interlocutory injunction calculus". In *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.), at para. 63, Strathy J. (as he then was) found that "the risk of removal or dissipation of assets can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud, itself."

27 The evidence established that this action did not progress procedurally from January to November 2020 because Mr. Jahangiri was in the Dominican Republic and was unable to return to Canada. He declined to conduct litigation steps on a virtual platform, as proposed by the Plaintiff. On the evidence in this motion, the Plaintiff submitted that Mr. Jahangiri's ability to pay a judgment rendered in favour of Ms. Woods is contingent on the net sale proceeds from the Hensall Property. Ms. Woods and Ms. Slenys deposed that they have only been able to identify one other property in Ontario in which Mr. Jahangiri has an interest, and that it has modest value. Ms. Woods submitted that she will be irreparably harmed if Mr. Jahangiri transfers out of Ontario the net sale proceeds from the sale of the Hensall Property.

28 Mr. Kligerman submitted that he understands that Mr. Jahangiri intends to be in Ontario for the foreseeable future and that he believes that Mr. Jahangiri has a good defence to the claim advanced by Ms. Woods. Mr. Kligerman stated that if a judgment were rendered against Mr. Jahangiri, he is entirely confident that it would be paid. He does not consider that the sale of the Hensall Property is indicative of any dissipation of assets by Mr. Jahangiri and submitted the there is no indication that Mr. Jahangiri intends to remove the net sale proceeds from the jurisdiction. None of these submissions were grounded in evidence in the record before me, and so could not factor in my analysis of this motion. If this evidence is filed in admissible form on the next hearing of this Motion on December 8, 2020, it can be considered by the Court at that time, in its discretion.

29 The risk of asset flight or dissipation can be reasonably inferred from the material facts supporting a strong *prima facie* case of fraud having been committed against the plaintiff: *663309 Ontario Inc. v. Bauman*, 2000 CanLII 22640, (2000), 190 D.L.R. (4th) 491 (Ont. S.C.J.), at para. 41; *Mills v. Petrovic*, 1980 CanLII 1871, (1980), 30 O.R. (2d) 238 (Ont. H.C.); *Sibley & Associates LP v. Ross*, 2011 ONSC 2951 (Ont. S.C.J.), at paras. 63-65. In the absence of any evidence of a means to satisfy any judgment if the single asset identified by the Plaintiff of sufficient value to meet her claim is transferred out of Ontario, the Plaintiff has, in my determination established irreparable harm through the serious risk of dissipation of the net sale proceeds from the sale of the Hensall Property.

(iii) The Balance of Convenience

30 The balance of convenience analysis requires a determination of which party will suffer greater harm from the granting or the refusal of the remedy sought: *RJR-MacDonald*, at p. 342, citing *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at p. 129.

31 The Plaintiff contended that the balance of convenience favours granting the interim Mareva Order as Ms. Woods could otherwise be deprived of any asset against which to enforce her claim, based in breach of trust and fraud. Mr. Klingerman submitted that it is unfair for Mr. Jahangiri to be deprived of the use of the net sale proceeds from the sale of the Hensall Property while the Plaintiff has not proven her case.

32 I have concluded that the balance of convenience favours granting an Order for the interim preservation of the net sale proceeds, but only until December 8, 2020, consistent with *Rule* 40.02(1) which provides as follows:

> An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days.

33 Although Mr. Jahangiri was notified of this Motion during the hearing day, I found earlier that he ought to have been served with this Motion Record in advance, in accordance with *Rule* 37.07(1). Accordingly, I will treat this interim interlocutory order as having been issued without notice and this Order will thereby be valid for a "period not exceeding ten days": in this case, until December 8, 2020.

34 In addition to ensuring compliance with *Rule* 37.07(1), I am satisfied that the eight-day duration of this Order balances the risk of harm identified by Ms. Woods with the ability of Mr. Jahangiri to file evidence in support of his position that the relief granted by this Order ought not to be extended beyond December 8, 2020.

(iv) Undertaking as to Damages

35 *Rule* 40.03 provides as follows:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, 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.

36 Ms. Woods deposed to the provision of an undertaking as to damages, as follows: "By way of this affidavit, I provide an Undertaking As to Damages for any damages that Jahangiri may incur as a result of this Court issuing a Mareva injunction in this Action, should it later be decided that the injunction should not have been granted and Jahangiri has suffered damages as a result." (Woods Affidavit, para. 115).

