Court File No. CV-18-602745-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ASTRAZENECA CANADA INC.

Plaintiff

- and -

SAMEH SADEK also known as SAM SADEK, ST. MAHARIAL PHARMACY INC. dba MD HEALTH PHARMACY, ST. MAHARIAL CLINIC INC., SRX INVESTMENT INC., SHEPHERD RX PHARMACY INC. and LILIAN FAM

Defendants

BOOK OF AUTHORITIES OF THE RESPONDING PARTY

(Motion by Lilian Fam to Set Aside Noting in Default Returnable April 17, 2019)

April 10, 2019

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LIST OF AUTHORITIES

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TAB 1

Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology, [2003] O.J. No. 40

Ontario Judgments

Ontario Superior Court of Justice

Molloy J.

Heard: December 3, 2002.

Judgment: January 7, 2003.

Court File No. 99-CV-179494

[2003] O.J. No. 40 | [2003] O.T.C. 7 | 2003 CanLII 12916 | 119 A.C.W.S. (3d) 826 | 2003 CarswellOnt 35

Between Canadian Imperial Bank of Commerce, plaintiff (responding party), and Credit Valley Institute of Business and Technology, Lawrence Mpamugo, Kathleen Mpamugo, Steven Mpamugo, Ernest Mpamugo, Pauline Mpamugo, Justine Mpamugo, Marygold Technologies Incorporated and Black Crown International Limited, defendants (moving parties)

(59 paras.)

Case Summary

Injunctions — Interlocutory or interim injunctions — Mareva injunctions, preservation of property pending judgment — Variation of interim injunction.

Motion by the defendant, Mpamugo, to vary injunctions to permit payment of various expenses from frozen assets and bank accounts. CIBC brought an action against Mpamugo and others, alleging a conspiracy to defraud it of over $13 million through fraudulent student loans. Mpamugo was also facing criminal charges in connection with the same scheme. Upon commencing the action, CIBC obtained an ex parte interim injunction freezing the defendants' bank accounts at several institutions and restraining the defendants from dealing with real property, including their residence and two small apartment buildings. The frozen assets included property which was traceable to the CIBC funds and also other property which was not. Mpamugo owed legal fees to both criminal and civil counsel. He argued that he had no money, and sought an order authorizing payment from the frozen assets for expenses for the apartment buildings, tax arrears on the family home, university tuition for his children, legal fees, and living expenses. On the date of argument, the court authorized payments to cover transit passes, tuition and books for the children's current academic year, $25,000 for a retainer in the civil action and $70,000 for a retainer in the criminal proceeding.

HELD: Motion allowed in part.

Mpamugo established that he did not have assets other than the assets frozen by the injunction that he could use to pay the expenses. The court ordered creation of a separate account into which would be transferred non-proprietary assets, being any funds not traceable to the CIBC. Amounts could be transferred into that account with the CIBC's consent, and if consent was withheld the matter could be referred to a Master. Mpamugo was not to pay non-essential expenses out of the non-proprietary injunction funds and then seek payment of essential expenses out of the proprietary injunction funds. The proposed monthly budget plus tuition required an after-tax

income of over $100,000, and there was no evidence as to the family's previous standard of living. Living expenses were allowed at $4,000 per month. Mpamugo was entitled to retain criminal counsel of the highest calibre and that counsel's accounts could be paid from the expense account. Civil counsel could also be paid, but an account from previous criminal counsel would remain unpaid. The nature of which expenses could be paid from which class of assets was set out, and a receiver was appointed to receive the rental income and oversee the management of the rental properties.

Counsel

Lincoln Caylor and Bianca Lanene, for the plaintiff (responding party). Brian Shiller and Alan Gold, for the defendants (moving parties).

MOLLOY J.

A. NATURE OF THE MOTION

1 The defendants Lawrence, Kathleen, Steven and Pauline Mpamugo seek a variation of injunction orders previously made against them to permit payment of various expenses, including ongoing living expenses and legal fees for civil and criminal counsel.

B. FACTUAL BACKGROUND

2 This action was commenced by the Canadian Imperial Bank of Commerce ("CIBC") in November 1999. The statement of claim alleges a conspiracy by Lawrence Mpamugo and others to defraud the CIBC of over $13 million. The alleged fraudulent scheme involved numerous individuals applying to CIBC for student loans to attend Credit Valley Institute of Business and Technology ("Credit Valley"), a vocational school operated by Lawrence Mpamugo. CIBC advanced over $6 million directly to Credit Valley as tuition for what it believed to be legitimate students. However, those "students" did not actually go to school and there is compelling evidence from the CIBC investigation that the school is fictitious, being nothing more than a front to obtain funds under the student loan program. The defendants concede that the plaintiff has presented a prima facie case of fraud and, apart from general blanket denials, have not put forward any evidence to rebut it.

3 Lawrence Mpamugo is also facing criminal charges of fraud in connection with the same scheme. Following the preliminary inquiry, he was committed to trial. The criminal trial has not yet been scheduled but is anticipated to begin in the spring of 2003.

4 Upon commencing this action, CIBC applied ex parte and obtained interim injunctive relief

freezing accounts of the defendants at the CIBC, Canada Trust, Royal Bank of Canada, The Bank of Nova Scotia and TD Waterhouse and restraining the defendants from dealing with real property located at Queens Avenue, Scarlett Road and Wallenberg Crescent: Order of Lissaman J. dated November 3, 1999.

5 CIBC then applied, upon notice to the defendants, to extend that injunction. On December 8, 1999, Cameron J. made an Order essentially extending the injunctive relief granted by Lissaman J. until judgment, or further order of the Court, subject to certain exceptions. Two of the properties covered by the injunction (Queens Avenue and Scarlett Road) are apartment buildings. Cameron J.'s Order permitted Kathleen Mpamugo (the wife of Lawrence Mpamugo) to open a new account for the receipt of rent and payment of expenses in connection with these two properties. Both Kathleen and Lawrence were also permitted to open one new account each, which would not be subject to the injunction. This would enable them to deposit their earnings from employment or other legitimate sources and pay their ordinary living expenses out of those funds. Lawrence Mpamugo was required to disclose to the plaintiff the source of any funds going into his account.

6 At the present time, both Lawrence Mpamugo and his wife Kathleen are unemployed. They have two children: Steven (aged 20) and Pauline (aged 19). Both are students at the University of Toronto. Pauline does not work; Steven works part-time at the Bay, earning $40.00 a week. In support of this motion for a variation of the injunction order, Lawrence Mpamugo has filed affidavits in which he states that over the past three years he has borrowed money and sold inherited properties in Nigeria to pay legal fees for this civil case and to fund the defence of the criminal charges against him. He says that he and his family are now broke and have no source of income to live on. He further claims that he has no assets other than those frozen by the injunction and household furnishings and jewellery worth less than $2000.00.

7 In his affidavit sworn in May 2002, Mr. Mpamugo sought an order authorizing payments in the following approximate amounts:

* $27,000 for expenses incurred on the Scarlett Road property (primarily property tax arrears and utility bills)
* $11,000.00 estimated as the cost of repairs and renovations needed at the Scarlett Road property
* $29,000.00 for tax arrears and unpaid utility bills at the Queens Avenue property
* $24,000.00 estimated for the cost of various repairs at the Queens Avenue property
* $43,000.00 estimated as the cost of removing and replacing all asphalt at the Queens Avenue property
* $15,000.00 for outstanding management fees for Queens Avenue
* $2000.00 estimated for legal fees to evict tenants in one apartment who have not paid rent since January 2001
* $8000.00 for tax arrears on the Wallenberg Crescent property (the family home)
* $94,000.00 for legal fees to Edward Greenspan in respect of the preliminary inquiry

* $50,000.00 by way of a retainer to Alan Gold for the continued defence of the criminal charges
* $75,000.00 by way of retainer to legal counsel in this civil action
* $5220.00 per month for living expenses for the family

8 At the initial return of this motion, Brennan J. made an interim order authorizing the release of $3500.00 per month for the family's living expenses. The balance of the motion was adjourned to permit cross-examinations.

9 In a supplementary affidavit sworn in November 21, 2002, Mr. Mpamugo swears that the family is unable to survive on $3500.00 per month. He now seeks an allowance of $6,855.00 per month plus a one-time emergency payment of $2320.00 to cover the cost of winter clothing for the four family members. In addition, he seeks the release of funds to pay university expenses for Steven and Pauline, including about $9500.00 for tuition, $141.00 per month each for transportation to and from school (they live in Mississauga and attend the University of Toronto), the cost of two laptop computers and approximately $2600.00 for books.

10 At the close of argument before me on December 3, 2002, I authorized payments out of Credit Valley's Royal Bank account #1003045 (located at Dundas St. and Highway 10) to cover transit passes for Steven and Pauline for the month of January 2003 and tuition and books for both of them for the current academic year. Also, from the same account, I directed payment of $25,000.00 to Shiller Layton Arbuck as a retainer in this civil action and $70,000.00 to Alan Gold to cover a retainer in the criminal proceeding and the already incurred $20,000.00 cost of transcripts from the preliminary hearing. At the request of the plaintiff, and on the consent of the defendants, I transferred this action into case management. Management of the action has been assigned to Master MacLeod and counsel were directed to arrange a case conference before the Master in the New Year. I reserved decision on the balance of the issues.

C. ASSETS FROZEN BY THE INJUNCTION

11 CIBC's total claim for damages in this action is about $13 million, of which $6 million represents funds advanced directly to Credit Valley. As a result of the injunctive relief, CIBC is aware of assets of the defendants with an approximate value of $5.7 million, of which at least $4 million is directly traceable to funds advanced by CIBC. Those assets are caught by the injunction order.

12 The known assets directly traceable to the CIBC funds and frozen by the injunction (in approximate amounts) are:

* $2 million in an account at CIBC in the name of Credit Valley
* $500,000 in an account at Canada Trust in the name of Pauline Mpamugo
* $500,000 in an account at Canada Trust in the name of Steven Mpamugo
* $530,000, the amount for which the Queens Avenue property was purchased in 1999
* $445,000, the amount for which the Scarlett Road property was purchased in 1999

* $140,000, approximate value of Mr. Mpamugo's Canadian and US accounts at TD Waterhouse

13 In addition, the following assets have been frozen (in approximate amounts):

* $300,000, estimated value of family home at Wallenberg Crescent
* $161,000 in a GIC with the TD Bank, which Mr. Mpamugo says came from income he received since 1993 for work unrelated to Credit Valley
* $492,000.00 in an account at Scotia Bank in the name of Credit Valley (Kirwin and Highway 10 - account #0126411), which Mr. Mpamugo says came from Scotia Bank advances for student loans and/or income received for unrelated work done by the defendant company Marygold, which Mr. Mpamugo controls
* $666,000 in an account at the Royal Bank in the name of Credit Valley (Dundas and Highway 10 - account #1003045), which Mr. Mpamugo says are funds advanced by Royal Bank for student loans and earnings of Marygold for unrelated work.

D. CASE LAW

14 There is surprisingly little Canadian case law on the test for determining whether to permit payments out of accounts or assets frozen by interlocutory Mareva or proprietary injunctions. There is, however, a body of case authority from the English Courts which is of considerable assistance.

15 It is important at the outset to distinguish between the proprietary injunction and the Mareva injunction. A proprietary injunction is granted to preserve an asset in the possession of a defendant, which the plaintiff says belongs to the plaintiff, or is subject to a trust in favour of the plaintiff. It is typically sought in cases of alleged theft, conversion or fraud where the defendant, by some wrongdoing, comes into the possession of the plaintiff's property. The purpose of the injunction is to preserve the disputed property until trial so that the property will be returned to the plaintiff if successful at trial, rather than used by the defendant for his own purposes.

16 A Mareva injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in Lister v. Stubbs (1890), 45 Ch. D.1 that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a Mareva injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong prima facie case: Chitel v. Rothbart (1983), 39 O.R. (2d) 513 at 522 and 532 (C.A.). In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: Chitel v. Rothbart at p. 532-533.

17 The purpose of the Mareva injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in

the usual course and paying other creditors. The nature of the Mareva is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business or living. As was noted by the English Queen's Bench in Iraqi Minister of Defence v. Arcepey Shipping Co. S.A., [1980] 2 W.L.R 480 at 485-486:

> ... the point of the Mareva jurisdiction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve that result the injunction must be in a wide form because, for example, a transfer by the defendant to a collaborator in the jurisdiction could lead to a transfer of assets abroad by that collaborator. But it does not follow that, having established the injunction, the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction.
>
> ... For my part, I do not believe that the Mareva jurisdiction was intended to rewrite the English law of insolvency in this way. Indeed it is clear from the authorities that the purpose of the Mareva was not to improve the position of the claimants in an insolvency but to prevent the injustice of a foreign defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment.

18 This principle has been endorsed by the Supreme Court of Canada (referring with approval to the Iraqi Ministry of Defence decision) in Aetna Financial Services Ltd. v. Fegelman (1985), 15 D.L.R. (4th) 161 at 177. Thus, even where the Mareva injunction may have been originally granted in a broad and sweeping form, this is in contemplation that it will likely later be modified to permit the defendant to maintain his normal standard of living and to meet legitimate debt payments accruing in the normal course. It is common for such exemptions to include the payment of ordinary living expenses and reasonable legal expenses to defend the lawsuit: University of British Columbia v. Conomos, [1989] B.C.J. No. 2269 (B.C.S.C.); Kelly v. Brown, [1999] O.J. No. 419 (Ont.Ct. Gen. Div.); National Bank of Canada v. Melnitzer, [1991] O.J. No. 2424 (Ont.Ct. Gen. Div.); Pharma-Investment Ltd. v. Clark, [1997] O.J. No. 1334 (Ont.Ct. Gen. Div.); Halifax plc v. Chandler, [2001] E.W.J. No. 5249 (R.C.J.C.A.).

19 The English cases apply a preliminary test before granting relief from a Mareva injunction. Under those authorities, before an Order will be made permitting payment of expenses out of funds frozen by a Mareva injunction, the defendant must satisfy the court that he has no other assets from which to make the payments: Halifax plc v. Chandler, at para 17; Ostrich Farming Corporation v. Ketchell, December 10, 1997, English Court of Appeal (Civil Division), per Roch and Millett LJJ. Although I could find no Canadian authority explicitly adopting that test, I believe it is implicit in many of the decisions. It is really only logical that this should be the case. Suppose, for example, that a defendant has one account in the jurisdiction containing $100,000.00 and it is properly frozen by a Mareva injunction at the behest of a plaintiff who has a claim exceeding that amount and who has shown that the defendant is trying to put the funds beyond the reach of the court. If that was the defendant's only source of funds, one can easily see the rationale of permitting his ordinary living expenses to be paid out of the account. If, however, the defendant has millions of dollars in other accounts not covered by the Mareva injunction, it is not reasonable to first deplete the assets that are covered by the injunction before having recourse to the other funds. Accordingly, I find it is appropriate to apply that preliminary test in this case.

20 Additional considerations apply to a defendant's motion to vary a proprietary injunction. It is one thing to permit payment of ordinary expenses out of money belonging to the defendant but which is frozen by a Mareva injunction. It is another thing altogether to permit the defendant to use the plaintiff's money for the purpose of attempting to defeat the plaintiff's claim, or to delay the plaintiff from obtaining judgment. The reason for the distinction is well stated by Lord Justice Millett in Ostrich Farming Corporation v. Kendall as follows:

> The courts have always recognized a clear distinction between the ordinary Mareva jurisdiction and proprietary claims. The ordinary Mareva injunction restricts a defendant from dealing with his own assets. An injunction of the present kind, at least in part, restrains the defendants from dealing with assets to which the plaintiff asserts title. It is not designed merely to preserve the defendant's assets so as to be available to meet a judgment; it is designed to protect the plaintiff from having its property expended for the defendant's purposes.

21 The test to be applied in determining whether a defendant ought to be permitted to make payments out of funds subject to a proprietary injunction begins (as does the variation of a Mareva injunction) with a consideration of whether the defendant has established on proper evidence that he has no other assets available to him to pay the expenses. If the defendant passes that hurdle, the court must engage in a balancing exercise "as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence": Halifax plc v. Chandler at para 17.

22 Mr. Caylor (for the plaintiff) argues that in cases where the defendant seeks to use funds subject to a proprietary injunction, there is an additional hurdle he must cross before the court will engage in this balancing of interests process: he must show an arguable case rebutting the plaintiff's position that the funds in question are the property of the plaintiff. Mr. Caylor relies on the decision of Millett LJ in Ostrich Farming Corporation v. Kendall as support for that proposition, and indeed that is the test advanced by His Lordship as stated at page 5 of the decision:

> It cannot be sufficient for a defendant to establish that he has no other funds with which to conduct his own defence. For even if that be so, he must in addition show that there is an arguable case for his having recourse to the funds in question. If he cannot show an arguable claim in his part to the funds, he has no right to use the money. A trustee has no right to have recourse to trust money to defend himself against a claim for breach of trust unless he has an arguable case for saying he has a beneficial interest in the funds in question. No man has a right to use someone else's money for the purpose of defending himself against legal proceedings. Just as the Court's jurisdiction to grant the injunction in the first place depended on the plaintiff's establishing an arguable case that the money belonged to it, so its willingness to permit the defendant to have recourse to the money depends upon his establishing an arguable claim to the money.

And further, at page 6:

> The plaintiff has put forward a strongly arguable case for saying that the money belongs beneficially to the plaintiff. The defendants ought not to have access to those moneys for the purpose of their legal costs unless they establish, first, that they have no other funds

> out of which to pay those costs, and secondly, that they have an arguable case for denying that the money belongs to the plaintiff company. For that purpose they must put in evidence and condescend to particulars. If they do so, and only then, will the court enter into the difficult balancing exercise which other judges have described, in which the court must weigh up the relative strength of the two cases, consider the nature of the defence which has been put forward and all the other circumstances of the case.

