ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00693758-00CL **DATE:** **15 February 2024**

NO. ON LIST: **1**

TITLE OF PROCEEDING: **ORIGINAL TRADERS ENERGY LTD. et al v. HIS MAJESTY THE KING IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF FINANCE et al**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jessica Orkin Natai Shelsen	Mandy Cox	jorkin@goldblattpartners.com; nshelsen@goldblattpartners.com;
Monique Jilesen	Glenn Page and 26586568 Ontario Inc.	mjilesen@litigate.com;

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Duncan Lau Broderick Lomax Paul van Eyk	KPMG (Court Appointed Monitor)	duncanlau@kpmg.ca; blomax@kpmg.ca; pvaneyk@kpmg.ca;
Shaan Tolani Richard Swan Raj Sahni	Counsel for the monitor	tolanis@bennettjones.com; swanr@bennettjones.com; sahnir@bennettjones.com;

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ENDORSEMENT OF JUSTICE KIMMEL:

1. The Monitor requested a brief case conference to seek the court's direction in settling the terms of the formal Mareva Order arising from the court's Endorsement dated January 16, 2024 on the Mareva motion heard December 21, 2023 (the "Mareva Motion"), on the issue of costs.
2. The Monitor and the respondents, Mandy Cox ("Cox"), Glenn Page, and 2658658 Ontario Inc. (the "Page Respondents"), agreed to: "*a fixed amount of costs to the successful party in the all-inclusive amounts of $100,000 in respect of the Mareva motion as against Glenn Page/265, and $85,000 in respect of the Mareva motion as against Mandy Cox, for a total of $185,000 in respect of all respondents*".
3. It was further agreed that costs payable by the Monitor, if any, would be payable from the assets of the OTE estate.

<u>Legal Costs and Other Expenses of the Page Respondents</u>

4. It is not disputed that the Monitor is entitled to an award of costs against the Page Respondents in the agreed amount of $100,000 for the Mareva Motion given that the requested Mareva Order was granted against them. The normal order under r. 57 that costs of a motion be fixed and ordered to be paid forthwith would require payment of these costs by the Page Respondents within 30 days of January 16, 2024, which is today, February 15, 2024.
5. It is also not disputed that, as a result of the Mareva Order grated against them, the Page Respondents are not able, without leave of the court, to access funds to pay the agreed upon costs, or to pay their accounts receivable for legal expenses or to pay for ongoing legal and other expenses.
6. The Page Respondents have asked that the costs now payable by them in the agreed amount of $100,000 be ordered to be paid out the $1,874,058.28 being held in the trust account of Lenczner Slaght LLP ("Trust Funds"), representing the proceeds of sale of 118 Main St. North, Page's and Cox's jointly-held home that was sold in the months leading up to the hearing of the Mareva Motion. The Page Respondents also seek an order directing that $574,722.40 of the Trust Funds be applied towards the Lenczner Slaght accounts receivable, most of which they say accrued prior to the Mareva Order being granted.
7. Further, the Page Respondents want an order allowing them to use frozen Trust Funds to cover their ongoing living and other expenses, as would be typically provided for in a Mareva Order to permit them to maintain a normal standard of living and to meet legitimate debt payments accruing in the normal course, including the payment of reasonable legal expenses to defend the lawsuit. They rely on *Otal v. Azure Foods Inc.*, 2019 BCSC 1510 at para. 22, citing *Kelly v. Brown*, [1999] O.J. No. 419 (Ont. Gen. Div.).
8. The Monitor contends that the Frozen Funds comprise a defined asset pool was expressly frozen by the court (on consent) for the benefit of OTE's creditors (from the sale of a home that the Monitor further contends was purchased and/or improved using funds sourced from OTE) and that this asset pool should not be diminished if the Page Respondents have other assets that may be used to the pay the costs award against them.
9. The Monitor wishes to cross-examine Page on his statement of worldwide assets and affidavit(s) in support of the motion by the Page Respondents regarding the use of the Trust Funds or other assets frozen by the Mareva Order to pay for any approved legal and living expenses. The parties have agreed

that Page will be cross-examined on February 22, 2024 and he shall deliver any supplementary affidavit he seeks to rely upon in support of this motion by the Page Respondents before the cross-examination.