37 As a term of my Order, the Plaintiff shall provide an undertaking as to damages, in accordance with *Rule* 40.03

C. Conclusions

38 I conclude that the moving party Plaintiff has established an entitlement to a Mareva Order preserving the net sale proceeds from the sale of the Hensall Property, to the maximum amount of $327,000, being the amount claimed by the Plaintiff. This Order will expire on December 8, 2020 unless extended by a further Order of this Court.

39 All expenses and disbursements resulting from the closing of the sale of the Hensall Property may be deducted and thereby paid from the funds received on closing. These include the real estate agent's commissions, the lawyer's fees and all other routine adjustments from the closing proceeds. The net sale proceeds shall be held by the lawyer acting for Mr. Jahangiri on the real estate transaction up to the maximum amount of $327,000. Mr. Kligerman will provide this Endorsement, and its resultant Order, to his client Mr. Jahangiri, and they will provide this Endorsement, and its resultant Order, to the real estate lawyer acting on Mr. Jahangiri's behalf in the closing of the sale of the Hensall Property. As a motion brought without notice, the moving party Plaintiff shall comply with *Rule* 37.07(4).

40 All other relief sought by the moving party Plaintiff in this Motion shall be adjourned to December 8, 2020. I am not seized of this Motion.

III. DISPOSITION

41 I order as follows:

(a) An interim interlocutory injunction in the nature of a Mareva Order shall issue against the Defendant Abbas Peter Jahangiri requiring the preservation, by the lawyer acting on behalf of this Defendant in the sale of property known municipally as 81 Nelson Street, Hensall, Ontario (the "Hensall Property"), of the adjusted net sale proceeds resulting from the sale of the Hensall Property up to the maximum amount of $327,000.

(b) The interim interlocutory injunction shall be in effect until December 8, 2020, at 4:30 pm, at which time it will expire, subject to further Order of this Court.

(c) The Plaintiff shall comply with *Rule* 37.07(4).

(d) The Plaintiff shall provide an undertaking as to damages, in accordance with *Rule* 40.03.

(e) All other relief sought by the Plaintiff in this Motion is adjourned to December 8, 2020.

(f) The costs of this Motion shall be reserved to the Judge hearing this Motion on December 8, 2020.

Motion granted in part.

TAB 24

2022 BCSC 1379
British Columbia Supreme Court

Vidcom Communications Ltd. v. Rattan

2022 CarswellBC 2207, 2022 BCSC 1379

Vidcom Communications Ltd. (Plaintiff) And Sharina Sabna Rattan, Dharam Raj Rattan, Maya Wati Rattan and Derek Kay (Defendants)

Crerar J., In Chambers

Heard: June 21, 2022
Judgment: June 21, 2022
Docket: Vancouver S204041

Counsel: D.P. Dahlgren, M.P. Katzalay, for Plaintiff / Applicant
A.M. Boldt, for Defendant / Application, Respondent, Sharina Sabna Rattan
J. Lu, for Defendant / Application, Respondent, Derek Kay
S.C. Hu, for Defendants / Application, Respondents, Dharam Raj Rattan and Maya Wati Rattan

***Crerar J., In Chambers*:**

1 These will be my brief oral reasons for judgment in this matter. I make the usual reservation to edit and augment them if a transcript is ordered or for any other reason.

2 Before the Court is an application for a *Mareva* freezing order. It is important to note at the outset that the order sought is not a conventional general freezing order over all of the defendants' assets in a manner that imposes daily interference, freezing all of their bank accounts, for example. Rather, the application today seeks an order preventing transfer or encumbrance of three properties. One of the properties is in the name of the defendant Sharina Rattan. One is in the name of her parents, Dharam and Maya Rattan. One is in the name of her common-law husband Derek Kay. They have apparently recently separated.

3 For ease in these oral reasons, I shall refer to these individual family members by their first names. I intend no disrespect by doing so.

4 The applicant plaintiff corporation asserts that Sharina Rattan has a full or partial interest in all three of these properties, regardless of the current state of title.

5 Sharina Rattan is at the centre of this dispute. She served as the bookkeeper and accountant for the corporate plaintiff for many years. The plaintiff alleges that from 2009 until 2019, Sharina stole roughly $1.9 million. The theft was discovered after she left for maternity leave in 2019.