23 The other judge in Ostrich Farming, Roch LJ, does not go as far as Millett LJ. in this regard, although agreeing in the result. Roch LJ. agreed with Millett LJ that the first stage requires the defendant to establish on proper evidence that he has no other funds available to him. However, Roch LJ., upon being satisfied that the defendant had met the first stage, would then engage in the balancing process, which would include as one of the considerations the relative strengths of the plaintiff's and defendant's cases. He stated, at page 7:

> Once that hurdle is cleared [referring to the defendant showing no other assets], the court can make an order allowing the defendant to use part of the funds (the equitable ownership of which is claimed by the plaintiff) for the defendant's legal expenses. That power in the court is a discretionary power. The court in deciding whether to exercise that power, must weigh the potential injustice to the plaintiff of permitting the funds which may turn out to be the plaintiff's property to be diminished so that the defendant can be legally represented, against the possible injustice to the defendant of depriving him of the opportunity of having the assistance of professional lawyers in advancing what may, at the end of the day, turn out to be a successful defence.
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> To perform this process, which Sir Thomas Bingham in the case of Sundt Wrigley & Co. v. Alan Charles Wrigley (unreported) described as a "careful and anxious judgment", the judge must have evidence so that he can consider all relevant circumstances and, in particular, so that he can weigh the relative strengths of the plaintiff's claim to the property in the funds held by the defendant and the defendant's defence to that claim.

24 It would appear that earlier case authority in England supports the test applied by Roch LJ, rather than the more stringent requirements described by Millett LJ: e.g. Xylas v. Khanna, [1992] E.W.J. No. 1486 (C.A.); Fitzgerald v. Williams, [1996] Q.B. 657, [1996] 2 All E.R. 171, [1996] 2 W.L.R. 447 (C.A.); and Sundt Wrigley & Co. v. Wrigley [1993] E.W.J. No. 4430 (C.A.). In Sundt Wrigley & Co. v. Wrigley, a deputy judge of the Queen's Bench had permitted a defendant to pay his legal expenses out of funds to which the plaintiff had asserted a proprietary claim. The plaintiff appealed. The Court of Appeal held that the judge below had not erred in the exercise of his discretion and dismissed the appeal. One of the arguments advanced by the plaintiff was that the judge in the first instance had failed to give appropriate weight to the merits of the case. In dealing with that argument, the Master of the Rolls (Sir Thomas Bingham, who also wrote the main judgment in Fitzgerald v. Williams) noted the difficulty and undesirability of a detailed examination of the merits based on affidavit evidence at an interlocutory stage. He then held at paragraph 32:

> In the exceptional case where a proprietary claim is made to enjoined funds and the plaintiff is able within the reasonable confines of an interlocutory hearing to demonstrate a strong probability that the proprietary claim is well-founded then that may properly affect the Court's decision whether the defendant should be free to draw on those funds to finance his defence. Given the Court's traditional tendency to protect the integrity of a trust fund that is a fact which in such circumstances need not, and indeed probably

should not, be ignored. That is not this case, however, and I do not want to encourage the belief that prolonged examination on the merits at an interlocutory stage should be other than exceptional.

25 I was not directed to, and am not aware of, any Canadian authority directly on point. However, in my view, the balancing of interests test applied by the English courts in this situation is consistent with the respective purposes underlying the proprietary and Mareva injunctions as identified by Canadian courts and is therefore an appropriate test to apply here. With respect to the consideration of the merits of the defendants' case, I am inclined to the view expressed by Roch LJ. and by the Master of the Rolls in Sundt Wrigley & Co. v. Wrigley that the relative merits of the plaintiff's case and the defence advanced by the defendant is a relevant consideration when balancing the competing interests of the parties. However, I would not go so far as to make it a pre-requisite for the defendant to demonstrate an arguable case on the merits before the Court should engage in the balancing of interests process. This is subject, however, to one caveat. Where the plaintiff has frozen assets and advanced an arguable case that those assets are subject to a proprietary claim by the plaintiff, there is an onus on the defendant to put forward credible evidence as to the source of the subject assets if the defendant seeks to use the funds for his own purposes. It is only where the defendant can demonstrate that the assets are from a source other than the plaintiff that the usual rules for variation of a Mareva will apply. Otherwise, his right to use the funds will be subject to the balancing of interests in the exercise of the court's discretion.

26 Accordingly, the test to be applied is as follows:

(i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?

(ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?

(iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

(iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

E. ANALYSIS

(i) Available Assets Not Frozen by Any Injunction

27 I turn now to a consideration of whether the defendant in this case is entitled to a variation of the injunction to permit payment of the expenses he seeks. The first step of the analysis is to determine whether the defendant has assets he could use to pay these expenses other than the assets frozen by the injunction. This is a preliminary step in the consideration both in respect of the funds to which the plaintiff asserts a proprietary claim and the funds that are assets of the defendant and subject only to a Mareva type injunction. I have come to the conclusion, although not without some misgivings, that the defendant has satisfied this test.

28 Mr. Mpamugo filed an affidavit in May 2002 in which he listed certain assets and swore that those were the only assets he owned. On cross-examination in August, he stated that he was not aware of any other bank accounts but undertook to review "the disclosure" (referring to the Crown's disclosure material in the criminal proceedings) to be sure. In November 2002, Mr. Mpamugo filed a supplementary affidavit in which he disclosed for the first time two other bank accounts in the name of Credit Valley, one at the Scotia Bank and the other at the Royal Bank. The total funds in the two accounts exceed $1 million. He also disclosed for the first time a GIC in his name with a value of approximately $161,000.00. The existence of these assets was known to the Crown and referred to in the disclosure material. It is difficult to accept that Mr. Mpamugo had simply forgotten about more than $1 million and tempting to conclude that he only disclosed it because he knew the police were aware of it and it was therefore inevitable that the plaintiff would find out about it eventually. Further, it was frozen by the injunctions in any event and frozen assets not readily traceable to the plaintiff's funds would be more likely to be released by the court for use in funding his defence and other expenses. The timing of Mr. Mpamugo's disclosure of these assets is therefore suspiciously convenient for him. That said, the existence of these additional assets is now known and I have no other evidence to rebut the defendant's sworn evidence that he has now disclosed all of his assets and that everything he has is frozen by the injunction. It is always difficult for a party to prove a negative, and particularly difficult to prove the non-existence of something. It is not unusual for the evidence on this kind of point to consist entirely of a sworn statement that there are no such assets. While the credibility of the defendant's evidence in this regard is suspect, I am not prepared on a motion of this nature to simply dismiss his evidence entirely without some evidence that there are assets elsewhere. For purposes of this motion, therefore, I hold that the defendant has established the first part of the test and that, apart from assets frozen by the injunction, he has no means to pay his ordinary living expenses and legal fees.

(ii) Assets Subject to the Proprietary Injunction

29 It is clear that all of the assets listed in paragraph [12] above are directly traceable to funds advanced by CIBC and to which CIBC has asserted a proprietary claim. CIBC has shown a strong prima facie case that these assets are rightfully the property of CIBC, which is unanswered by the defendant apart from a general denial.

30 Further, the plaintiff has established that although it advanced $6 million to the defendants, only approximately $4 million of that has been accounted for. The defendant has not provided any explanation as to the location of the missing funds. In these circumstances, it is particularly incumbent on the defendant to demonstrate that any other assets in his name were not acquired with the plaintiff's money.

31 The defendant has asserted that the family home at Wallenberg Crescent was purchased

years before the advances by the CIBC and is therefore beyond the plaintiff's proprietary claim. It would appear that there is no mortgage on the house. There was a suggestion during argument that the mortgage was discharged using funds from the plaintiff. However, there was no evidence on the point one way or the other. For the time being, there has been no request to either sell or encumber the Wallenberg Crescent house to raise funds for the defendants. That point may well be reached as it would appear that at the defendant has at least some equity in the property which is not subject to the proprietary injunction and those assets must be depleted first before the defendant is entitled to access funds subject to the proprietary injunction. However, if the defendant intends to do so in the future, he will be required to demonstrate that none of the CIBC's funds went into that property.

32 The defendant recently disclosed a GIC in his name at the TD Bank which he says came from money he earned between 1993 and 1999 and is not money received from the CIBC. He produced no documentation to support that proposition. For present purposes, he has failed to discharge his onus of demonstrating that the source of this asset was other than the CIBC. I will treat it as if it were subject to the proprietary injunction.

33 The defendant also recently disclosed bank accounts at the Scotia Bank and at the Royal Bank which he has sworn contain no funds advanced by CIBC. It is clear that at least some of the funds in those two accounts were advanced by those two other banks in respect of student loan advances for tuition.

34 In respect of the Scotia Bank account, Mr. Mpamugo produced as an exhibit to his November affidavit a bank statement for the period from May 31 to June 30, 1999. That statement shows an opening balance of $232,257.87 and five deposits over that month totalling $122,000.00. Mr. Mpamugo testified under cross-examination (at page 109) that all of those deposits came from money earned by one of his companies (the defendant Marygold) from "computer systems, peripherals and accessory sales, and from installation of network systems, computer repairs, service and maintenance". No supporting documentation of any kind has been provided. With respect to the opening balance as of May 30, 1999, Mr. Mpamugo said that 60% of those funds were also earned by Marygold. Of the remaining 40%, he testified that some of the money was from tuition paid by students of Credit Valley and some of it was student loan advances for tuition from Scotia Bank. Again, Mr. Mpamugo provided no documentation whatsoever to support his position. Further, his evidence was extremely vague and totally devoid of details.

35 I think it quite likely that some, and perhaps even all, of the money in this account comes from sources unrelated to the CIBC. However, Mr. Mpamugo has failed to bring forward any credible evidence to corroborate his testimony, although if his testimony is truthful such documentation must surely exist. I understand that many of Mr. Mpamugo's documents are now in the hands of the police and that there may have been difficulties in obtaining source documents from the financial institutions involved. However, there was ample time to obtain such documentation and I am not prepared to accept Mr. Mpamugo's uncorroborated evidence as to the source of the funds in this account. Therefore, until such supporting evidence is forthcoming, I will treat the funds in the Scotia Bank account as subject to the proprietary injunction.

36 In respect of the Royal Bank account, Mr. Mpamugo produced the bank statement for the month from June 7, 1999 to July 7, 1999. There is an opening balance of $568,235.02 and a closing balance of $655,522.95. The total of all deposits during the month is approximately

$150,000.00. Mr. Mpamugo testified on cross-examination that the account was opened in January 1999 and that 50% of the funds in the account are from earnings by Marygold, with the remaining 50% being tuition received directly from students and student loan advances by the Royal Bank for tuition. However, Mr. Mpamugo conceded on cross-examination that all of the deposits for the month shown on the statement are preceded by the entry "RB STUDENT TUIT" and that those amounts were student loan advances from the Royal Bank. There were no other deposits during the month. Therefore, at least $150,000.00 (plus interest earned on that amount since July 1999) is from a source other than CIBC and is not subject to the proprietary injunction. With respect to the balance of the funds, Mr. Mpamugo produced no documentation of any kind and again his evidence was vague and devoid of particularity. As is the case with the Scotia Bank account, Mr. Mpamugo has failed to satisfy me on credible evidence that any of the funds in the account represent business earnings by Marygold or actual tuition paid by legitimate students directly to Credit Valley. Therefore, apart from the $150,000.00 from Royal Bank funds, for purposes of this motion I will treat the funds in this account as subject to the proprietary injunction.

(iii) Payments Out of Funds Not Subject to the Proprietary Claim

(a) The available funds

37 There is at least $150,000.00 at the Royal Bank which is frozen by the Mareva injunction but not subject to a proprietary claim. The defendants are clearly entitled under the case law to the use of that money to pay legitimate living and business expenses. I have already ordered the release of $70,000.00 to Alan Gold out of these funds, to pay for transcripts of the preliminary inquiry and a $50,000.00 retainer. I have also authorized payment of a retainer of $25,000.00 to Shiller, Layton, Arbuck in respect of the defence of this civil action, the payment of university tuition and books for the two children for this academic year and the cost of transit passes for them for January 2003. There is an interim order in place giving the family $3500.00 per month for living expenses, although I am unclear which account that is coming from. Finally, the defendants have been receiving the rental income from and managing the apartment properties on Queens Avenue and Scarlett Road.

38 It is apparent that the payments I have already ordered will exhaust the only funds that have clearly been shown to be from a source other than the plaintiff. However, it is likely that the defendant can demonstrate that other funds in the Scotia Bank and Royal Bank accounts, and possibly the GIC, are also not CIBC funds. It is important to clearly distinguish between those assets which are subject only to the ordinary Mareva injunction from those which are also subject to the proprietary injunction. I therefore direct that a separate account be established by the defendant Lawrence Mpamugo, ideally (although not necessarily) at a branch of the CIBC, into which shall be transferred any funds not traceable to the monies advanced by the CIBC. I will refer to that account hereafter as "the Expense Account". Mr. Mpamugo shall give the plaintiff full particulars of the Expense Account and monthly account statements shall be forwarded to counsel for the plaintiff. An amount equal to all deposits into the Royal Bank account with the explanation code identifying them as student loan tuition advances, plus interest accrued thereon, shall be immediately transferred to the Expense Account (less any amounts already paid pursuant to the order I made on December 3, 2002). Further amounts may be transferred into the Expense Account with the consent of the plaintiff. It is very much to Mr. Mpamugo's advantage to identify funds or assets which are not properly subject to the proprietary injunction and have those funds transferred to the Expense Account, as there are fewer strictures on the release of funds not covered by the proprietary injunction. He should first

present supporting material to counsel for the plaintiff. The written consent of counsel for the plaintiff, along with a copy of my Order herein, shall be sufficient authority for any bank or financial institution to transfer funds into the Expense Account. If the parties are unable to agree, there shall be a reference to the Master to determine the amount of any funds to be transferred into the Expense Account. Once the account is set up, all payments authorized to be made only out of monies not subject to the proprietary injunction, shall be paid out of the Expense Account. The defendant Lawrence Mpamugo shall keep accurate accounts of all deposits and expenditures in respect of the Expense Account, which accounts are subject to review by the Master if requested by the plaintiff.

39 The Mareva injunction is an extraordinary remedy and is not meant to interfere with the legitimate payment of expenses by the defendant. Provided the expenses are truly legitimate, it is not, in my view, proper to scrutinize their appropriateness too closely. It is, after all, the defendant's money and, unless he is intending to use it for purposes inconsistent with the purpose of the Mareva, he should be free to choose which expenses he will pay and which he will not. Here, however, there is a complicating factor in that the funds free from the proprietary injunction will not be sufficient to cover all of the expenses Mr. Mpamugo seeks leave of the court to pay. It is not appropriate for the defendant to pay for non-essential expenses out of the Mareva injunction funds and then to seek payment of essential expenses out of the proprietary injunction funds. I am therefore inclined to scrutinize such requests for exemption more closely than would usually be the case for funds that are not subject to a proprietary injunction.

(b) Living Expenses

40 In the normal course, a defendant seeking relief from a Mareva injunction is entitled to maintain the same standard of living the family maintained prior to the granting of the injunctions. Here, the defendant seeks approximately $6800.00 per month as living expenses, plus $2320.00 to purchase winter clothing plus the cost of putting two children through university. The proposed monthly budget plus tuition, books and transportation for the two children would require about $100,000.00 per year of after-tax income. The principal difficulty in evaluating the reasonableness of that request is that I have no information as to the family's standard of living prior to any monies being advanced by the CIBC. Luxuries that are affordable only because of monies wrongfully obtained from the plaintiff should not be counted as part of the normal standard of living. In the absence of that information, it is difficult to determine the appropriate amount to be allowed. I note from the defendant's proposed budget that the combined expense of vehicle insurance, lease payments and maintenance is over $2500 per month. That seems excessive in the circumstances, particularly given the fact that nobody in the family is employed, and I would consider it a luxury. The other living expenses do not appear to be out of line. In these circumstances, I would have been prepared to permit a payment of $4000.00 per month for the family's living expenses out of the Expense Account, provided there were sufficient funds in the account to cover it. Since it may be the case that there will not be sufficient money in the Expense Account for this purpose, I will also deal below with the payment of living expenses out of the funds frozen by the proprietary injunction.

41 My conclusion that $4000.00 would be an appropriate amount for living expenses is based on the failure of the defendant to provide evidence as to his standard of living prior to the CIBC advancing any funds. However, if documentation is produced indicating that the family did indeed have disposable income in excess of $50,000.00, this issue can be revisited.

(c) Legal Expenses

42 Mr. Mpamugo seeks the release of sufficient funds to cover his legal fees for the defence of the criminal charges against him. I have already authorized payment of $20,000.00 for the transcripts of the preliminary hearing and a $50,000.00 retainer to Mr. Gold. The criminal charges are serious in nature and if Mr. Mpamugo is convicted he could be looking at a period of incarceration that is not inconsequential. It would be difficult for Mr. Mpamugo to represent himself at trial. The documentation is voluminous and the issues relatively complex. I consider the ongoing cost of criminal counsel to be a high priority.

43 Mr. Caylor, for the plaintiff, argues that Mr. Mpamugo should not be entitled to retain counsel of the highest calibre, but rather should be restricted to counsel with a more modest hourly rate than Mr. Gold. I disagree. First of all, the right to counsel of choice should not be lightly interfered with, particularly where serious criminal charges are involved. Secondly, a higher hourly rate for lead counsel does not necessarily translate into a higher overall fee for the trial. Mr. Gold's expertise will likely enable him to accomplish more in less time than would be the case for less experienced counsel. Thirdly, there will be a process involved to ensure that the fees are reasonable, as dealt with in more detail below. Finally, insofar as funds subject only to the Mareva injunction are concerned, there should be no fetter on how expensive a defence Mr. Mpamugo chooses to mount. To the extent the amount of the legal costs is an issue at all, it is only because the non-proprietary claim assets are limited and insufficient to cover everything requested by the defendant. Since those funds are limited, however, only reasonable legal costs will be permitted. Mr. Mpamugo is entitled to retain Mr. Gold. It is understood that the full cost of the defence on the criminal charges will far exceed the amount of the retainer. Mr. Gold shall render accounts from time to time. Any account should be sent first to Mr. Mpamugo. If he approves the amount of the account, it should then be sent to counsel for the plaintiff. If the plaintiff consents, through its counsel, Mr. Gold's account can be paid out of Expense Account. Counsel for the plaintiff may request back-up documentation from Mr. Gold, and such shall be provided as long it can be done without compromising the defence or breaching solicitor and client privilege. If counsel are unable to agree on any issue in respect of the payment of the account, that issue shall be referred to the Master for determination. In deciding whether the amounts charged by Mr. Gold are recoverable, the Master shall apply the usual tests for assessment of an account by a solicitor to his own client.