10. The Monitor wishes to test, among other things, the assertion by the Page Respondents that they do not have other liquid assets, aside from the Trust Funds, from among their frozen assets sufficient to pay the costs of the Monitor, their own legal costs, and/or their living expenses.
11. Cox currently has not objected to the use of Page's share of the frozen Trust Funds (which she has an interest in as a former joint owner of the house that was sold) to pay the Page Respondents' court ordered costs or legal expenses, but she may have a different position if they are seeking on the motion to use more than the amount of Page's share of those Trust Funds.
12. The parties hold out some hope that they might be able to reach an agreement regarding the payment of the Page Respondents legal and living expenses out of frozen assets after Page's cross-examination. To facilitate such, a case/settlement conference has been scheduled before a judge other than me for one hour on February 27, 2024. The parties shall serve, file and upload their Aide Memoires for use at that case conference by 2:30 p.m. on February 26, 2024.
13. In the meantime, the court confirms that the Page Respondents shall not be required to pay the $100,000 in costs payable by them in respect of the Mareva Motion pending further order of this court directing from which frozen assets those costs shall be paid.
14. The motion by the Page Respondents has been scheduled for two hours on March 19, 2024. If the parties do not reach an agreement regarding the remaining issues on that motion at the February 27, 2024 case/settlement conference, they shall at that time or shortly thereafter agree upon a timetable for all pre-hearing steps for the motion on March 19, 2024 such that all material shall have been served, filed and uploaded onto CaseLines by no later than 2:30 p.m. on March 18, 2024.

Cox's Costs of the Mareva Motion

15. Cox wants the Monitor to pay her the agreed upon $85,000 in costs in respect of the Mareva Motion, since the requested Mareva injunction against her was not granted.
16. The Monitor argues that even though the Mareva Order sought was not made against Cox, because Cox agreed that assets she jointly held with Page could be subject to any Mareva Order granted against him and because the court ordered Cox to submit a statement of her worldwide assets, cooperate with the Monitor in its investigation, and expressly left open the question of obtaining further relief, including a freeze order, against Cox based on the information to be provided by Cox, the costs agreement should not be enforced, or its enforcement should at least be deferred until it has been determined whether a further order will be sought and made against Cox.
17. The Monitor relies on *Arfanis v. University of Ottawa*, 2004 CanLII 34513 (ON SC), at para. 6, for the proposition that: "Where there is mixed complexity to the court's direction and certain matters remain to be determined, costs are usually deferred (often "in the cause", even if the amount may be fixed)." I do not find this case to be particularly helpful to the circumstances of this case. As well, and like the judge in *Arfanis*, I am mindful of the concerns with respect to distributive costs orders.
18. Cox's concession that her assets jointly held with Page could be subject to any Mareva Order against him is a reflection of what one might expect would be ordered based on the Commercial List Model Mareva Order and is in service of the Mareva Order granted against the Page Respondents. That does not amount to an order against her. The orders that were made against Cox (to submit her sworn asset list and co-operate with the Monitor) are also in service of the objective of ascertaining and identifying the assets Cox may jointly hold with the Page Respondents; thus, also in service of the Mareva Order against the Page Respondents.
19. Nor do I consider this a situation of divided success in relation to Cox.
20. The fact that the court did not close the door on the Monitor coming back at a later date for further relief against Cox (e.g., for example, did not render the Monitor's request for a Mareva injunction against Cox *res judicata*) does not change the fundamental outcome of the Monitor's motion and request for a Mareva Order against Cox, which was not granted. Cox is entitled to her costs of that motion.

21. The alleged misconduct of Cox (suggested misrepresentations in her prior evidence regarding her assets that the Monitor raises as a further basis for not awarding costs in her favour) is not something that can be addressed by the court at a case conference. In any event, on the face of the transcript, Cox's prior answers do not directly contradict the assets she has now disclosed. There may be some answers close to the line but it does rise to the level of fraud or intentional misleading of the court. Based on the evidence I was directed to, Cox does appear to be answering the questions asked, even if she might be interpreting them differently than counsel now suggests, for example whether condos she owns through holding companies in St. Lucia that are rented out could be considered to be other homes owned by her (whether directly or indirectly).
22. There is the further nuance of the alleged misconduct being based on evidence that was not part of the record before the court at the time of the Mareva Motion. The fact that the statement of worldwide assets that Cox has now provided discloses additional assets that she did not previously disclose in response to questions asked of her on her cross-examination on the Mareva Motion may require some further explanation from her at some point in time. I do not foreclose that there may be some consequence for that at some later point when the full evidentiary record regarding the assets of the Page Respondents and Cox and their jointly held assets has been fully developed.
23. In the meantime, Cox is entitled to her costs of the Mareva Motion. The court found that a *prima facie* case had not been made out against her and did not grant the requested worldwide Mareva Order against her. The parties agreed that the amount of those costs to be paid to the successful party, as between the Monitor and Cox, is $85,000, and agreed that the Monitor could pay those costs out of the assets of the OTE estate. Counsel for the Monitor confirmed that there are assets in the OTE estate (outside of the Trust Funds) that can be used to pay these costs and the Monitor should do so forthwith upon receipt of this endorsement.

Settling the Order

24. It is my understanding that the directions now provided in this endorsement will enable counsel to finalize the form of order to be taken out on for the Mareva Motion. Once the form of order has been settled, the approved form of order (with confirmation of approval from each counsel) together with a clean copy of the order to be signed may be sent to me through the Commercial List Office to be signed.
25. This endorsement and the orders and directions contained in it shall have the immediate effect of a court order in the meantime.

KIMMEL J.