6 The assertion of a decade of defalcation is not merely a general pleaded assertion, but it is supported by an extensive forensic accounting report by James Blatchford, CPA. In his summary, Mr. Blatchford sets out two primary means by which Sharina allegedly defrauded her employer. The first was a classic vendor fraud of the sort that the courts see with all too frequent regularity. In a nutshell, the bookkeeper, in this case Sharina, makes a record in the software application for tracking cheques that a given cheque will be issued to a third-party supplier, when in fact the actual cheque is issued to herself.

7 In another form of the alleged fraud, she issued unusually large cheques to "petty cash," but used those funds for herself. She then allegedly changed the underlying records to hide her personal use of the funds.

8 It is alleged that in most of these transactions, Sharina forged the signature of her supervisor on the cheques.

9 While the full extent of these allegations has not been proven in court and will be explored at a summary trial next year, the Blatchford report is compelling and convincing, for the limited purposes of this injunction application.

10 There is further remarkable evidence before the Court: Sharina's own admission on discovery that she did defalcate at least $1 million from her employer. Sharina's discovery evidence has not been consistent or precise. Nor has she been complete in her document disclosure such as to allow the plaintiff, through an examination of Sharina's records, to confirm the full extent of her theft from the company.

11 Suffice to say, based on the above expert report and admission, the fraud allegations have been made out more fully than one ordinarily sees in a *Mareva* freezing application.

12 In the underlying claim, the plaintiff seeks the return of the $1.9 million, as well as substantial punitive damages.

13 I turn to the other defendants, and the properties in their names, presently in the cross-hairs of this *Mareva* application.

14 As stated, Derek Kay is or was the common-law spouse of Sharina Rattan. They were together from roughly 2016 until recently. In Mr. Kay's affidavit, he states that they have recently separated due to the stress of this litigation. His affidavit is sparse and vague as to when that occurred, and is silent with respect to the unraveling of their financial affairs as a result of that separation. Mr. Kay works as an auto mechanic.

15 I turn to Sharina's parents, Dharam and Maya Rattan. They apparently own a body shop. They have inhabited the house, presently held in their name, since its purchase in 1998. They are now in their 70s and retired.

16 The notice of civil claim filed by the plaintiff focuses on Sharina and sets out her alleged actions in defrauding her employer. It does, however, specifically allege that the other defendants had knowledge and participation in the fraud and that they benefitted from the fraud, specifically with respect to the purchase, improvement, maintenance and preservation of the properties in question.

17 The notice of civil claim does not plead knowing receipt or knowing assistance, using those phrases. Ordinarily greater particulars would be provided with respect to these allegations. As noted, however, the notice of civil claim does effectively allege knowing participation and receipt by these defendants. Apart from that, the claim specifically alleges that the defendants were unjustly enriched by the receipt of these funds, and seeks a declaration of constructive trust over assets obtained through the misappropriated funds, including the specific properties in question in this application.

18 I will spend only a brief time on the governing case law for *Mareva* freezing orders. There is no significant disagreement amongst the parties with respect to those principles.

19 The leading authority in British Columbia is Kepis & Pobe Financial Group Inc. v. Timis Corporation, 2018 BCCA 420. In Zheng v. Anderson Square Holdings Ltd., 2022 BCSC 801, Justice Kent, just last month, usefully summarised *Kepis* :

> [10] The law regarding Mareva Injunctions was recently reviewed by the Court of Appeal in *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 420(paras. 3-19). Some of the observations in that case include:
>
> • A Mareva Injunction is an extraordinary remedy that restrains a defendant from removing, dissipating or disposing of its assets before the plaintiff can obtain a prospective judgment;
>
> • In most cases the court will be reluctant to interfere with the parties' normal business arrangements, or to affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted;

• In British Columbia, the fundamental question to be decided is whether the granting of the Mareva Injunction is just and equitable in all the circumstances of the case;

• The test first imposes a threshold requirement on the plaintiff to establish a "strong *prima facie*" or "good arguable" case against the defendant(s);

• If this threshold test is met, then the plaintiff must also establish that the interests of justice militate in favour of the injunction in the particular circumstances of the case; and,

• In balancing the interests of justice, the Court will consider all the relevant factors including (1) the relative strength of the claims and defences, (2) the nature of the defendant's assets inside or outside the jurisdiction, (3) evidence of irreparable harm that might be caused to the parties or third persons, (4) whether there is a real risk of disposal or dissipation of assets that would impede the enforcement of any favourable judgment to the plaintiff, and (5) any other factors affecting the public interest.