44 Mr. Mpamugo also seeks leave to pay the account of Mr. Edward Greenspan, who represented him at the preliminary inquiry. Those services have been fully rendered and Mr. Greenspan is no longer acting. There are insufficient assets to warrant payment of that account at this time. That is particularly so since the account has not been assessed and I am not in a position to determine if it is reasonable.

45 I have already ordered the release of $25,000.00 by way of retainer to defence counsel in this civil action. The defendant shall follow the same process for obtaining approval to pay the accounts of civil counsel out of the Expense Account as I outlined above for the payment of Mr. Gold's accounts.

(d) University Expenses

46 On December 3, 2002 I ordered the release of sufficient funds to pay the university tuition and books for Steven and Pauline, as well as transit passes for January. I hereby authorize a

further payment out of the Expense Account to cover transit passes for February 2003. I approved the university expenses for this academic year because both Steven and Pauline are already into the school year and would lose their year if the payment could not be made. However, in the absence of evidence that the family's previous disposable income was over $50,000.00 per year, I am not prepared to continue payment of the university expenses in future years. Also, there is no reason that Steven and Pauline should not contribute to their own support through part-time work. I have provided for transit passes to the end of February, which should give them time to raise the funds themselves for transportation costs thereafter. The cost of two laptop computers is a luxury that cannot be justified on the basis of the material before me. The anticipated costs of both civil and criminal counsel shall have priority over payment of future university expenses for Steven and Pauline. However, if the Expense Account balance reaches a point where it would appear that the legal costs can be covered with enough money left over to pay for university for one or both children, a further motion may be brought for a variation of my Order. I am not seized. The motion may be brought in the ordinary course before any judge of this Court.

(e) Wallenberg Crescent Tax Arrears

47 There are property tax arrears in respect of Wallenberg Crescent in the approximate amount of $8000.00. Tax arrears may be paid out of funds in the Expense Account.

(iv) Use of the Assets Frozen by the Proprietary Injunction

(a) The Apartment Buildings at Scarlett Road and Queen Avenue

48 The apartment buildings at Scarlett Road and Queen Avenue were purchased with cash received from the CIBC and are subject to the proprietary injunction. In an affidavit sworn in November 1999, the defendant Kathleen Mpamugo swore that the total monthly income from the two properties was approximately $8000.00 and that the total monthly expenses to maintain them were $4500.00. The defendants were authorized under the December 1999 Order of Cameron J. to open a separate account for these properties and to deposit all rental income and pay all expenses out of that account. Although the account was opened, it was not operated on a consistent basis. Some of the rental cheques were cashed through other accounts or at Money Mart. Some payments were allegedly made in cash. It would appear no records were kept, or at least none were produced. It is unclear what, if any, expenses were paid. There are no mortgages on the property. The tax arrears have grown to sizeable proportions, to an extent that suggests no property taxes were paid at all. There are also utility arrears and Mr. Mpamugo stated in his affidavit that both properties are in a poor state of repair. By the time of Mr. Mpamugo's affidavit in support of this motion in May 2002, there would have been $240,000.00 of income from these properties. It is largely unaccounted for. Although Mr. Mpamugo now swears that the apartment buildings have been operating at a loss, I am hard pressed to understand how that can be the case since there is substantial revenue and virtually no expenses have been paid. At the very least, the properties would appear to have been mismanaged. Alternatively, revenue from the properties may have been used by the defendants for other purposes.

49 It would appear from Mr. Mpamugo's affidavit that there are in fact some repairs and maintenance that need to be done. Some of these are priority items because health and safety of tenants may be at risk. Property tax arrears also need to be addressed on an urgent basis.

However, it is clear to me that the defendants cannot be trusted to run the buildings and to account properly for the income and expenses. Accordingly, a receiver shall be appointed to receive the rental income and oversee the management of both properties. If the parties cannot agree on the terms of the order appointing the receiver/manager, I can be spoken to. The receiver shall be authorized to retain counsel and take such steps as are necessary to terminate the lease of any tenant who is in default. The receiver shall also be authorized to pay the normal operating expenses for the properties, including routine repairs and maintenance. All issues relating to the conduct of the receivership are hereby referred to the Master. Substantial repairs, or work that is capital in nature, should only be undertaken if both parties consent or if ordered by the Master. Repairs required as a health or safety matter or payments to prevent the loss of the property due to tax arrears are appropriately made on an urgent basis out of the proprietary injunction assets even if the income from the property is not sufficient to cover them. Otherwise, I would expect that the costs of running the buildings would be recoverable from the revenue received. If, however, the rental revenue is not sufficient to cover the expenses, the expenses may be paid out of proprietary assets.

(b) Payment of Expenses Out of Proprietary Assets

50 I have a discretion in respect of whether payments should be made out of the assets frozen by the proprietary injunction in the event there are insufficient funds in the Expense Account to cover them. In exercising that discretion I must be mindful that the plaintiff has not yet proven its entitlement to the assets in question and there is an underlying unfairness to the defendant in tying up his assets prior to the plaintiff proving its case at trial. On the other hand, there is unfairness to the plaintiff if I permit the defendant to use the funds for his own purposes, including funding his defence of this case, only to discover at the end of the action that the money belonged to the plaintiff all along. There is a fundamental unfairness in requiring the plaintiff to fund the defence of its own case against the defendant and to provide the defendant and his family with all of their living expenses for the time it takes to get this case to trial, if the defendant did in fact defraud the plaintiff of the amounts claimed. In this situation, I find the relative strength and weakness of the parties' cases to be very influential. The plaintiff has put forward evidence establishing a strong prima facie case of fraud. Apart from a bald denial, the defendant has not put forward any defence at all. The evidence before me therefore overwhelmingly favours the plaintiff.

51 It is with this in mind that I turn to the particular expenses which the defendant now wants to pay and I consider the disadvantage to the defendants if the payment is not made against the unfairness to the plaintiff in requiring the payment to be made out of monies which would appear to belong to the plaintiff.

52 The university expenses for Steven and Pauline shall not be payable out of the proprietary assets. There is no unfairness to the defendants if the money in fact belongs to the plaintiff. The disadvantage to the Steven and Pauline if their father is ultimately successful at trial is that their university education will have been interrupted or delayed by the period of time it takes to complete the action. Alternatively, they can continue at school and pay for their own education costs. This is not a disadvantage that outweighs the unfairness to the plaintiff of paying the expenses out of its money. It is virtually certain that such amounts would ever be recovered from Mr. Mpamugo if the plaintiff is ultimately successful at trial.

53 Likewise, the cost of legal counsel to defend this civil action is, in my opinion, an expense

that should not be payable out of the proprietary assets. An initial retainer has been paid, which should suffice to take care of the more complex interlocutory and pleading stages. Mr. Mpamugo is obviously an intelligent and highly educated individual who, although not legally trained, would be more capable than most to manage much of the defence of the civil action on his own if necessary. He is also the one who is most intimately familiar with all aspects of the case and although the documents may be voluminous, they would not likely be unfamiliar to him. To the extent there are funds in the Expense Account, reasonable legal costs of civil defence counsel may be covered. However, I am not prepared at this time to order payment of those costs out of the proprietary funds. If evidence is presented by the defendant showing an arguable case on the merits in defence to the plaintiff's claim, this matter may be returned for reconsideration before any judge. I am not seized.

54 The situation is somewhat different with respect to the defence of the criminal charges. The criminal trial is expected to be scheduled for the spring of 2003. It would be a formidable task for a lay person to mount a defence to these charges within that period of time. Further, there is more at stake in respect of the criminal charges given the criminal record that would follow if convicted and the risk of a lengthy period of incarceration. These factors, in my view, tip the balance slightly in favour of the defendant. Therefore, if there are no funds available from the Expense Account to pay Mr. Gold's accounts when due, payment may be made from other assets, subject to the same review process to ensure the accounts are reasonable.

55 I am not prepared to permit the payment of Mr. Greenspan's account out of the proprietary assets. The consequence to the defendant of not paying that account in a timely way are not sufficiently dire to counteract the unfairness to the plaintiff if the account is paid out of the plaintiff's money.

56 Living expenses should be paid first out of the Expense Account. If that account is depleted, I am inclined to the view that the defendants ought to be able to support themselves. I realize that both Mr. and Mrs. Mpamugo are unemployed at the present time. However, it would appear that they are both employable and capable of working in some sort of employment. However, in the event there are insufficient funds in the Expense Account after payment of legal fees, and to ease the transition period so as to give the family time to adjust to their new circumstances and an opportunity to seek and obtain jobs, I will authorize payment of up to $4000.00 per month out of other assets for the months of January, February, March and April 2003, payable on the first day of each month or as may be agreed to by the parties.

57 To the extent there are insufficient funds in the Expense Account to pay property tax and/or property tax arrears on the Wallenberg Crescent property, they may be paid out of proprietary funds, provided the plaintiff consents.

F. SUMMARY OF RULINGS and COSTS

58 To summarize:

(i) I am satisfied on the material before me that the defendants have no assets with which to pay their ordinary living expenses other than those frozen by the injunctions previously granted;

(ii) I am satisfied on the material before me that there is at least $150,000.00 plus accrued interest in the Royal Bank account which is not traceable to any funds advanced by the CIBC;

(iii) The defendant Lawrence Mpamugo shall open a new account ("the Expense Account"), preferably (but not necessarily at a branch of the CIBC), into which shall be deposited such of the funds frozen by the injunctions as have been demonstrated to be covered only by the ordinary Mareva and are not subject to the CIBC's proprietary claim. Full particulars of the new account and monthly account statements from the bank shall be delivered to counsel for the plaintiff.

(iv) Once the Expense Account is set up, all payments authorized to be made only out of monies not subject to the proprietary injunction, shall be made from that account.

(v) An amount equal to $150,000.00, plus accrued interest from July 7, 1999, less any amounts already paid pursuant to my Order of December 3, 2002, shall be transferred from the Royal Bank account to the Expense Account.

(vi) The written consent of counsel for the plaintiff, together with this Order, shall be sufficient authorization for any bank or financial institution to transfer any further amounts into the Expense Account.

(vii) Any dispute between the parties as to the amount of any funds to be transferred to the Expense Account is referred to the Master;

(viii) The defendant Lawrence Mpamugo shall keep accurate accounts as to all deposits to and expenditures from the Expense Account, which accounts are subject to review by the Master if requested by the plaintiff.

(ix) Transit passes for Steven and Pauline Mpamugo for the month of February 2003 may be purchased from funds in the Expense Account;

(x) Accounts rendered from time to time by Alan Gold for services rendered in defence of the criminal charges shall first be sent to Mr. Mpamugo for approval, and once approved by him, shall be forwarded to counsel for the plaintiff. Upon the written confirmation by counsel for the plaintiff that an account is reasonable, the account may be paid out of the Expense Account. Failing such consent, either Mr. Gold or the defendants may move before the Master and the Master shall determine whether the account is reasonable, applying the usual tests for assessment of an account from a solicitor to his own client. The plaintiff, the defendants and Mr. Gold shall be parties entitled to notice of such a motion.

(xi) Accounts for services rendered by counsel for the defendants in this civil action shall be payable out of the Expense Account, subject to the same process of approval as set out above for Mr. Gold's accounts.

(xii) To the extent there are funds available after payment of any accounts for legal services rendered and in the process of approval under paragraphs (x) and (xi) above, the defendants may draw a living allowance from the Expense Account to a maximum of $4000.00 per month. The Order of Brennan J. dated May 29, 2002 is set aside.

(xiii) Upon filing further affidavit evidence with supporting documentation showing a disposable family income (after tax) in excess of $50,000.00 for the period prior to the advance of any student loan funds by the CIBC, the defendants

may re-apply to this Court to increase the living allowance and/or to vary my order to provide for payment of some or all of the university expenses for Steven and Pauline Mpamugo for future academic years out of the Expense Account. Also, if the Expense Account is increased to an amount that permits the payment of all legal fees with money left over, a motion may be brought to vary this order to provide for the payment of university costs.

(xiv) A receiver is appointed to receive all income and manage the properties at Scarlett Road and Queen Avenue. The conduct of the receivership is referred to the Master. To the extent that income revenue from the properties is insufficient to cover any costs in respect of running the properties, such costs may be paid out of funds subject to the proprietary injunction. Paragraph 7 of the Order of Cameron J. dated December 9, 1999 is set aside. Any funds remaining in the account referred to in paragraph 7 of the said Order of Cameron J. shall be paid to the receiver, along with all documentation in the possession or control of the defendants relating to the management of the properties. I can be spoken to with respect to the precise terms of the receivership Order if the parties cannot agree.

(xv) Tax arrears in respect of Wallenberg Crescent may be paid out of the Expense Account. If there are insufficient funds in the Expense Account, and if the plaintiff consents, tax arrears and ongoing taxes in respect of Wallenberg Crescent may be paid out of other assets frozen by the proprietary injunction.

(xvi) If there are insufficient funds in the Expense Account to pay any account of Mr. Gold that has been approved for payment, payment may be made out of the funds frozen by the proprietary injunction.

(xvii) If there are insufficient funds in the Expense Account to pay the living expense allowance of $4000.00 per month to the defendants, payment of up to $4000.00 per month may be made out of the proprietary claim assets for the months of January, February, March and April 2003, payable on the first day of each month or as may be agreed by the parties.

(xviii) Apart from payments authorized by this Order, the injunction set out in the Order of Cameron J. shall continue.

59 Costs are left to the trial judge.

MOLLOY J.

TAB 2

De Morales v. Lafontaine-Rish Medical Group Ltd., [2009] O.J. No. 328

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

E.E. Gillese, J.L. MacFarland and H.S. LaForme JJ.A.

Heard: January 28, 2009.

Judgment: January 28, 2009.

Docket: C49229

[2009] O.J. No. 328 | 2009 ONCA 87

Between Susana Martinez De Morales, Plaintiff (Respondent), and Lafontaine-Rish Medical Group Ltd., Alvin James Anderson, Canderm Pharma Inc. and Bioform Medical Inc., Lafontaine Jeneusse Corporation, Defendants (Appellant)

(3 paras.)

Case Summary

Appeal From:

On appeal from the order of Justice David Aston of the Superior Court of Justice, dated July 4, 2008.

Counsel

Robert Zigler, for the appellant.

Bois P. Wilson and François Sauvageau, for the respondent.

APPEAL BOOK ENDORSEMENT

The following judgment was delivered by

THE COURT

1 We would dismiss the appeal. The motion judge applied the correct principles although he did not expressly set them out. He was fully justified in concluding that Mr. Froom made the

deliberate choice not to file a statement of defence. As this court stated in *Schill & Beninger Plumbing & Heat Ltd. v. Gallagher Estate* [2001] O.J. No. 260 at para. 11: "Even if a viable defence was presented the intentional refusal to defend ... stands as a permanent bar to intervention."

2 We note that even today no statement of defence has been filed, which makes it difficult to assess whether - much less contend for - there is a good defence on the merits. Like the motion judge, we view the award of punitive damages as high. However, not a single authority was provided to support the contention that it is more than is necessary to serve the purpose for which it was awarded. In the circumstances, there is no basis on which to interfere with the amount awarded.

3 Accordingly, the appeal is dismissed with costs to the respondent fixed at $7,500, all inclusive.

TAB 3

DIRECTV Inc. v. Souphanthong, [2005] O.J. No. 5407

Ontario Judgments

Ontario Superior Court of Justice

J.D. Ground J.

Heard: December 6, 2005.

Oral judgment: December 12, 2005.

Court File No. 03-CL-005209

[2005] O.J. No. 5407 | 144 A.C.W.S. (3d) 227

Between DIRECTV Inc., plaintiff, and Steve Souphanthong et al., defendants

(13 paras.)

Case Summary

Civil procedure — Pleadings — Striking out pleadings or allegations — Motion by plaintiffs for order striking statement of defence on ground that defendants failed to pay previously ordered costs and cross-motion by defendants for order permitting them to place second mortgage on house to pay costs and own legal fees — Motion allowed in part, cross-motion dismissed — Consideration of defendants' request limited to amount necessary to pay outstanding cost award, as evidence indicated that defendants paid all legal fees and that defence not hampered by alleged inability to pay legal fees — Defendants failed to prove that they had no other assets available to pay costs award.

Motion by plaintiffs for order striking statement of defence on ground that defendants failed to pay previously ordered costs and cross-motion by defendants for order permitting them to place second mortgage on house to pay costs and own legal fees -- HELD: Motion allowed in part, cross-motion dismissed -- Consideration of defendants' request limited to amount necessary to pay outstanding cost award, as evidence indicated that defendants paid all legal fees and that defendants not hampered in putting forward vigorous defence by alleged inability to pay legal fees -- Defendants failed to prove that they had no other assets available to pay costs award -- Evidence indicated that defendants had liquid assets in excess of amount of cost award, and received rental income and employment income -- Statement of defence and counterclaim to be struck if defendants failed to pay cost award within 30 days.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure Rule 57.03(2)

Counsel

Chris Bredt, Ira Nishisato, for the Plaintiff

Ian Angus for the Defendants

J.D. GROUND J. (orally)

1 This Endorsement applies to all three proceedings.

1. Bell ExpressVu 03-CL-5210
2. DIRECTV 03-CL-5209
3. EchoStar 03-CL-5211

2 The Plaintiff's motion before this court is for an order pursuant to Rule 57.03(2) to strike the defences of the Defendants, Kikham Souphanthong and Leng Souphanthong (the "Parents"), based upon the failure of those Defendants to pay a cost award of $14,000 ordered by Farley, J. on May 20, 2005 to be paid prior to June 21, 2005.