20 Netolitzky v. Barclay, 2002 BCSC 1098, an older decision still frequently cited, confirms that a *Mareva* order is available as a form of security:

> [23] It is important to this case that the purpose of Mareva injunctions is not limited to prevention of dissipation of assets to avoid payment of a judgment. It is also available as a form of security . . . This purpose is significant here because the plaintiff does not allege that there is a risk of disposal or dissipation of assets. Rather, the plaintiff says that a prima facie case of fraud may give rise to an inference that assets are at risk.

21 In the next paragraph of *Netolitzky* , Justice Dillon notes that fraud is a recognized exception to the general judicial hostility to prejudgment execution.

22 While *Marevas* are granted in many other contexts beyond simple fraud, where fraud is cogently established on the evidence, there is a more compelling case for a *Mareva* injunction. Such a case also compellingly animates the court's fears — just alluded to in *Zheng* — of a risk of disposal, dissipation, or encumbrance of assets such as to impede the enforcement of a favourable judgment to the plaintiff.

23 With these legal principles in mind, I turn to consider the cases for a freezing order against with respect to each of the defendants and each of the properties.

24 As I have already indicated, there is a strong *prima facie* case against Sharina: much stronger than required under the first part of the *Mareva* inquiry. She admits having committed the fraud.

25 With respect to the properties held in the name of her present or former spouse and her parents, there is a good arguable case that: a) Sharina has a full or partial interest in those properties; and/or b) that defalcated funds were used to benefit those properties in a way that would ground the remedy of a constructive trust, or in these circumstances, a freezing order.

26 A defendant's spouse or relatives may be subject to a *Mareva* freezing order even if they are not a party to the action itself: Mercantile Group (Europe) A.G. v. Aiyela, [1994] 1 All ER 110 (CA). In the present case, all three other persons face direct allegations of wrongdoing in the underlying action as named defendants.

27 The case against the common-law spouse, Mr. Kay, is multi-pronged.

28 The plaintiff first argues, and I agree, that as an apparently separated common-law spouse, Sharina herself would have a claim and an interest in the property that is held in his name.

29 Second, the plaintiff points to the fact that the parties held a joint account from 2017: during the period of the defalcation from the plaintiff. The defendants have inadequately produced documents, such that the plaintiff cannot at this stage provide a

complete forensic accounting of that joint account such as to connect the dots between funds taken from the plaintiff by Sharina, put into Sharina's account, and then transferred into the joint account. There are sufficiently suspicious circumstances, however, to serve as bricks in building the *Mareva* wall today. There have been large transfers in and out of the joint account.

30 Third, facts about the purchase and the maintenance of that property are vague and suspicious. Mr. Kay claims that it was purchased in September 2016, around the time of the start of the relationship with Sharina, even on their own accounting. Then in September 2018, they made a $300,000 mortgage payment on the property. Mr. Kay claims that the payment came from his sister pursuant to a loan. This unusually large lump-sum payment was made by a man working as a car mechanic. That payment was made, again, during the period of defalcation carried out by Sharina.

31 Although Mr. Kay has attached some documents to his affidavit to support that $300,000 loan, including a record from his sister, there is no affidavit from the sister before the Court. Given the allegations that are made in the notice of civil claim, including the intertwined aspect of this family's finances and their involvement in the fraud, one would expect an affidavit from the sister as an alibi of sorts to vouch for the defendant brother's story; there is none here today.

32 As a final point of suspicion with respect to the Kay property, in October 2019 after discovery of the fraud, Mr. Kay re-mortgaged that property and obtained a payout of some $342,000.

33 I turn to the parents. The parents' house is presently in their name, and it has been in their name since 2015. It was also briefly in their name in 1998 when it was purchased. For most of the time, however, this house has been registered in Sharina's name: from 1998 until 2015. That covers six years of the defalcation period. In their affidavit materials, the parents claim that the property was always intended to be theirs, and that they possessed equitable ownership at all times. Their explanation as to why the house was ever in Sharina's name is not sympathetic, however. They swear that it was only put in her name to avoid potential execution on a potential claim brought against them on a business deal gone sour.