3 The Parents in their responding motion record, presumably by way of cross motion, are seeking an order permitting them to place a second mortgage in the amount of $50,000 on one of the houses to which the certificates of pending litigation authorized by Farley, J. apply and to postpone the certificate of pending litigation to such second mortgage.

4 The amount of $50,000 is sought to provide for the payment of the cost award of $14,000 and for the legal fees for the Parents in defence of this action currently estimated to be $30,000.

5 As a starting point, it seems to me that the consideration of the Parents' request today should be limited to the funds necessary to pay the $14,000 award. The evidence appears to be that all legal fees over the past two years since this litigation was commenced have been paid by the corporate Defendants or by the Parents' son, Steve Souphanthong, that the Parents have no current obligation to pay any legal fees, that Mr. Angus continues to represent all of the Defendants in the action and that the Parents have not, to date, been hampered in putting forward a vigourous defence to this action by their inability to pay legal fees. Parenthetically, it appears to me that the claims against all Defendants are based on the alleged piracy activities of the corporate Defendants and I would have thought that the legal fees for the defence of the action could be billed to the corporate Defendants and presumably be deductible by them.

6 It also appears to me that if, at some future date, the Parents become liable for legal fees in connection with this action and their inability to pay such fees is affecting their mounting of full defence to this action, they could apply at that time for a postponement of the certificates pending litigation to fund such fees.

7 With respect to assessing the value of the houses to provide funds to pay the costs award,

the parties concede that the test set out by Molloy, J. in Canadian Imperial Bank of Commerce v. Credit Valley Institute [2003] O.J. No. 40 is applicable.

8 The Plaintiff is claiming a constructive trust and tracing based upon funds from the alleged piracy business being applied toward the acquisition of the houses. I am satisfied that the equity in the houses is, to the extent of such tracing claim, a proprietary asset. I am also satisfied, on the evidence before this court, that there is probably equity in the houses in an amount in excess of the amount of the business income which could be traced to the houses and certainly in excess of $50,000 and that such excess would constitute a non-proprietary asset and "an asset acquired from sources other than the plaintiff" for the purposes of the test set out in the Credit Valley case.

9 That, however, in my view, is not of assistance to the Parents on these motions. It is clear from the Reasons of Molloy, J. that the initial threshold or hurdle, which the Parents must meet, is to establish on proper evidence that they do not have any other assets to pay the costs award other than their equity in the houses.

10 At paragraph 26 of her Reasons, Molloy, J. states:

> "Accordingly the test to be applied is as follows:
>
> (i) has the Defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction;
>
> (ii) if so, has the Defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the Plaintiff".

And at paragraph 27:

> "The first step of the analysis is to determine whether the Defendant has assets he could use to pay these expenses other than the assets frozen by the injunction. This is a preliminary step in the consideration, both in respect of the funds to which the Plaintiff asserts a proprietary claim and the funds that are assets of the Defendant, subject only to a Mareva type injunction"

11 Accordingly, access to non-proprietary assets will not be considered unless the Parents have satisfied the court that they have no other assets available to pay the costs award. They have failed to do so. The evidence before this court indicates that the Parents have liquid assets of $15,000 to $18,000 and have rental income, in addition to their employment income, more than sufficient to pay the mortgage payments on the two houses. This initial hurdle not having been met, the court need not consider the question of access to non-proprietary assets nor the question of the balancing of competing interest of the parties.

12 Accordingly, an order will issue that if the costs award is not paid by the Parents within 30 days of today's date, the statement of defence and counterclaim of the Parents will be struck. The order sought by the Parents permitting them to register a second mortgage against one of the houses in the amount of $50,000 and to postpone the certificate of pending litigation on that house to such second mortgage will not issue.

13 Costs fixed in the amount of $15,000, all in, payable to the Plaintiff in this action and the Plaintiffs in the two related actions, such costs to be payable within 30 days of today's date

without prejudice to the right of the Parents to make a proposal to the Plaintiffs with respect to the payment of such costs or to bring a motion before this court for access to funds to make payment of the costs.

J.D. GROUND J.

End of Document

TAB 4

Garten v. Kruk, [2009] O.J. No. 1764

Ontario Judgments

Ontario Superior Court of Justice

Master R. Dash

Heard: April 20, 2009.

Judgment: April 30, 2009.

Court File No. 07-CV-340413PD

[2009] O.J. No. 1764

RE: Irving Garten, and Anne Kruk

(30 paras.)

Case Summary

Civil litigation — Civil procedure — Judgments and orders — Default judgments — Noting in default — Setting aside — Delay in applying — Reasonable excuse for default — Application by the defendant to set aside being noted in default, dismissed — Defendant did not demonstrate a continuing intention to defend — Default in defending prior to being noted in default was not adequately explained — Defendant did not move with dispatch once becoming aware of the noting in default — Delays were inordinate and the explanations were wanting.

Application by the defendant Kruk to set aside the noting of default and to extend the time for delivery of a statement of defence. On August 18, 2007 the parties signed an agreement of purchase and sale in which Kruk agreed to sell her property to Garten. On August 21, 2007 Kruk repudiated the agreement. Garten on September 21, 2007 commenced an action for specific performance and for a declaration that the agreement of purchase and sale was binding. Kruk did not deliver a notice of intent to defend or a statement of defence. Garten noted Kruk in default on March 20, 2008. Garten never demanded a defence and gave no warning of his intention to note Kruk in default. Kruk was informed she was noted in default on September 24, 2008. The motion to set aside was not served until December 31, 2008.

HELD: Application dismissed.

Kruk did not have an intention to defend within the time limits for filing a statement of defence. That intention did not continue until the time that she was made aware that she had been noted in default. The lack of intention was evidenced by the fact that Kruk did not file a statement of defence or a notice of intent to defend. She did not request an extension of time or file responding material in response to Garten's application for a certificate of pending litigation. Her default in delivering a statement of defence was not adequately explained. The delay in this case was inordinate. The motion to set aside was also not brought with reasonable dispatch once it was learnt that Kruk was noted in default. The failure by Garten to warn before noting Kruk in default was unprofessional but it did not provide grounds by itself for setting aside the noting in default.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 19.01, Rule 19.03(1), Rule 39.01(4)

Counsel

Robert A. Watson, solicitor for the plaintiff.

Alfred J. Esterbauer, counsel to the solicitors for the defendant.

REASONS FOR DECISION

MASTER R. DASH

1 The plaintiff noted the defendant in default on March 20, 2008 for having failed to deliver a statement of defence. The defendant moves to set aside the noting in default under rule 19.03(1). Although noting in default is routinely set aside, often on consent except perhaps as to terms, the plaintiff opposes the motion based on the particular circumstances that transpired in the 15 months between the time that the statement of claim was served and the time that this motion was served to set aside the default.

BACKGROUND

2 On August 18, 2007 the parties signed an agreement of purchase and sale wherein the defendant agreed to sell her property at 145 Madison Ave., Toronto to the plaintiff for $1,500,000. On August 21 a solicitor for the defendant wrote to the plaintiff advising that the defendant "repudiates" the agreement on several grounds including duress. He noted that the defendant was an 86 year old widow who was tired, intimidated and not given an opportunity to obtain family or legal advice. The allegations were denied in a return letter from the plaintiff's solicitor. The plaintiff subsequently gave evidence by affidavit on a motion for a certificate of pending litigation. That evidence, which has never been contradicted, indicates that the defendant was alert, knowledgeable, wanted to sell her home, met twice with the plaintiff (the second time at an arranged appointment), was given opportunity to consult others, was aware of the value of her home and was able to convince the plaintiff to increase the price beyond what he wanted to pay such that she received the price she wanted.

3 The following are the relevant events in this litigation:

(a) On September 21, 2007 the plaintiff commenced this action claiming specific performance and a declaration that the agreement of purchase and sale is binding.

(b) On September 27, 2007 the statement of claim together with a motion for a certificate of pending litigation ("CPL") was served on the defendant. She retained solicitor Benjamin Salsberg on October 3, 3007.

(c) At the return of the motion before Master Clark on October 10, 2007 Mr. Salsberg requested an adjournment in part because he intended to deliver responding material, possibly including medical evidence, and cross-examine the plaintiff on his affidavit. The adjournment was opposed by Mr. Watson, but was granted by Master Clark to a date to be set on terms that the defendant not sell, mortgage or otherwise deal with the property until the hearing of the motion or further order of the court.

(d) There was a dispute about the form of the order, namely whether it should include a term that the order be registered on title, but it was settled by Master Clark on November 19 and on November 30, 2007 Mr. Watson sent Mr. Salsberg a copy of the entered order and registration particulars.

(e) Nothing further was done with respect to the motion or the action. The defendant did not file responding material and took no steps to cross-examine the plaintiff on his affidavit. Neither party brought the CPL motion back on for hearing. The defendant did not deliver a notice of intent to defend or a statement of defence. No request was made for an indulgence or extension of time.

(f) On March 20, 2008 the plaintiff noted the defendant in default. The plaintiff had never demanded a defence and had given no warning of his intention to note default.

(g) Mr. Watson first advised Mr. Salsberg that he had noted the defendant in default by letter dated September 24, 2008. The letter included an offer to settle. There had been no correspondence by either counsel between November 30, 2007 and September 24, 2008.

(h) Mr. Salsberg did not respond, but retained Mr. Esterbauer who contacted Mr. Watson on October 5 and then on October 31 asked Mr. Watson if he would consent to setting aside the noting in default. There was no response to the plaintiff's offer to settle.

(i) On November 5, 2008 Mr. Watson wrote to Mr. Esterbauer querying Mr. Esterbauer's role and stating: "Any motion brought now by anyone claiming to act on behalf of Mrs. Kruk seeking to set aside the noting in default will be opposed." On November 20 Mr. Esterbauer again sought consent stating he was instructed to bring a motion to set aside the noting in default should the plaintiff refuse to consent.

(j) The motion to set aside was not served until December 31, 2008. It was initially returnable on February 12, 2009 but was adjourned on consent to April 20.

THE LAW

4 Under rule 19.03(1) the court may set aside a noting in default on such terms as are just. On such motion the court is principally concerned with the answers to three questions: "(1) Is there believable evidence that, in the time permitted for responding to a statement of claim, the defendant had an intent to defend? (2) What prevented the defendant from responding to the statement of claim in a timely fashion? (3) Has the motion been brought with reasonable

dispatch?"[1] The onus of satisfying the court that the noting in default should be set aside rests with the defendant who has been noted in default.

5 The court is to consider the "context and factual situation" in which it is asked to exercise its discretion to set aside a noting in default and should consider such factors as "the behaviour of the plaintiff and of the defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and value of the claim involved."[2] The court will not usually refuse to set aside a noting in default if the "sole basis" in an inadequate explanation for "tardiness in pleading."[3] The court will also consider "any prejudice to the party relying upon the noting in default caused by setting it aside."[4]

6 On a motion to set aside a noting in default (where there has been no judgment signed) it is not usually necessary to show a valid defence on the merits provided the defendant has demonstrated a continued intention to defend, has adequately explained the default, and has moved expeditiously to set aside.[5] The court will rarely, and only in extreme situations, exercise its jurisdiction to require evidence as to the merits of the defence.[6]

7 Motions to relieve against a noting in default are "typically granted on an almost routine basis" where a time period is missed inadvertently, provided of course that there has been a demonstrated intention to defend and the motion to set aside is brought promptly. Such orders are usually made on consent except perhaps as to terms or costs. While parties should comply with the time requirements for filing a defence, "the Rules are not meant to be traps for the unwary" and "where slips are made ... accommodations should and will be made." As a basic principle "the Court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties."[7]

POSITION OF THE PARTIES

8 The plaintiff argues that the defendant has met none of the aspects of the test: there was no continuing demonstrated intention to defend, the default has not been adequately explained and the defendant did not move promptly once she was aware that she had been noted in default. He also asserts that he will be prejudiced if the noting in default is set aside. The defendant argues that she always intended to defend, the default was due to inadvertence by her solicitor and she moved promptly once her solicitor was advised that she was noted in default. She asserts that there is no prejudice to the plaintiff, and although there is no evidence to this effect, submits that she will be prejudiced if she is not permitted to defend. All of the defendant's evidence comes from her solicitor. There is no affidavit from the defendant herself.

ANALYSIS

9 I will consider the various factors applicable on motions to set aside a noting in default based on the evidence before me.

Intention to Defend

10 Did the defendant have an intention to defend within the time limits for filing a statement of defence and did that intention continue until the time that she was made aware that she had been noted in default? The totality of the evidence in support of such intention is this statement in the affidavit of the defendant's solicitor, Mr. Salsberg: "At all times, the Defendant intended to defend the action and resist the CPL motion, which had been adjourned by Master Clark." Mr.

Salsberg does not specify the source of his information in his affidavit contrary to rule 39.01(4). As such, the statement is not admissible on the motion. There is no other evidence in support of the defendant's intention to defend. The defendant herself failed to file an affidavit attesting to her intention to defend. Mr. Esterbauer submits that as Mr. Salsberg is the defendant's solicitor, it must be presumed that the information came from his client. I disagree. This is not a mere technical breach of rule 39.01(4) since the defendant's intention to defend is very much in issue. Mr. Esterbauer argues that the court must accept Mr. Salsberg's statement as true since he was not cross-examined. The evidentiary value of Mr. Salsberg's statement however does not improve by the failure to cross-examine.

11 Rather than resting my conclusions based on the failure of Mr. Salsberg to state the source of his information and on the failure of the defendant Ms. Kruk to attest as to her intention by filing her own affidavit, I will examine the actions (and inactions) of the defendant and Mr. Salsberg that support or contradict an intention to defend.

12 The defendant was served with the statement of claim and the motion for a CPL on September 27, 2007. She was noted in default on March 20, 2008 and informed of that on September 24, 2008. Here is the sum total of what Mr. Salsberg did after being retained on October 3, 2007: he requested an adjournment of the CPL motion. The motion was adjourned so that the defendant could file responding evidence, including possible medical evidence about herself, and cross-examine the plaintiff on his affidavit. Here is what Mr. Salsberg did not do: He did not file a statement of defence, he did not file a notice of intent to defend, he did not request an extension of time, he did not file responding material for the CPL motion, he did not seek to cross-examine the plaintiff, he did not bring the CPL motion back on for hearing notwithstanding that the defendant's lands were tied up. There is no evidence that Mr. Salsberg ever prepared a statement of defence or shared it with Ms. Kruk.

13 In *Enbridge Gas* there was evidence that the defendant provided the solicitor with the pleadings and asked if a statement of defence could be filed, but then failed to fund a retainer. Ducharme J. determined that the client had an initial intent to defend but the question was whether he "continued to have an intent to defend".[8] Ducharme J. stated that there was no evidence that the defendant ever personally made enquiries as to the status of the action, or received a copy of the statement of defence or made any request to review the statement of defence. He concluded that the client "must have known" that the solicitors were not defending the claim and, "if he had a bona fide continuing intent to defend, he would have taken further steps in this regard". He determined this was "a sufficient basis to refuse to set aside the noting in default."[9]

14 Similarly in this case, there is no evidence whatsoever that Ms. Kruk ever enquired of Mr. Salsberg as to the status of the action or whether the claim against her was being defended or whether the motion for a CPL was being bringing brought back on since her lands were tied up pursuant to the order of Master Clark. There is no evidence of what instructions she gave Mr. Salsberg. There is no evidence that she continued to retain Mr. Salsberg throughout the period subsequent to the initial retainer on October 3, 2007. There is no evidence of her involvement whatsoever in this action subsequent to October 3, 2007.

15 The only step taken by Mr. Salsberg after being retained was to seek an adjournment of the motion for a CPL. In my view that does not demonstrate an intention to defend. The evidence as a whole fails to demonstrate that the defendant had a continuing intention to defend this action.

Explanation of the Default

16 Has the default in delivering a statement of defence been adequately explained? This is what Mr. Salsberg says in his affidavit: "Due to inadvertence on the part of my office, the delivery of a Statement of Defence was not diarized, and the matter was inadvertently overlooked." Full details of that inadvertence are within the sole knowledge of Mr. Salsberg, yet his explanation is devoid of any meaningful detail. He does not state what his office "tickler" system consisted of, who was responsible for it and why it was not diarized. The statement of defence, or at least a notice of intent to defend, was due by October 17, 2007, 10 days after the hearing before Master Clark. One could understand if Mr. Salsberg missed the deadline by a few days, or even a few weeks, or possibly even a few months. It stretches all credulity to accept that the defence of this action was totally removed from Mr. Salsberg's mind for the next 11 months until he was informed that his client had been noted in default. Further, although Mr. Salsberg says the defence was not diarized, he does not say that the file never came across his desk for review or that staff never mentioned the file to him or that he never billed the client or that he never reviewed a computerized list of files or that he never spoke to his client. He does not say that in the 11 months after Master Clark's order in October 2007 he never once remembered that he had taken on the defence of this action. What stands out sharply against the suggestion that Mr. Salsberg simply forgot to file a defence because it was not diarized is the fact that he took no steps to bring the motion for a CPL back on or to file responding material or seek to cross-examine the plaintiff despite any concern that his client may have had because her lands were tied up by the order of Master Clark.

17 The failure to respond further to the CPL is consistent with the possibility that Mr. Salsberg was simply not retained to take further steps. I appreciate however that that would amount to speculation on the part of the court. What convinces me that simple inadvertence was not the cause of the failure to file a defence is the fact that no steps were taken to defend the action or the CPL motion after Mr. Watson sent Mr. Salsberg a letter on November 30, 2007 informing him about the registration particulars of Master Clark's order. Even if Mr. Salsberg's staff failed to diarize a date to file a defence and even if the defence of the action had totally escaped Mr. Salsberg's mind, surely the letter from Mr. Watson would have been a reminder that there was still an action against his client. That letter would have served as a "tickler" to file a defence and take steps relating to the CPL motion. The onus remains on the defendant and her solicitor to adequately explain the default in filing a defence. The delay herein was inordinate. I am not satisfied on the evidence before me that the reference to solicitor's inadvertence adequately explains the default. The answer to the question "What prevented the defendant from responding to the statement of claim in a timely fashion?" is simply nothing prevented her from doing so.