34 The parents have produced documents from 2013 until the discharge of the mortgage showing that they themselves made the regular mortgage payments. There are two problems with this argument, however, on the evidentiary record. The first is that the evidence, and indeed the document production, is silent on who made the mortgage payments between 2009 and 2013: again, during the defalcation period, when Sharina herself was listed as the owner of that property. The documents also do not make clear the ultimate source of those funds; the possibility remains that Sharina indirectly made those mortgage payments by advancing them first to her parents.

35 As will be clear from the tenor of the reasons so far, the granting of a *Mareva* order is just and equitable in all of the circumstances of this case. Apart from the strong *prima facie* and good arguable case that Sharina has an interest in these two properties, the balancing of the interests of justice also favours the issuance of a *Mareva* order. I reiterate the remarkable circumstances here, with the admitted defalcation of some $1 million over ten years by a fiduciary, using a variety of sophisticated methods designed to avoid detection.

36 Another aspect that weighs in the balance of convenience, particularly germane in the context of a *Mareva* application based upon an allegation of fraud, is the actions or inactions of the defendants with respect to their obligations under the Rules and orders of this Court. There is extensive evidence in the materials setting out the failings of the defendants with respect to their discovery obligations. Apart from those already referred to, the parents have only just filed their list of documents last month, in a proceeding that started two years ago. They admit that their list of documents is incomplete, and that they are still looking for other documents.

37 Further, when Mr. Kay was examined for discovery in February, he was left with a long list of document and informational requests that remain unfulfilled.

38 As for Sharina herself, she has failed to attend several scheduled examinations for discovery, and has not provided full document disclosure.

39 Finally, the defendants collectively have brought an aggressive series of applications for further particulars and the like. I will not second guess those applications, but they give the appearance of a scorched earth defence.

40 I turn briefly to the defendants' arguments, which focus on three major prongs. The first is that there is no real risk of dissipation, because the assets in question are real property against which certificates of pending litigation ("*CPLs*") are filed; although the action was filed some two years ago, the defendants have not attempted to dispose of these properties. The defendants cite Jeana Ventures Ltd. v. Garrow, 2021 BCSC 769, at para 82, where the Court noted parenthetically that the existence of filed CPLs on the properties in question *inter alia* indicated no risk of dissipation.

41 In *Jeana*, however, the Court expressly noted that the allegation of fraud was far from established and was strongly contested: see para 73. Further, the *Jeana* Court ultimately set aside the existing *Mareva* order, which suffered from several other problems. The CPL point raised in *Jeana* is just a parenthetical observation and not meant as some sort of black-letter prohibition against a *Mareva* order wherever a certificate of pending litigation is in place.

42 I also note the decision of Justice Steeves in Wang v. Yu, 2017 BCSC 1076 at para 69, where a similar argument was made. As Justice Steeves observed in *Wang*, although a *Mareva* order may seem to be superfluous with a certificate of pending litigation, a *Mareva* order provided much stronger security. A *Mareva* order wholly prevents encumbrance or transfer of a property. In contrast, a certificate of pending litigation merely serves as a red flag to would-be purchasers or lenders that if they proceed, they do so at their own risk, with the taint and potential liability of that claim.

43 That red flag will, in ordinary circumstances, scare away most arm's length purchasers. But it may have no effect on a non-arm's length purchaser, particularly an orchestrated arm's length purchaser. I agree with Mr. Dahlgren's observation that the property could be transferred to a non-arm's length's entity. While that may not have an irreversible long-term effect, it could certainly complicate any execution proceedings. That is a particularly acute issue in a case which will require extensive forensic accounting based upon full documentation production.

44 The last response to the CPL point is that in March of this year, Mr. Kay in fact tried to overturn that status quo of the CPLs. He applied to have the CPL removed. Justice Milman denied that application. Mr. Kay has appealed the order of Justice Milman. Thus even if one were to say that the CPLs provide some sort of security, making a *Mareva* order unnecessary, at least with respect to the Kay property, that reassurance may be writ in water.