Delay in Moving to set Aside

18 Has the motion to set aside been brought with reasonable dispatch after learning that the defendant had been noted in default? Mr. Salsberg was notified on September 24, 2008 that his client had been noted in default yet the motion to set aside was not served until December 31, 2008, over three months later. While I do not fault counsel for making an initial attempt to obtain Mr. Watson's consent to set aside the noting in default, counsel must move expeditiously once such consent is denied. Mr. Watson made it clear on November 5, 2008 that he would not consent. Instead of immediately serving a motion to set aside, counsel still waited eight more weeks before serving the motion. Mr. Salsberg's affidavit in fact was not even sworn until

December 30, 2008. No explanation has been provided. In my view a delay of three months and one week before moving to set aside the default does not constitute moving with expedition. That delay has never been fully or adequately explained. I would however not refuse to grant the relief on this ground alone - there are many cases where the delay has been even longer. It is however one more example of the approach taken by the defendant to this litigation and, taken with the failure of the defendant to meet the other criteria, weighs against granting the relief claimed.

Defence on the Merits

19 Should the defendant be required to demonstrate a defence on the merits? As noted, that would normally not be necessary on a motion to set aside a noting in default (unless default judgment has also been signed), save in a rare and exceptional case. I do not consider this to be an exceptional case. I do not conclude that the defendant is "required" to lead evidence as to the merits, but it may have been helpful in seeking the court's indulgence. In this case there has been no statement of defence filed and no affidavit from Ms. Kruk on the certificate of pending litigation motion nor on this motion. She is asking for the opportunity to defend on the merits, but has given no evidence as to the merits. The only clue as to her defence has come from a letter written by a former solicitor indicating that she agreed to the sale under duress. The plaintiff filed a detailed affidavit that sets out precisely how the parties ended up signing an agreement of purchase and sale. His affidavit sets out that the defendant was an alert and active participant in forming the decision to sell her home and in setting the price and that she had an opportunity between the two meetings to consult with others. Had the defendant provided some evidence as to the nature and merits of her defence it could have supported her position that she had an intention to defend on the merits. For reasons set out earlier in this endorsement, I determined that based on the evidence before me, the defendant had not satisfied the onus of establishing that she had a continuing intention to defend the action.

20 During his argument, once he became aware of the court's concerns, Mr. Esterbauer requested an adjournment to file additional material "in the event that the court required evidence of the defence." I declined to adjourn for that purpose. The defendant made a deliberate decision not to file evidence as to the nature or merits of the defence and thereby accepted the risk that the court might have found such evidence helpful. It is not a case of inadvertence or a change in circumstance. Rather, the request was "made solely as a consequence of an unfavourable response from the court. Courts should not encourage or permit litigation to be undertaken on a trial and error basis."[10] Parties should put their best foot forward on a motion and deliver all evidence that they wish the court to consider before the hearing commences. Counsel should not in the middle of argument be permitted an adjournment to file additional evidence to bolster their case after the court has expressed concerns that the existing evidence may be lacking. As in *Walsh*, there was a "conscious decision taken by counsel not to present certain evidence ... Counsel and their clients have to bear the consequences of such decisions. Counsel cannot foist that responsibility onto the court and essentially say 'I have made this decision but if the court does not agree with how I have chosen to present the case then tell me how to do it and I will try again.'"[11]

21 In any event, I did not "require" evidence as to the merits of the defence. Although the evidence would have been helpful, it would by no means have been determinative of whether the defendant had a continuing intention to defend given the substantial evidence that contraindicates such intention.

Prejudice

22 Will the plaintiff suffer any prejudice if the noting in default is set aside? In my view the answer is clearly "no". The plaintiff asserts he will suffer prejudice by the additional delay if the noting in default is set aside. He asserts that his case is strong and this will only delay the completion of the agreement of purchase and sale which the court will likely award even if the action proceeds to trial on the merits. The actions of the plaintiff in this litigation belie the suggestion of prejudice. The CPL motion was adjourned on October 10, 2007 on terms that prevented the defendant from dealing with her lands pending further order of the court. While the motion was adjourned because the defendant wanted an opportunity to file responding material and cross-examine the plaintiff, both of which she failed to do, and while in my view the defendant should have moved expeditiously to bring the motion back on, the plaintiff also had an onus to move the action forward. In fact, with the defendant's lands being tied up for the protection of the plaintiff, effectively equivalent to an injunction, there is a particular onus on the plaintiff to move the action forward with expedition. He did not do so. He did not bring the CPL motion back on. He did not demand a defence. He did not move the action to the production and discovery stage (which would not have been required until after pleadings were completed). He waited almost six months after adjourning the CPL motion before noting the defendant in default and then without warning. After noting default, he did not move for default judgment for specific performance. He waited another six months after noting in default before advising the defendant's solicitor that he had done so. The plaintiff is as responsible as the defendant for the delay in moving the action forward. It is not tenable to suggest that the plaintiff has suffered any prejudice in consequence of the delay or that he will suffer any prejudice if the noting in default is set aside.

23 The cases do not suggest that prejudice to the defendant is a factor for the court to consider if the noting in default is not set aside. That may be because it is assumed that a defendant with an arguably meritorious defence will always be prejudiced if they are not permitted to defend an action. In any event, given the failure to provide evidence as to the nature or merits of the defence, the court is not in a position to consider whether the defendant will be prevented from pursuing an arguably meritorious case. I also note that this not an action for damages. It is primarily an action for specific performance of an agreement of purchase and sale. If the defendant is denied an opportunity to file a defence and the plaintiff obtains default judgment for specific performance, the plaintiff will still be required to pay the defendant $1.5 million to complete the agreement. The only evidence before me is that this was an agreed and fair sum. Mr. Esterbauer argues that the plaintiff will however be forced to move out of her home. The sworn evidence of the plaintiff indicates that the defendant told him that it was her intention to move into the adjoining house, also owned by her. There is no evidence to contradict that. In my view there is no specific prejudice to the defendant if the noting in default is not set aside, save for what is applicable to all defendants in default - being prevented from defending the action.

The Failure to Warn

24 Should the actions of the plaintiff in failing to warn the defendant of an intention to note her in default provide grounds by itself to set aside the noting in default? The defendant was in default in delivering a statement of defence and the plaintiff had a clear legal right to note her in default under rule 19.01. Although a plaintiff may have a legal right to note default, "it was unprofessional to do so without warning" particularly where the plaintiff was aware of the identity of the defendant's solicitor. Nonetheless, a "failure to warn, without more, does not provide

grounds to set aside any resulting default judgment" and "in each case where a default judgment was set aside based on a failure to warn there was either breach of an agreement or undertaking not to note default or a statement of defence had been served and received by the plaintiff who took advantage of the fact that the defendant inadvertently failed to file it. A failure to warn however could have an affect on the costs to be awarded on the motion to set aside the default judgment."[12] None of these additional factors were present in this case. Therefore in my view, the failure to warn, although unprofessional, does not provide grounds, by itself to set aside the noting in default. It may however be a factor in determining costs.

CONCLUSION

25 Although motions to set aside a noting in default are routinely granted in the "usual" case and while the court should strive to grant "reasonable" accommodation to allow disputes to be resolved on their merits and not denied "based solely on technical default", this is not the "usual" case nor was this a mere "technical default". There is a test to be met, which the defendant has failed to meet.

26 No attempt was made to file a defence between the time that the statement of claim was served on September 21, 2007 until a year later when the defendant was advised on September 24, 2008 that she had been noted in default. Even then it took over three more months, until December 31, 2008, to serve this motion to set aside the noting in default. I have concluded that the three questions with which the court must be principally concerned have been answered in support of the court not exercising its discretion to set aside the noting in default. I have determined that the defendant has not demonstrated a continuing intention to defend, that the default in defending prior to the noting in default has not been adequately explained and that the defendant did not move with dispatch once becoming aware of the noting in default. The delays herein have been inordinate and the explanations wanting.

27 Although the plaintiff would not be prejudiced if the noting in default were set aside, the defendant must still adequately address the three principal issues that the court must consider in the exercise of its discretion. I have concluded that the defendant has failed in that endeavour. Had the defendant otherwise met the test then the court would have had to balance any prejudice to the plaintiff if the noting in default were to be set aside. I am also troubled by the failure of the plaintiff to warn the defendant that it intended to note her in default, however that does not constitute grounds by itself to set aside the noting in default, although it may go to the issue of costs.

28 In all of the circumstances the defendant has failed to meet the onus of convincing the court to exercise its discretion in favour of setting aside the noting in default. The motion will be dismissed.

COSTS

29 The plaintiff was successful in resisting the motion and normally costs should follow the event. However, given the failure of the plaintiff to warn the defendant that he would be noting her in default and the subsequent delay in advising the defendant that she had been noted in default, I would be hard pressed to award the costs of the motion to the plaintiff. I am of the preliminary view that there should be no costs of the motion to either party. Both counsel however have asked for an opportunity to make submissions in writing as to costs after release of this decision.

ORDER

30 It is hereby ordered as follows:

(1) The motion of the defendant to set aside the noting in default and extend the time for delivery of a statement of defence is dismissed.

(2) Any party seeking costs of this motion shall within 10 days of release of these reasons deliver brief submissions together with a Costs Outline (Form 57B) and dockets. Brief responding submissions may be delivered within a further 7 days

MASTER R. DASH

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1 *Biss v. Egmond*, [2004] O.J. No. 5200 (S.C.J.) at paragraph 22.

2 *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.*, (1991) 3 O.R. (3d) 278, [1991] O.J. No. 717 (C.A.) at paragraph 18.

3 *Bardmore*, supra, at paragraph 20.

4 *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327 (S.C.J.) at paragraph 8.

5 *Bardmore*, supra, at paragraph 11.

6 *Bardmore*, supra, at paragraph 18.

7 *McNeill Electronics Ltd. v. American Electronics Inc.*, [1996] O.J. No. 3446, 5 C.P.C. (4th) 266 (O.C.G.D.) at paragraph 2.

8 *Enbridge Gas*, supra, at paragraphs 3 and 9.

9 *Enbridge Gas*, supra, at paragraph 11-12.

10 *Walsh v. 1124660 Ontario Ltd.*, [2004] O.J. No. 2246 (S.C.J.) at paragraph 14.

11 *Walsh*, supra, at paragraph 15.

12 *1317621 Ontario Inc. v. Krauss*, [2008] O.J. No. 3054 (S.C.J. - Master) at paragraph 31, affirmed [2008] O.J. No. 5170 (Div. Ct.) at paragraph 10.

Garten v. Kruk, [2009] O.J. No. 4438

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

J.M. Wilson J.

Heard: October 20, 2009.

Oral judgment: October 20, 2009.

Court File No. 229/09

[2009] O.J. No. 4438 | 257 O.A.C. 59 | 2009 CanLII 58071 | 2009 CarswellOnt 6477 | 181 A.C.W.S. (3d) 661

Between Irving Garten, Plaintiff, (Respondent), and Anne Kruk, Defendant, (Appellant)

(34 paras.)

Case Summary

Civil litigation — Civil procedure — Judgments and orders — Default judgments — Noting in default — Setting aside — Defence on the merits — Reasonable excuse for default — Appeal by defendant from a Master's order refusing to set aside a noting in default in an action by the plaintiff for specific performance of an agreement of purchase and sale allowed — The court ought to exercise its discretion to provide a just result for the party and that matters ought to be dealt with on their merits — The evidence showed an intent to defend, the delay was due to the solicitor's conduct only, and the defendant was an 86-year-old woman who entered into an unsolicited real estate transaction for the sale of her home without representation.

Real property law — Proceedings — Appeals and judicial review — Amendment or rescission of decision — Appeal by defendant from a Master's order refusing to set aside a noting in default in an action by the plaintiff for specific performance of an agreement of purchase and sale allowed — The court ought to exercise its discretion to provide a just result for the party and that matters ought to be dealt with on their merits — The evidence showed an intent to defend, the delay was due to the solicitor's conduct only, and the defendant was an 86-year-old woman who entered into an unsolicited real estate transaction for the sale of her home without representation.

Appeal by defendant from an April 30, 2009 Master's order refusing to set aside a noting in default. The defendant was an 86-year-old woman who entered into an unsolicited real estate transaction for the sale of her home without legal representation or an agent acting on her behalf. The plaintiff's claim was for specific performance for the sale of the home. The proposed statement of defence raised issues of undue influence, duress and intimidation, etc. The defendant argued that on any reasonable assessment of the facts, the order requested ought to have been granted.

HELD: Appeal allowed.

The noting of default of the defendant's claim was set aside, and the statement of defence was to be filed within 15 days. The Master erred in his general approach to the motion. He failed to apply the overriding principle that the court ought to exercise its discretion to provide a just result for the party and that matters ought to be dealt with on their merits. With respect to the conclusion that the defendant did not demonstrate an intent to defend, the Master failed to consider the lawyer's letter written three days after the agreement of purchase and sale was signed contesting the validity of the sale. The defendant immediately retained counsel. Although the conduct of counsel for the defendant merited criticism, the defendant ought not to be punished for those errors. The Master erred in his assessment of the facts with respect to rejecting the sworn statement of the solicitor and analysed factors that might or might not have had relevance. Furthermore, plaintiff's counsel ought to have had further contact with the defendant's solicitor before taking default steps, and the Master's order reinforced sharp practice.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 19.03(1)

Counsel

Robert A. Watson, for the Plaintiff (Respondent).

Alfred J. Esterbauer, for the Defendant (Appellant).

J.M. WILSON J. (orally)

The Appeal

1 This appeal raises issues in a motion to set aside the noting of default when the actions of counsel for both parties are to blame.

2 The appeal from the order of Master Dash dated April 30, 2009, refusing to set aside the noting in default of the defendant pursuant to rule 19.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, is granted.

Standard of Review

3 The standard of review of a final order of a Master is stipulated in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and *Zeitoun v. Economical Insurance Group* (2009), 307 D.L.R. (4th) 218) (Ont. C.A.). Findings of fact should not be reversed on appeal unless the lower court made a

palpable and overriding error in the assessment of facts or in the application of the facts to the law. For questions of law, the standard is correctness.

Background and the effect of the order made

4 The defendant is an 86 year-old woman who entered into an unsolicited real estate transaction for the sale of her home without legal representation or an agent acting on her behalf. The plaintiff knocked on the door of her home with a signed Agreement of Purchase and Sale in hand. The result of the Master's order is to preclude the defendant from defending the plaintiff's claim for specific performance for the sale of her home.

5 The allegations outlined in the proposed statement of defence raise issues of undue influence, duress and intimidation, and further alleges that the plaintiff had limitations with respect to the comprehension of the document in question.

6 The Agreement of Purchase and Sale was signed on August 18, 2007. On August 21, 2007, a lawyer on behalf of the defendant advised in writing that the defendant contested the validity of the Agreement of Purchase and Sale, and asserted that the agreement was not binding due to the circumstances at the time it was entered into.

7 The plaintiff moved before Master Clark to obtain a certificate of pending litigation when the statement of claim was issued in September 2007. Mr. Salsberg was retained on behalf of the defendant to defend the motion. That motion to obtain a certificate of pending litigation did not proceed, although an interim order was made preventing the defendant from selling her home.

8 After the initial appearance, nothing happened on the file, apart from a letter written by counsel to the defendant in November 2007 enclosing the order of Master Clark.

9 Counsel for the plaintiff took steps to have the defendant noted in default by the Registrar, some six months after the initial court appearance. No demand was made by counsel for the plaintiff requiring a statement of defence to be filed within a certain number of days. No notice was provided to counsel for the defendant that noting in default was contemplated.

The Issue

10 The defendant's motion to set aside the noting of default was refused. The defendant argues that on any reasonable assessment of the factual matrix in this case, the order requested by the defendant should have been granted.

11 I agree.

12 Respectfully, in my view, the Master erred in his general approach to the motion. It appears that he did not apply the overriding principle that the court should exercise its discretion to provide a just result for the party and that matters should be dealt with on their merits. To ignore this overriding principle was incorrect.

13 Although he cited the correct principles, the Master approached the issues in a highly technical and compartmentalized fashion in his consideration of the factors relevant to a rule 19.03(1) motion. I conclude that there were specific palpable and overriding errors within the meaning of *Housen, supra,* with respect to some of his findings of fact.

14 As well, the Master's order reinforces sharp practice.

The factors to consider in a rule 19.03(1) motion

15 Rule 19.03(1) provides that "the noting of default may be set aside by the court on such terms as are just."

16 The Master notes, correctly, that motions to set aside a noting of default are generally granted in the usual case. The Courts should strive to grant reasonable accommodations and allow disputes to be resolved on their merits. Matters should not be determined based upon a technical default.

17 The factors to be considered by the court on a motion to set aside a noting of default were outlined in *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Development Ltd.* (1991), 3 O.R. (3d) 278 (C.A.). At para. 18, Mckinlay J. states:

> 18. Rule 19.03 provides that a noting in default "may be set aside by the court on such terms as are just" ... it is the context and factual situation in which the discretion arises which should determine its application. Such factors as the behavior of the plaintiff and of the defendant, the length of the defendant's delay, the reasons for the delay, and the complexity and value of the claim involved are all relevant factors to be taken into consideration. However, I consider that it would only be in extreme situations that a trial judge would exercise his discretion to require an affidavit as to the merits of the defence on a motion to set aside a noting in default.

18 These principles have been applied and refined over the years in the case law. What Mckinlay J. outlined were factors to consider in the factual matrix, not rigid requirements.

19 I turn to consider the reasons of the Master.

Intent to Defend

20 The Master concluded that the defendant did not demonstrate an intent to defend. Respectfully, the Master did not consider the letter written by a lawyer three days after the Agreement of Purchase and Sale was signed contesting the validity of the sale. The defendant immediately retained counsel. The fact that the defendant was before him and is here today speaks volumes of the defendant's desire and intent to defend the claim.

Explanation for Default

21 The Master was critical of the conduct of Mr. Salsberg, counsel for the defendant. Clearly the conduct of Mr. Salsberg and his office merit criticism. However, the defendant should not be punished for the errors of her counsel. Mr. Salsberg filed a lengthy affidavit dealing with the issues relevant to the Rule 19.03 motion. He states specifically in his affidavit that the reason for failing to file a defence was as outlined in paragraph 16 of the reasons of the Master:

> "Due to inadvertence on the part of my office, the delivery of a Statement of Defence was not diarized, and the matter was inadvertently overlooked."

22 The Master did not accept the sworn statement of a solicitor and conducted his own analysis with respect to credibility. I note that the solicitor was not cross-examined on his affidavit. There was no other evidence as to why a defence was not filed.

23 In my view, the Master erred in his assessment of these facts and embarked into an analysis of other factors that may or may not have had relevance. This was a palpable and overriding error.

Failure to Warn

24 The reasons of the Master do not consider the questionable conduct of plaintiff's counsel. Counsel failed to advise either verbally or in writing the defence counsel of his intent to note the defendant in default if the statement of defence was not filed.

25 The plaintiff's counsel then waited six months after noting the defendant in default before notifying counsel for the defendant that his client had been noted in default.

26 In my view, the principles enunciated by Nordheimer J. in *Xpress View Inc. v. Daco Manufacturing Ltd.* (2002), 36 C.C.E.L. (3d) 78 (Ont. S.C.) apply:

> 15. The costs thrown away were incurred as a result of the plaintiff taking advantage of a slip by the defendant's solicitors. This is a practice that is happening with altogether too much frequency. Indeed, this is the second time in a week that I have been faced with such a situation and it is one which I believe should stop. Counsel have obligations to deal with each other fairly and not to take advantage of missteps by opposing counsel. This requirement is reflected in the Rules of Professional Conduct, rule 14 of which, commentary 4, states, in part:
>
> "The lawyer should avoid sharp practice, and should not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of the client's rights."
>
> (Emphasis added)
>
> 16. The requirement of integrity is also reflected in the case law. As Rose J. said more than 100 years ago in *Re Backhouse v. Bright* (1889), 13 P.R. 117 (Ont. H.C.J.):
>
> "To build up a client's case on slips of an opponent, is not the duty of a professional man."

27 The comments of Rose J. one hundred years later still apply, although the duty now applies to both men and women in the practice of law.

28 In the case before Nordheimer J., he noted that there was no follow-up letter or telephone call made to advise counsel that the defence was not received. He observes:

> 17. Plaintiff's counsel ought to have realized the potential for a slip or error and should, in my view, have had further contact with the defendant's solicitor before taking default steps.

29 I agree with the analysis of Nordheimer, J.. These principles apply squarely to the facts of this case. Counsel for the plaintiff had a professional duty to advise opposing counsel before taking steps to note the defendant in default. This obligation is evident, particularly in the facts of this case. The effect of the Master's order reinforces what is sharp practice. This is a palpable overriding error.

30 The Master correctly concluded that there was no real issue with respect to any delays after the noting of default was discovered. The Master also correctly concludes that there is no issue with respect to prejudice on the part of the plaintiff as a result of setting aside the noting of default, since the very extensive delays are a clear responsibility of the plaintiff.

31 The plaintiff's counsel suggests that the defendant may have been lying in ambush and was in essence treating the Agreement of Purchase and Sale as an option to sell her home in a changing real estate market. This suggestion more aptly applies to the conduct of the plaintiff.

32 For these reasons, the appeal is allowed. The noting of default of the defendant's claim is set aside. The statement of defence shall be served and filed within 15 days.

33 The plaintiff's action shall not be struck as failing to set this matter down for trial in accordance with my order containing my fiat.

Costs

34 In the circumstances, there shall be no order as to costs.

J.M. WILSON J.

TAB 5

Innovative Marketing, Inc. v. D'Souza, [2008] O.J. No. 3051

Ontario Judgments

Ontario Superior Court of Justice

L.A. Pattillo J.

Heard: July 31, 2008.

Judgment: August 6, 2008.

Docket: 08-CL-7352

[2008] O.J. No. 3051 | 169 A.C.W.S. (3d) 188 | 65 C.P.C. (6th) 234 | 2008 CarswellOnt 4618 | [2008] CanLII 39221

RE: Innovative Marketing, Inc. (Plaintiff), and Marc Gerard D'Souza, Maurice D'Sousa, Marina D'Souza, Elvira Martinez-Romero, Conrad D'Souza, Leonard D'Souza, Winpayment Consultancy SPC, Web Integrated Net Solutions, Inc. Billingnow.com, Inc., Billing Solutions, SPC, Winsolutions, FZ-LLC, Reinsurance and Insurance Consulting House SPC, Synergy, B.V., Wingem, Inc., Winsecure Solutions, PTE, Ltd., Billplanet, PTE, Ltd., Dsoft, PTE, Ltd., GE Management, PTE, Ltd., and Scorgem, PTE, Ltd. (Defendants)

(54 paras.)

Case Summary

Civil litigation — Civil procedure — Injunctions — Interlocutory or interim injunctions — Continuation or variation of interim injunction — Preservation of property — Mareva injunctions — Procedure — Motion to vary order allowed — Mareva order had been issued, freezing defendants' assets — Defendants sought variation to allow $600,000 to fund defence — Plaintiff argued defence should be funded through business defendants had established, rather than through other assets — To vary, defendants had to establish that they had exhausted use of non-proprietary assets frozen by the injunction — Defendants failed to establish there were no assets subject to order that did not have proprietary claim by plaintiffs — Revenue of new business was caught by order but was not subject to proprietary claim and was thereby available.

Motion by the defendants D'Souza for an order to vary a Mareva order. The plaintiffs had a business selling Internet-based products through wholly-owned websites. The defendant Marc had performed marketing services for the plaintiff, and had his father help in developing payment processes to aid the plaintiffs in managing their cash flow. The plaintiffs realized that they had lost control of their financial resources to Marc, and contended that the defendants retained $48 million of the plaintiff's money. Marc had resigned from the plaintiff's business and had begun an e-commerce site with another defendant. A Mareva order had been issued, freezing the defendants' access to the $48 million. The order had been varied to allow the defendants access to $2.5 million. The defendants were seeking another variation to allow for $600,000 further in funds. The plaintiff took the position that the funds they withdrew should be funded through the e-commerce site Marc had established, rather than through other assets.

HELD: Motion allowed.

To vary a Mareva order, the defendants had to establish that there were no other funds available, that there were assets caught by the injunction that were from a source other than that of the plaintiff's, and that the defendant had exhausted the use of non-proprietary assets frozen by the injunction. The Mareva order had effectively frozen all of the defendants' worldwide assets, but the defendants had failed to establish that there were no assets subject to the injunction that did not have a proprietary claim by the plaintiffs. The defendants had assets available to them in the form of revenue created by the e-commerce site which, while caught by the Mareva order, were not subject to the plaintiff's proprietary claim and was thereby available to fund the defence costs.

Counsel

Matthew J. Latella for the Plaintiff.

Elizabeth Ackman and *Craig Mills* for the Defendants Maurice D'Souza, Marina D'Souza, Web Integrated Net Solutions, Inc., Winpayment Consultancy SPC, Billingnow.com, Inc., Billing Solutions, SPC, Winsolutions, FZ-LLC, Reinsurance and Insurance Consulting House, Synergy, B.V., Wingem, Inc., Winsecure Solutions, PTE, Ltd., Billplanet, PTE, Ltd., Dsoft, PTE, Ltd., GE Management, PTE, Ltd., and Scorgem, PTE, Ltd.

Daniel Schwartz for the Defendant Marc D'Souza.

ENDORSEMENT

Introduction

L.A. PATTILLO J.

1 This is a motion by the defendants Maurice D' Souza ("Maurice"), his wife Marina D'Souza ("Marina") and the corporate defendants (collectively the "Moving Parties") for an order varying the order of Pepall J. dated February 22, 2007 (the "*Mareva* Order") to permit the Moving Parties to access assets frozen by the *Mareva* Order in order to pay both past and ongoing defence costs (legal and expert fees) in respect of the action.

2 The plaintiff, Innovative Marketing, Inc. ("IMI") agrees that the *Mareva* Order can be varied to allow for the past and future payment of the Moving Parties' reasonable legal and expert fees but takes the position that such fees should be paid from the revenue generated from the e-commerce business started by the defendant, Marc D'Souza ("Marc") on January 1, 2007 following the termination of his relationship with IMI and its principals (the "New Business"). IMI also seeks certain controls to ensure that the Moving Parties' legal fees, which have been

significant to date, are reasonable going forward. IMI has brought a cross-motion seeking among other things, an order requiring such conditions.

3 Marc takes no position in respect of the Moving Parties' motion. He takes issue, however, with IMI's cross-motion on the grounds that the revenues generated from the ecommerce business he commenced in January 2007 belong to him as the owner of the business. He further submits that IMI's cross-motion constitutes a preemptive attack against his pending motion to vary the *Mareva* Order to release revenues generated by his business.

Background

(a) The Mareva Order

4 The *Mareva* Order provides, among other things, for a freeze of all the worldwide assets of the defendants, howsoever held, up to a value of USD $48 million. It also provides that the individual defendants must prepare and provide sworn statements describing the nature, value and location of their assets worldwide, howsoever held and submit to examinations under oath with respect thereto. It is both a proprietary injunction in that it freezes monies in the possession of the defendants which IMI has established belong to it and a Mareva injunction in that it prevents the defendants from dissipating or disposing of their assets.

5 The *Mareva* Order was granted by Pepall J. upon affidavits filed on behalf of IMI and by Marc and Conrad D'Souza in response and following submissions by counsel for both IMI and Marc and Maurice.

6 The highlights of the evidence relied on by the Pepall J. were set out by her in her endorsement dated February 26, 2007. The facts leading up to the granting of the *Mareva* Order can be summarized briefly as follows.

7 IMI was incorporated in 2002 and is in the business of designing, developing, marketing and distributing a variety of Internet-based products through wholly-owned websites. In July 2002, Marc began to perform certain marketing and other services for an IMI. Shortly thereafter and with the knowledge of IMI, Marc got Maurice, his father, involved in the business to provide, among other things, payment processing and merchant banking services to allow IMI to manage the significant cash flow generated from the sales of its Web-based products.

8 In 2006, IMI realized that its financial resources had essentially been placed beyond its control through a series of transactions and entities orchestrated and created by Marc and Maurice. Numerous companies and merchant banking accounts had been set up across the world including in Bahrain, the United Arab Emirates, Singapore and Canada. IMI became frustrated with Marc's failure to provide an accounting and supporting documentation in respect of its funds.

9 Marc resigned from the business in December 2006. In January, 2007 he commenced the New Business through the defendant Web Integrated Net Solutions, Inc. ("WINS").

10 Notwithstanding that Marc had arranged for payment of some monies to IMI and its principals, at the time of the *Mareva* Order, IMI's evidence indicated that Marc and Maurice continued to retain approximately USD $48 million of IMI's money, of which it alleged that

USD$22 million went into accounts in the name of the D'Souza's personally and USD $18 million went into accounts in Maurice 's name personally.

11 In her endorsement, Madam Justice Pepall stated, in part, at paragraphs 15 and 16:

> [15] ..... It is conceded by the defendant's' counsel that the revenue generated and that is in issue arose for the most part from the sale of IMI's products. Furthermore, the defendants do not take the position that they are entitled to the millions of dollars they are holding.
>
> [16] In my view, a strong prima facie case has been established by IMI. I am also persuaded that there is a real risk that the defendants will dissipate the assets to defeat satisfaction of a judgment obtained by the plaintiff. Mr. D'Souza's response to inquiries, the movement of funds, the failure to identify in the defendants' affidavits the location and quantum of the subject funds and the evidence relating to the forged signatures all cause me to conclude that the risk is real and indeed that removal has already commenced.

12 Following its issuance, the *Mareva* Order has been varied a number of times by orders of this Court, all on consent of the parties. In particular, on March 9 and 14th, 2007, both the Moving Parties and Marc respectively obtained orders from C.L. Campbell J. permitting, among other things, a withdrawal of certain sums from the frozen assets to enable payment of certain business expenses and personal living expenses in respect of the defendants. In particular, both Orders contain the following paragraph:

> The Moving Parties shall be entitled to access the funds held in the trust account of Miller Thomson LLP, presently in the amount of Cdn $2.5 million, for payment of defence costs, including expert fees and including accounts of BDO Dunwoody for services related to compliance with the *Mareva* Injunction and ongoing litigation support but not extending to the conduct of any parallel forensic accounting process to the forensic accounting which the parties have agreed will proceed on consent, on the following basis:
>
> (i) Redacted versions of accounts are to be provided to Plaintiff's counsel which will not include a description of the services provided but which will include the dates and hours expended by timekeeper, and hourly rates;
>
> (ii) Unredacted versions of accounts are to be provided to the Honorable Mr. Justice Colin Campbell for his review, but same shall not be filed and shall not become part of the Court record;
>
> (iii) With respect to defence costs going forward, after the month of March, 2007, the Moving Parties will make best efforts to notify Plaintiff's counsel if it is anticipated that the defence costs being incurred will exceed $20,000 per month, and in the event Plaintiff's counsel objects, the parties shall be at liberty to come back before the Court.

13 The $2.5 million was paid to Miller Thomson LLP in favor of the Moving Parties shortly after the *Mareva* Order was issued but prior to the orders of March 9 and 14, 2007.

14 Subsequent to the above orders permitting the defence costs to be paid from the $2.5 million in the Miller Thomson trust fund, accounts were provided by Miller Thomson to counsel for IMI (redacted) and to Mr. Justice Campbell, who, in each case, issued a letter indicating he had reviewed the account.

15 The $2.5 million has now been exhausted as a result of the following payments: $189,904.73 to the defendants initial counsel in respect of the *Mareva* Order; $1,116,968.93 to Miller Thomson for its representation of the Moving Parties commencing shortly after the *Mareva* Order was issued; $609,504.24 to Marc's counsel in relation to his representation; $514,847.29 to BDO Dunwoody in respect of services to the defendants relating to compliance with the *Mareva* Order; and $68,774.81 to the solicitors for Conrad D'Souza (no longer a party).

16 In addition to the amount noted above that Miller Thomson has received from the trust fund, since the depletion of the trust fund, it has performed additional services on behalf of the Moving Parties and has owing to it on account of amounts billed and unbilled to the end of June, 2008, a further amount of $295,638.25. Further, BDO Dunwoody is also owed fees for services both billed and unbilled subsequent to the depletion of the trust fund in the amount of $82,830.59.

17 The firm of Ernst & Young LLP was jointly retained by the parties to conduct a forensic accounting of the business the parties were involved in prior to the end of December, 2006. E&Y's report, dated June 10, 2008 indicates that, among other things, at the end of February 2007 (approximately one week after the *Mareva* Order was granted), the defendants collectively had the approximate sum of $39.8 million in their control and IMI had approximately $16.3 million under its control.

The Law

18 On a motion to vary a Mareva injunction to permit the defendant to pay expenses, the court is called upon to consider the interests of both the plaintiff and the defendant having regard to their interests in the assets which have been frozen.

19 All of the parties to this motion agree that the test to be applied in considering whether relief should be granted from a *Mareva* Injunction to permit a defendant to pay expenses, including a reasonable legal expenses to defend the lawsuit, is set forth by Malloy J. in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.J. No. 40 (S.C.J.). The test in *CIBC v. Credit Valley* was recently applied with approval by the Court of Appeal in *Waxman v. Waxman*, [2007] O.J. No. 1688 (C.A.).

20 *CIBC v. Credit Valley, supra*, was a motion by the defendant to vary a *Mareva* Injunction to permit payment of its expenses from frozen assets and bank accounts. The injunction obtained was similar to the *Mareva* Order in this case, in that it involved both a proprietary injunction and a *Mareva* Injunction. After discussing the distinction between the two types of injunctions and reviewing English authorities, Malloy J. set out the following test to be applied on the motion at paragraph 26:

(i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?

(ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?

(iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs. Those assets

must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

(iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

Analysis

21 The first test the Moving Parties must meet, therefore, is that they have no assets available to pay their expenses other than those frozen by the *Mareva* Order. In my view, given the broad nature of the *Mareva* Order, the Moving Parties meet the first test. The *Mareva* Order freezes all of the worldwide assets of the defendants, including the Moving Parties, howsoever held up to a value of $48 million.

22 In addition, paragraph 16 of Maurice's affidavit sworn June 13, 2008 filed in support of the Moving Parties' motion, states that as the trust funds have been depleted, the Moving Parties do not have any assets available to pay their ongoing defence costs in connection with the action other than those frozen by the *Mareva* Order.

23 The second test the Moving Parties must meet is encompassed in sub paragraphs (ii) and (iii) of the test set forth by Malloy J. referred to above. The Moving Parties are required to show any assets that are caught by the *Mareva* Injunction but are not subject to IMI's proprietary claim. In my view, the Moving Parties have failed to establish, on their evidence, that there are no assets, which have been frozen by the *Mareva* Order from a source other than the plaintiff, i.e. assets subject to the *Mareva* Order but not a proprietary claim by IMI.

24 As I have noted, the evidence of the Moving Parties is from an affidavit of Maurice's sworn June 13, 2008 and a subsequent affidavit of Maurice's sworn July 9, 2008. Other than paragraph 16 referred to above, the first affidavit contains no information concerning the assets of the Moving Parties.