45 The defendants also argue that the plaintiff has in essence acquiesced and delayed impermissibly in bringing the *Mareva* application, some two years after the start of the litigation. Again, I note the recent change in circumstances brought by Mr. Kay's application. The defendants put forward no authority where *laches* or acquiescence blocked the granting of a *Mareva* application. This Court would posit that this is unsurprising: it would be surprising if these equitable doctrines could be evoked in response to a fraud claim against a deceptive fiduciary, particularly a fraud claim that has been to some extent been supported by the affirmative and thorough evidence provided by Mr. Blatchford, as well as Sharina's own admission.

46 The defendants argue that the Blatchford forensic audit only sets out one step of the process: the flow of the funds from the plaintiff to the defendant Sharina. It does not connect the further dots showing the flow of those funds to the properties or to the co-defendants. I have already alluded to the defendants' incomplete document production. It is not realistic to expect those dots to be connected until there has been full document production by the defendants, and it does not lie in their mouths to make this argument.

47 The plaintiff also seeks, as part of the *Mareva* order, the standard asset disclosure order. As noted in the bedrock case of *Sekisui House* Kabushiki Kaisha (Sekisui House Co. Ltd.) v. Nagashima, [1982] BCJ No. 1491 (CA), the point of an order requiring a defendant to set out their assets in sworn form is to breathe life into the *Mareva* freezing order. The standard model order of this Court includes such an asset disclosure order. I note again that the document and discovery deficiencies and delays by the defendants make an asset disclosure order particularly appropriate in this case.

48 I do have one concern, however. This Court's model order includes a Schedule C that is to be executed by the representative of the plaintiff seeking the *Mareva* order, undertaking to the Court that they will protect and safeguard and not disclose the sensitive documents that they receive pursuant to the order. I direct a representative of the plaintiff, if it does wish to obtain the asset disclosure order, to provide a signed undertaking in that regard in the language set out in the model order. As the plaintiff has provided a signed Schedule A -- the undertaking as to damages -- I do not anticipate that the plaintiff's representative will hesitate in providing this undertaking.

49 I note the usual judicial admonitions that the extraordinary *Mareva* remedy must be carefully tailored not to overreach or overly inconvenience the defendants. One can hypothesise that the claim will be at least $1.9 million and likely more, given the punitive damages and the possibility that further documents will reveal further defalcation. In this specific circumstance, if Sharina's own property had enough equity in itself to satisfy the full hypothetical amount of the claim, there would be no need to resort to freezing the other properties, even if ultimately they are found to have received defalcated funds. That said, again, the evidentiary record before the Court, and as I understand, the document production in the proceeding, does not allow the plaintiff or the Court to determine with clarity the amount of equity in each of those properties.

50 The order as drafted contains the standard provisions allowing any of the affected parties to return to court on minimal notice to set aside or vary the *Mareva* order. That provision would allow, for example, the defendants to come back before the Court and argue, based on full and proper documentary production, that the there is sufficient equity in one or two of those properties such as to allow the release of the *Mareva* against the remaining property or properties. That provision would also allow the defendants to come back and post another form of security in lieu of those properties.

51 That provision would also allow the defendants to come back to Court if they had a pressing need to encumber or mortgage those properties. The results of such an application would be determined on the state of the evidence and discovery at the time. Suffice to say, there is no evidence before the Court of any particular urgency or inconvenience that would be posed by a *Mareva* freezing order beyond the existing certificate of pending litigation over each of those properties. This aspect, of course, also speaks to the balance of convenience and the balance of equities in the overall *Mareva* consideration.

52 Accordingly, the Court grants the *Mareva* order in the form put forward by the plaintiff. I have already indicated that Schedule C will have to be included if the disclosure order provisions wish to be included. The order should also be redrafted to include paragraphs 9 and 10A of the Supreme Court of British Columbia model order.

53 Costs will be in the cause.

(DISCUSSION)

54 THE COURT: The practice is that if a party wishes to bring an application to vary or set aside the order, that party will send a communication to the Registry, noting that I issued the order. If I am available, I will hear it, but if I am not available, then it should be heard in general chambers before any judge.

55 I can advise you that my own schedule, with the assize and reserve weeks and holidays, *et cetera*, is very booked up. So write that letter, as you are required to do, if you are going to seek to vary or set aside the order. But you can anticipate that it will be heard in general chambers: this may require you, notwithstanding the 48-hours' notice, to preplan and provide advance notice to the Registry, to ensure that a judge is available to hear it.

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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(Returnable July 17, 2023)

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