25 The *Mareva* Order froze all of the Moving Parties assets worldwide. IMI's proprietary claim relates to the monies belonging to it which are being held by the defendants. I have trouble believing, apart from the monies claimed by IMI as its own, that Maurice and Marina would not have assets, accumulated prior to Maurice's involvement with IMI in 2002. Such assets would, of course be caught by the Mareva Order but are not subject to IMI's proprietary claim. Based on the services Maurice is alleged to have provided to IMI (for which he claims a significant remuneration on *quantum meruit* in his counterclaim), Maurice had extensive experience both in merchant banking and payment processing prior to his involvement with IMI. Marina is a schoolteacher who lives in a house in North Toronto. Any assets the couple would have accumulated together or individually prior to Maurice's involvement with IMI, given the wording of the *Mareva* Order, would be frozen by it. On the other hand, it may in fact be the case that none of the Moving Parties has any assets frozen by the *Mareva* Order, which are not subject to

IMI's proprietary claim. The problem is that there is no mention in Maurice's affidavits or otherwise in the Moving Parties' material of either the existence or nonexistence of such assets.

26 The fact that the Moving Parties have failed, on their evidence, to meet the second test, does not, however, bring the Moving Parties' motion to an end. As noted at the outset of these reasons, IMI is in agreement that the *Mareva* Order can be varied to allow for the past and future payment of the Moving Parties reasonable defence costs. Its position however is that the costs should come from the cash flow generated by the New Business, in which it submits the evidence establishes the Moving Parties are significantly involved. IMI further submits that while it has a damage claim against the defendants relating to the New Business based on, among other things, copyright infringement, it has no proprietary claim in respect of the revenue generated by the New Business.

27 The Moving Parties and Marc oppose IMI's position that the Moving Parties reasonable legal fees should come from the revenue generated by the New Business. Maurice denies any material involvement in the New Business or any entitlement to or actual receipt of revenue from the New Business. Marc's position is that the New Business' revenues belong to him and it would be "unfair" to require Marc to pay the legal expenses of the Moving Parties.

28 It is necessary therefore to review the evidence of all parties on the motion to determine whether there are assets available to the Moving Parties, in the form of revenues from the New Business, which can be used to pay the Moving Parties defence costs.

29 IMI's evidence on the motion comes from Marc, in the form of excerpts from affidavits he has filed in response to the *Mareva* Order and its subsequent variation, as well as from his cross-examinations on those affidavits and from the pleadings in the action. That evidence establishes:

a) Starting in January 2007, Mark began operating the New Business through WINS. WINS is controlled by Mark and Maurice. Mark, Maurice and Marina are WINS' directors: Marc's affidavit of March 4, 2007, paragraph 78; Marc's affidavit of April 5, 2007, paragraph 10; Marc's statement of defense and counterclaim, para. 34; Marc's cross-examination, January 11, 2008, question 1365;

b) Maurice is assisting the New Business in financial management, accounts receivable, accounts payable, financial management, managing transactions, managing bank accounts and merchant account transaction processing. He administers the accounts and takes care of the companies' administration: Marc's cross-examination, April 25, 2007, question 283; Marc's cross-examination, January 11, 2008, questions 1369, 1389 and 1390.

c) The corporate defendants (other than WINS) are owned or controlled by Maurice and are involved in the New Business: Marc's affidavit, March 4, 2007, paragraph 83; Marc's cross-examination, March 6, 2007 question 388; Marc's cross-examination, April 25, 2007, questions 267 - 290 ; Marc's affidavit of November 13, 2007, paragraph 7; and paragraph 6 of the Moving Parties' defence and counterclaim.

30 The evidence also establishes, again based on Marc's evidence, that he had an agreement with Maurice that Maurice would receive remuneration from the New Business once its clash flow was more positive. Maurice admits the agreement but says it has not been proceeded with.

He has no recollection of its terms: Marc's cross-examination, April 25, 2007, Maurice's cross-examination, July 9, 2008. pp. 78-79.

31 In his affidavit sworn July 9, 2008, Maurice denies that he had provided any services to the New Business or that he had received or was entitled to receive any remuneration therefrom. On his cross-examination on July 9, 2008, Maurice was at times evasive and non-responsive in relation to questions dealing with the statements his son had made both in his affidavits and in cross-examination concerning his involvement in the New Business. Maurice stated that he was not aware in certain cases what his son meant by such statements as "administration", "financial management services" and "process of tracing payments". He attempted in his answers to minimize or deny what Marc said he was doing in relation to the New Business.

32 Notwithstanding that the Moving Parties motion was adjourned at Marc's request on July 16, 2008 to enable him to file material in response to IMI's position on its cross-motion, Marc did not submit an affidavit responding to IMI's evidence.

33 Given the numerous examples of Marc's statements under oath concerning his father's and the other Moving Parties involvement in the New Business since its inception, I have great difficulty with Maurice's statements in his July 9th affidavit and with his responses on his cross-examination to the effect that he had minimal or no involvement with the New Business and no entitlement to any remuneration from it. His position is simply not credible in the face of all Marc's evidence. This is particularly so given that Marc, although he had the opportunity to do so, did not file an affidavit on the motion supporting his father's position. Maurice's position is also not credible having regard to the relationship between Marc and his father and the work which Maurice is alleged to have done for IMI at Marc's request from 2002 to 2006. Notwithstanding that that work appears to have been undertaken by Maurice (and his companies) as a result of an agreement with Marc in the absence of any written agreement documenting the terms, Maurice is now bringing a counterclaim against IMI, among others, seeking significant remuneration on a *quantum meruit* basis. For the above reasons, therefore, I do not accept Maurice's evidence on the issue of the Moving Parties involvement in the New Business. I prefer the evidence of Marc, on the issue as put forward by IMI.

34 Apart from Maurice's evidence of his non-involvement in the New Business, the evidence of both Marc and Maurice clearly establishes that the New Business is being operated by WINS. The revenue from the New Business is being received by WINS. WINS is a defendant in the action and one of the Moving Parties. The revenue is an asset of WINS, which is controlled, in part, by Maurice. Marc submits that he was forced into using WINS as a result of the effect of the *Mareva* Order. I simply note that he utilized WINS to carry on the New Business when it first started in January 2007, before the *Mareva* Order was issued.

35 Marc submitted that IMI's cross-motion constituted a preemptive strike on his pending motion, currently returnable September 18, 2008, to vary the *Mareva* Order to release the New Business from the *Mareva* Order. It was Marc's position that IMI's cross-motion should therefore not be allowed or at least adjourned to a date after his variance motion has been decided. The Moving Parties were opposed to any adjournment of their motion given the fact that the trust fund has been depleted and Miller Thomson is continuing to do work, particularly for contempt motions being brought against the Moving Parties later in August.

36 I indicated to all parties at the hearing that I did not intend to adjourn IMI's cross-motion. In my view, IMI's cross-motion does not constitute a preemptive strike against Marc's motion. In

the first place it was brought on as a result of the Moving Parties motion and not by IMI independently. Second, I do not consider that the relief requested in the cross-motion has or should have any bearing on Marc's motion to vary. The issue it raises is whether the Moving Parties have access to assets which are available to pay their defence costs. Currently those assets are caught by the *Mareva* Order and accordingly it is the second test in *CIBC v. Credit Valley, supra*, which is engaged. In the event that those assets were not caught by the *Mareva* Order, it would be the first test which would apply. Either way, the question of whether the New Business should be released from the *Mareva* Order is separate.

37 Marc also relies on the decision of Spies J. in *Waxman v. Waxman*, [2006] O.J. No. 2621 (S.C.J.) in support of his position that the court should not consider the assets of the New Business as a source of funds to pay the Moving Parties defence costs.

38 *Waxman, supra*, also involved a motion to vary a *Mareva* Injunction to enable legal expenses to be paid in circumstance where previous amounts allocated to pay for defence costs had been exhausted. One of the issues before the court was whether the defendant had to look to funds controlled by the defendant's family members to pay for the legal expenses. In granting the defendant's motion, Spies J. applied the test in *CIBC v. Credit Valley, supra*. In so doing she stated (at para. 82 and 83) that she would not consider the funds controlled by the defendant's family as a source upon which to draw the defendant's legal costs because the court could not compel family members to assist financially with the defendant's legal costs.

39 As noted earlier, Spies J.'s decision in *Waxman, supra*, was appealed to the Court of Appeal ([2007] O.J. No. 1688 (C.A.)) which allowed the appeal and dismissed the defendant's motion on the ground that, on the evidence of the other family money, the defendant did not meet the first test in *CIBC v. Credit Valley* because he had not established that he had no assets available to him to pay his legal fees other than those frozen by the *Mareva* Injunction. The Court specifically did not decide the issue of whether it is appropriate to look beyond a defendant's assets to family members determine whether any funds are available to pay legal fees.

40 In my view, *Waxman* does not assist Marc in the present case. Even if I agree that it is not appropriate to look beyond the defendant to family members when considering assets available to pay legal fees that is not the case here. The evidence establishes that the Moving Parties have assets in the form of an interest or entitlement in the New Business. It is not simply a case of forcing Marc to pay the legal fees of the Moving Parties.

41 As a result, therefore, and for the above reasons, it is my view on the evidence as a whole that the Moving Parties have available to them assets in the form of revenue from the New Business which, while caught by the *Mareva* Order, is not subject to IMI's proprietary claim and accordingly, pursuant to the test in *CIBC v. Credit Valley, supra*, is available to fund the Moving Parties defence costs.

42 The Moving Parties seek an initial amount of $600,000.00 to be applied to past due amounts and ongoing costs. They submit that the Moving Parties' accounts should continue to be approved by Justice Campbell. Once the $600,000.00 has been exhausted, the Moving Parties submit that they would provide a brief to the court describing the status of the litigation to date and, "if possible" provide a reasonable estimate of fees to cover the next stage of the action.

43 IMI submits that the Moving Parties defence costs should be capped at $50,000.00 per month and, given what it submits has been an "unacceptable and unjustified rate of fees", it

seeks a "more robust" review procedure for the accounts be put in place. As part of this review procedure, IMI wishes to receive copies of the accounts, unredacted.

44 The most recent financial information concerning the New Business is an affidavit of dated January 31, 2008 from Marc wherein he admits that the New Business is profitable and producing substantial cash receipts and that he has deposited approximately $800,000 from the New Business into accounts frozen by the *Mareva* Order. There is no doubt, therefore that the New Business is profitable and generating substantial revenue. My concern is that there is no up to date financial information.

45 On May 1, 2007, the *Mareva* Order was further varied, on consent of the parties, by order of Siegel J. to enable Marc to withdraw certain specified amounts from the WINS bank account in Bahrain to pay expenses for the New Business. Paragraph 9 of that order required that Marc provide IMI with an accounting of any and all sales, expenses and cash realized from his ongoing business operations of any kind worldwide, providing monthly updates regarding the same. Despite that provision, there is no evidence of the current financial status of the New Business.

46 Notwithstanding the lack of evidence on the New Business' present financial situation, I infer from the positions taken by the defendants on the motion and particularly Marc, that if the New Business did not have the revenue to meet the Moving Parties request, I would have been apprised it. Accordingly, I am of the view that the evidence establishes that there are at least sufficient revenues from the New Business to fund the moving party's legal expenses to the extent requested by them.

47 I agree with IMI that the previous review/approval procedure contained in the consent orders of March 9 and 14, 2007 did not really operate to control costs. On more than one occasion, Mr. Justice Campbell raised a concern as to the amount of the costs. He noted, quite rightly, that it was a matter of solicitor-client to be dealt with between them. Unfortunately, the evidence shows that Maurice, to whom copies of the account were going, was merely glancing at them, if that. He stated that he relied on the court to review them and approve them.

48 Given that I have ordered that the accounts shall now be paid from monies generated from the New Business which all the defendants have an interest in, I anticipate that the client's scrutiny of the legal costs will become much more heightened. Issues with respect to the fees and the extent of the work required to be done are matters best dealt with between solicitor and client, in the absence of the court if possible.

49 Finally, I do not consider it appropriate or proper that IMI receive copies of the Moving Parties accounts in an unredacted form. Such accounts contain privileged information and in addition would provide IMI with a significant tactical advantage in the action. Nor do I think that it is proper, despite the significant fees being generated, to cap the Moving Parties fees at $50,000.00 per month as requested by IMI. Such a step could perhaps fetter the Moving Parties' defence to the action.

Conclusion

50 In the result, therefore, the Moving Parties motion is allowed. The Moving Parties shall be permitted to access $600,000.00 from the revenue of the New Business currently frozen by the *Mareva* Order for the payment of past and future legal costs. The monies will be paid into Miller

Thomson's trust account. The accounts previously delivered which have been reviewed by Justice Campbell and approved for payment, may be paid from the monies in Miller Thomson's trust account. Accounts for time spent but not billed should be sent to the Moving Parties with a redacted copy to both Marc and IMI. What additional information the Moving Parties wish to share with Marc concerning the accounts is up to them. In the absence of any concern from any of the parties concerning the account within 10 days of its delivery, Miller Thomson shall be at liberty to with draw the monies to pay the account from the trust account. If a concern is expressed by any party within the 10 days concerning the account, the account shall be reviewed and approved by the Master prior to payment.

51 Going forward it is my view, having regard to the significant fees incurred to date by the Moving Parties and the fact that the action is not yet at the discovery stage, Miller Thomson shall provide the Moving Parties within 30 days with a budget in respect of the entire action and at the beginning of each month going forward with a specific budget covering the work to be done in the coming month. Accounts shall be rendered monthly and only after the budget for the month has been provided and they shall be in accordance with it unless the client has approved any variation to the budget. To the extent that there are questions arising from the procedure outlined, I can be spoken to.

52 When the $600,000.00 has been exhausted and in the event the parties cannot agree on a consent order for further monies from the New Business being made available, the Moving Parties may apply to the court for a further order. I am not seized of the matter.

53 Having regard to the relief claimed by IMI in its cross-motion and my disposition of the Moving Parties' motion, the cross-motion is also allowed.

54 At the conclusion of the argument the parties agreed that the issue of costs should be dealt with either by way of written submissions or by attendance. The parties should contact my assistant to arrange for a mutually convenient time to provide submissions in respect of the costs of the motions.

L.A. PATTILLO J.

TAB 6

Intact Insurance Company v. KiselIntact Insurance Company v. Bijelic[Indexed as: Intact Insurance Co. v. Kisel], 125 O.R. (3d) 365

Ontario Reports

Court of Appeal for Ontario,

Laskin, Simmons and Watt JJ.A.

March 26, 2015

125 O.R. (3d) 365 | 2015 ONCA 205

Case Summary

Civil procedure — Default judgment — Plaintiffs suing their insurer for failure to comply with hold harmless agreement signed by parties following dispute over payment of statutory accident benefits — Defendant failing to deliver statements of defence — One plaintiff noting defendant in default and other plaintiff obtaining default judgment — Motion judge erring in refusing to set aside noting in default and default judgment — Defendant having reasonable excuse for its default as hold harmless agreement had not been triggered when plaintiffs commenced their actions — Defendant more prejudiced by failure to set aside defaults than plaintiffs would be by setting them aside.

The plaintiffs received statutory accident benefits from their insurer, the defendant. The defendant took the position that two of the plaintiffs' health service providers had submitted invoices for excessive amounts. The dispute was partially settled, and the defendant agreed to hold harmless and indemnify the plaintiffs from any claims brought by the two service providers for outstanding accounts. When they received demand letters for payment from the service providers, the plaintiffs commenced actions against the defendant. The defendant took the position that the hold harmless agreements had not been triggered because neither service provider had started an action for payment of its outstanding accounts. It delivered a notice of intent to defend in each action, but did not deliver statements of defence. The plaintiffs moved promptly to obtain, in one case, a default judgment, and in the other case, a noting in default. The motion judge refused to set aside the noting in default and the default judgment. The defendant appealed. [page366]

Held, the appeal should be allowed.

The motion judge erred in finding that the defendant had not offered a reasonable excuse for its default. The defendant's position that the hold harmless agreements had not been triggered when the actions were commenced was correct. Moreover, the defendant would be more prejudiced by failing to set aside the defaults than the plaintiffs would be by setting them aside.

Cases referred to

Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc., [2005] O.J. No. 4327, [2005] O.T.C. 891, 142 A.C.W.S. (3d) 937 (S.C.J.); *Flintoff v. von Anhalt*, [2010] O.J. No. 4963, 2010 ONCA 786, 195 A.C.W.S. (3d) 61; *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278, [1991] O.J. No. 717, 49 O.A.C. 1, 26

A.C.W.S. (3d) 1171 (C.A.); *Mountain View Farms Ltd. v. McQueen* (2014), 119 O.R. (3d) 561, [2014] O.J. No. 1197, 2014 ONCA 194, 317 O.A.C. 255, 372 D.L.R. (4th) 526, 56 C.P.C. (7th) 133, 239 A.C.W.S. (3d) 635; *Nobosoft Corp. v. No Borders Inc.*, [2007] O.J. No. 2378, 2007 ONCA 444, 225 O.A.C. 36, 43 C.P.C. (6th) 36, 158 A.C.W.S. (3d) 896

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 19.03, (1), 19.08, (1)

APPEAL from the order of Perell J., [2014] O.J. No. 3812, 2014 ONSC 4787 (S.C.J.) dismissing a motion to set aside a noting in default and a default judgment.

John A. Campion and *Thomas Hanrahan*, for appellant.

Alon Rooz, for respondents.

The judgment of the court was delivered by

[1] **LASKIN J.A.**: — Intact Insurance appeals the refusal of the motion judge to set aside a noting of default and a default judgment of approximately $68,000 obtained against it by the respondents, Rade Bijelic and Yaroslava Kisel. I would allow the appeal. It is not in the interests of justice to maintain either the noting of default or the default judgment.

A. *Background*

(i) *The underlying dispute*

[2] Bijelic and Kisel sued Intact, their own insurer, for its alleged failure to comply with a hold harmless agreement signed by the parties following a dispute over the payment of statutory accident benefits.

[3] Bijelic and Kisel, both elderly, were injured in a car accident in December 2009. Each applied for statutory accident benefits from Intact, and most of those benefits were paid. Intact, however, claimed that two of their health service [page367] providers -- Osler Rehabilitation Centre and Assessment Direct -- had submitted invoices for excessive amounts. Intact maintained that the number and frequency of visits by Bijelic and Kisel to these service providers could not be justified.

[4] Intact settled its dispute with Bijelic and Kisel in two stages: first by a partial settlement on February 5, 2013, and then by a full settlement on February 11, 2013. Under the partial settlement, Intact agreed to settle all accident benefit claims save for outstanding accounts of approximately $60,000 and $67,000, submitted to Intact by the two service providers on behalf of Bijelic and Kisel, respectively.

[5] Under the full settlement, Bijelic and Kisel agreed to release Intact from any further claims, and Intact agreed to hold harmless and indemnify both Bijelic and Kisel from any claims brought by the two service providers for the outstanding accounts. The wording of the hold harmless agreements, which is handwritten, is central to this appeal. The agreement for Kisel states:

> OFFER TO SETTLE ANY OTHER TERMS (specify)
>
> Intact agrees to hold Yaroslava Kisel harmless and indemnify her from any claims brought by Assessment Direct from Osler Rehabilitation Centre, only in relation to the exceptions listed in the partial release, signed February 5, 2013.
> The applicant agrees to cooperate fully with Intact and attend an examination under oath forthwith if a claim is commenced as against Ms. Kisel.

The agreement for Bijelic is similar.

(ii) *The litigation*

[6] Both Osler Rehabilitation and Assessment Direct sent demand letters to Bijelic and Kisel for payment of their outstanding accounts. On receipt of the demand letters, Bijelic and Kisel asked Intact to act under the hold harmless agreements. Intact took the position that the hold harmless agreements had not been triggered because neither Osler Rehabilitation nor Assessment Direct had started an action for payment of its outstanding accounts.

[7] Nonetheless, though neither service provider had sued, Bijelic and Kisel started these actions -- which have led to this appeal -- alleging Intact had breached the hold harmless agreements. Their counsel advised Intact that he expected strict compliance with the rules of practice for delivering a statement of defence.

[8] Intact delivered a notice of intent to defend in each action, but did not deliver statements of defence. In this court, [page368] Mr. Campion for Intact candidly acknowledged that his client ought to have done so. When Intact did not deliver a defence, each plaintiff moved promptly to obtain a default judgment, in one case, and a noting of default, in the other. The relevant dates are as follows:

(a) Kisel action

-- May 13, 2013: Kisel serves statement of claim

-- May 30: Intact serves notice of intent to defend
-- June 12: statement of defence due

-- June 20: Kisel notes Intact in default and obtains default judgment for $67,717, plus costs

(b) Bijelic action

-- August 7, 2013: Bijelic serves statement of claim
-- August 27: statement of defence due

-- September 10: Bijelic notes Intact in default. Bijelic attempts to obtain default judgment, but the registrar refuses to sign the order

-- September 18: Intact serves notice of intent to defend

(iii) *The motion judge's ruling*

[9] Intact moved to set aside the default judgment and noting of default. The motion judge heard both motions together, and gave thorough reasons for dismissing the motions. He referred to a number of cases setting out the factors a judge must consider when determining whether to set aside a default judgment. As I will discuss below, the test for setting aside a default judgment and the test for setting aside a noting of default differ. Given my conclusion, however, that the motion judge ought to have set aside both defaults, his failure to distinguish between the two makes no appreciable difference to the result in this case.

[10] In dismissing Intact's motions, the motion judge accepted that Intact had moved promptly; that it had at least an arguable defence; and that setting aside the defaults would not adversely affect the overall integrity of the administration of justice. Nonetheless, he refused to set aside the defaults for two reasons. First, he did not accept that Intact had a reasonable excuse or explanation for its default. In his words [at para. 9], "Intact's explanation for its default has more impudence than excuse." [page369] Second, in his view Bijelic and Kisel would be far more prejudiced by granting Intact an indulgence than would Intact be prejudiced by a refusal to set aside the defaults. The motion judge therefore concluded that it would not be just to relieve Intact of the consequences of its defaults.

[11] The motion judge also ordered that Bijelic could move, without notice, for a default judgment against Intact. From the motion record, it appears that he did so on September 24, 2014, obtaining a default judgment of $61,306.98, plus costs. This later judgment was not referred to by the parties.

B. *Discussion*

[12] Rules 19.03(1) and 19.08(1) [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] provide the basis for setting aside a noting of default and a default judgment, respectively. Both rules give the court discretion to set aside the default "on such terms as are just". This court has held that the tests to be met under these rules are not identical. See *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278, [1991] O.J. No. 717 (C.A.), at pp. 284-85 O.R.

[13] When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 284 O.R. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, [2007] O.J. No. 2378, 2007 ONCA 444, 225 O.A.C. 36, at para. 3; *Flintoff v. von Anhalt*, [2010] O.J. No. 4963, 2010 ONCA 786, at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see, *e.g.*, *Enbridge Gas Distribution Inc. v. 135 Marlee*

Holdings Inc., [2005] O.J. No. 4327, [2005] O.T.C. 891 (S.C.J.), at para. 8. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: *Bardmore*, at p. 285 O.R.

[14] On a motion to set aside a default judgment, on the other hand, the court considers five major factors, one of which is whether the defendant has an arguable defence on the merits. The five factors are

(a) whether the motion was brought promptly after the defendant learned of the default judgment; [page370]

(b) whether the defendant has a plausible excuse or explanation for the default;

(c) whether the defendant has an arguable defence on the merits;

(d) the potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and

(e) the effect of any order the court might make on the overall integrity of the administration of justice.

Again, these factors are not rigid rules. The court has to decide whether, in the particular circumstances of the case, it is just to relieve a defendant from the consequences of default: *Mountain View Farms Ltd. v. McQueen* (2014), 119 O.R. (3d) 561, [2014] O.J. No. 1197, 2014 ONCA 194, 372 D.L.R. (4th) 526, at paras. 48-50.

[15] The motion judge applied the test for setting aside a default judgment. As he found that Intact had an arguable defence on the merits, his application of that test alone did not affect the outcome of his decision. He refused to set aside both defaults because he found that Intact had not adequately explained its delay and that Kisel and Bijelic would be prejudiced if he granted the motions. These were relevant considerations both on the motion to set aside the noting of default and on the motion to set aside the default judgment.

[16] Nonetheless, in my opinion the motion judge erred in relying on these two grounds for refusing to set aside the defaults. In my opinion, Intact had a reasonable explanation for its defaults and neither Bijelic nor Kisel would have been prejudiced by allowing Intact to defend each action.

(i) *Intact's explanation*

[17] In finding that Intact had not offered a reasonable explanation for its defaults, the motion judge stopped short of interpreting the hold harmless agreements. The parties had differed on their interpretation: Bijelic and Kisel maintained that the hold harmless agreements were triggered once the two service providers served demand letters; Intact maintained that the hold harmless agreements would only be triggered when the service providers started an action. The motion judge thought that Intact had the better interpretation, but concluded it was neither necessary nor appropriate to decide the point. [page371]

[18] Yet the proper interpretation of the hold harmless agreement was fundamental to Intact's submission that it had a reasonable explanation for not defending the actions. Intact's simple position was that on a proper interpretation of the hold harmless agreements, Bijelic's and Kisel's causes of action against Intact had not accrued because when they sued Intact, neither service provider had yet sued them.

[19] In this court, both sides filed lengthy written submissions on the interpretation of the hold harmless agreements. It is unnecessary to review these submissions. On the plain wording of these agreements, they do not come into effect until either Osler Rehabilitation or Assessment Direct sues either Bijelic or Kisel. They do not come into effect on a mere demand for payment. The hold harmless agreements provide an indemnity from "any claims" brought by the two service providers, not from any demands for payments. Claims and demands are different. A claim means an action, not a demand letter.

[20] This interpretation is supported by two other provisions of the parties' settlement documents. First, the other handwritten clause in the hold harmless agreement: "The applicant agrees to cooperate fully with Intact and attend an examination under oath forthwith if a claim is commenced as against Ms. Kisel." A claim is commenced when an action is started. Until one is started, Kisel would have no obligation to attend an examination.

[21] The second provision supporting this interpretation is included in the terms of the full and final release, which Bijelic and Kisel signed with the benefit of legal advice: Bijelic and Kisel "HEREBY RELEASE AND FOREVER DISCHARGE [Intact] from any and all actions, causes of actions, Mediations, Arbitrations, claims and demands for Statutory Accident Benefits". In other words, the release distinguishes between claims and demands. The letters from the service providers were "demands" for payment; they were not "claims".

[22] For these reasons, neither Bijelic nor Kisel had a cause of action against Intact when each chose to sue the insurer in 2013. Thus, though Intact ought to have delivered a statement of defence in each action, it had a reasonable explanation or excuse for not doing so. On this ground alone, I would set aside the noting of default and the default judgment.

[23] During oral argument, we were told that both Osler Rehabilitation and Assessment Direct have now sued for payment of their outstanding accounts. In other words, they have made "claims". In accordance with the hold harmless agreements, Intact has agreed to defend these actions. [page372]

(ii) *Prejudice*

[24] The motion judge found that Bijelic and Kisel would be more prejudiced from setting aside the defaults than Intact would be by maintaining them. That finding is unreasonable. Setting aside the defaults would cause no prejudice to either Kisel or Bijelic. Neither can be inoculated against a claim by the service providers. Short of paying the entire amount of the outstanding accounts of Osler Rehabilitation and Assessment Direct, Intact could not prevent either service provider from suing Bijelic and Kisel. And Intact was entitled to resist paying the full amounts on the ground that the accounts were allegedly unjustified.

[25] Intact, on the other hand, is prejudiced by not setting aside the defaults because it becomes liable for outstanding accounts it disputes and may well have no obligation to pay.

[26] Moreover, this is not a case like many brought under rules 19.03 and 19.08, in which a plaintiff gives a defendant a considerable indulgence before taking default proceedings. Here, Bijelic and Kisel moved very quickly -- each noted Intact in default within 45 days of the delivery of the statement of claim. Although they were entitled to do so, and Intact had fair warning that they might do so, the shortness of the period between the delivery of the statement of claim and the noting of default is a consideration on the question of prejudice.

[27] Even if I am incorrect in my interpretation of the hold harmless agreements, on the ground of prejudice alone I would set aside the defaults.

C. *Conclusion*

[28] I would set aside the noting of default and the later default judgment in the Bijelic action, and the default judgment in the Kisel action. If either plaintiff wishes to continue with his or her action, then Intact must deliver a statement of defence within 30 days of the release of these reasons, failing which each default will be reinstated.

[29] I would order no costs of the motions. Intact is entitled to its costs of this appeal, which I would fix in the amount of $5,000, inclusive of disbursements and applicable taxes.

Appeal allowed.

End of Document

TAB 7

Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate, [2001] O.J. No. 260

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Carthy, Doherty and Rosenberg JJ.A.

Heard: January 12, 2001.

Judgment: January 31, 2001.

Docket No. C34542

[2001] O.J. No. 260 | 140 O.A.C. 353 | 6 C.P.C. (5th) 80 | 102 A.C.W.S. (3d) 798 | 2001 CanLII 24134

Between Schill & Beninger Plumbing & Heating Ltd., (plaintiff (respondent)), and Amanda Kelly Rozon as Executrix of the Estate of Rosalind Gallagher and of the Estate of George Gallagher, Canadian Imperial Bank of Commerce and The Toronto-Dominion Bank, (defendants (appellant))

(14 paras.)

Case Summary

Practice — Judgments and orders — Setting aside judgments — Default judgments, grounds — Jurisdiction — Damages — Liquidated damages — Liquidated damages defined.

Appeal by the defendant, the Gallagher Estate, from an order permitting the plaintiff, Schill & Beninger Plumbing & Heating, to amend a judgment to set forth the proper name of the corporation and dismissing an application by the Estate to set aside default judgment against it. Schill brought an action for damages for conversion and fraud. Schill alleged that the deceased, Gallagher, had stolen money from Schill, who was her employer. The Estate argued that the Registrar did not have jurisdiction to sign the default judgment on the basis of the statement of claim.

HELD: Appeal allowed in part.

The default judgment was set aside. However, there was no reason to set aside the noting of pleadings closed. The claim was one that required examination by a judge to ensure that the amount claimed could be justified. It was not a liquidated claim within the meaning of the Rules.

Statutes, Regulations and Rules Cited:

Constitution Act, 1867, s. 96.

Ontario Rules of Civil Procedure, Rule 19.04, 19.04(1)(a), 19.05.

Appeal from:

On appeal from the order of Justice G.W. Dandie dated May 19, 2000.

[Quicklaw note: A corrigendum was released by the Court February 6, 2001. The correction has been made to the text and is appended to this document.]

Counsel

John E. Callaghan and John P. Ormston, for the appellant. John K. Lefurgey, for the respondent.

The following judgment was delivered by

THE COURT (endorsement)

1 This appeal is from an order of Dandie J. permitting the plaintiff to amend a judgment to set forth the proper name of the corporation named as judgment creditor and dismissing an application by the defendants to set aside a default judgment and permit them to defend.

2 The action was for damages for conversion and fraud alleging that Rosalind Gallagher had stolen money over an extended period of time from the plaintiff, her employer, with the connivance of her husband, George Gallagher. The Gallaghers died in a motor vehicle accident and a litigation administrator was appointed, Clive Ramage, a Manitoba lawyer. On the morning of this appeal hearing Mr. Ramage was replaced by order of this court by Amanda a daughter of the original defendants.

3 Clive Ramage did not defend the Ontario action and this was an intentional decision based, presumably, upon his belief that a trial on the merits would be required in Saskatchewan to reach the assets of the Gallagher estate.

4 Pleadings were noted closed and the plaintiff then obtained a default judgment, signed by the Registrar on January 9, 1998, pursuant to r. 19.04(1)(a) as "a debt or liquidated demand in money". The judgment was in the amount of $557,013.22 being the $450,000 claimed in the statement of claim plus interest.

5 That judgment has been the basis of proceedings in Manitoba and Saskatchewan.

6 It was only when the plaintiff brought a motion to correct its name in the Ontario proceeding that the administrator decided to seek to set aside the default judgment. On the material before Dandie J. he quite properly allowed the amendment to the name, characterizing the misnomer as a technicality, and refused to set aside the judgment because the administrator had intentionally defaulted and presented no defence to the action.

7 Dandie J. also ordered the administrator to personally pay the costs of the motion on the ground that the administrator was responsible for failing to adequately protect the estate he was administering. The essence of this concern was that Mr. Ramage was playing tactical games between jurisdictions rather than coming to grips with the interests of the estate and its creditors. This order was appealed and we would not interfere with that exercise of discretion.

8 On this appeal, for the first time, the appellant raised the issue of the jurisdiction of the Registrar to sign judgment under r. 19.04, arguing that the proper procedure was under r. 19.05 to a judge on affidavit material supporting the claim. The appellant takes the position that this is a jurisdictional issue in that the Registrar is not a s. 96 judge [s. 96 of the Constitution Act, 1867] and cannot make judicial decisions. The Registrar acted solely on the basis of the statement of claim, presumably treating this as an administrative act. However, the statement of claim suggests that it is not clear how much money was allegedly stolen and used the expression "approximately $450,000."

9 In other circumstances we would not tolerate the conduct of the administrators in raising this issue at this stage of a long tactical chess game, and even now presenting no defence to the claim. However, we cannot turn away from a jurisdictional issue. Upon analysis, and even without the word "approximately" the claim was one that required examination by a judge to assure that the amount could be justified. It was not a liquidated claim within the meaning of the authorities decided under rule 19.04 and former Rule 33, which dealt with specially endorsed writs. Adjudication was required to determine that the allegation had substance in respect of the amount claimed.

10 Having so concluded we have no choice but to set aside the default judgment signed by the Registrar with leave to the plaintiff to now proceed before a judge under r. 19.05.

11 We would not accede to the appellant's request to set aside the noting of pleadings closed. Nothing has been presented to suggest a basis for defending the action at this time. Even if a viable defence was presented the intentional refusal to defend as recorded in the correspondence stands as a permanent bar to intervention.

12 We regret the dislocation this may occasion to the proceedings in Manitoba and Saskatchewan, but there is no avoidance of a jurisdictional defect.

13 An order shall issue in accordance with these reasons. The appellant has had some success but we would order no costs of the appeal since the issue upon which she succeeded was raised for the first time on appeal and she was unsuccessful on the substance of the appeal.

14 There was mention that the plaintiff's name is still not accurately spelled. That was not an appeal issue and we leave that in the plaintiff's hands to seek correction if that is necessary.

CARTHY J.A.

DOHERTY J.A.
ROSENBERG J.A.

* * * * *

Corrigendum

Released: February 6, 2001

Please note the correction is on page 1 in the style of cause. The name of counsel John E. Callaghan is to come before the name of counsel John P. Ormston.

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TAB 8

Sunlife Assurance Co. of Canada v. Premier Financial Group Inc. (c.o.b. Premier Financial), [2013] O.J. No. 1107

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

R.J. Sharpe, G.J. Epstein and S.E. Pepall JJ.A.

Heard: March 11, 2013.

Judgment: March 12, 2013.

Docket: C56053

[2013] O.J. No. 1107 | 2013 ONCA 151

Between Sunlife Assurance Company of Canada, Respondent/Plaintiff, and Premier Financial Group Incorporated o/a Premier Financial, Premier Financial Capital Investments, and Premier Mortgage-Mortgage Alliance, David K. Chung a.k.a. Cheechul Chung and David Kee Choi Cheung, Kay Kim a.k.a. Youngchol Chung, Kyung-Sook Kiim and Kyung-Sook Kim, 2234170 Ontario inc., and Mohammad H. Khosprowbeygi, Appellants/Defendants

(2 paras.)

Case Summary

Appeal From:

On appeal from the judgment of Justice B.P. O'Marra of the Superior Court of Justice, dated August 22, 2012.

Counsel

Stefan A. De Smit, for the appellants.

B. Phillips, for the respondent.

APPEAL BOOK ENDORSEMENT

The following judgment was delivered by

THE COURT

1 The motion judge found that there was overwhelming evidence that the appellants were personally served and that they decided to ignore the process. There is ample evidence, including video recordings, to support the finding. It is established that a conscious decision not to participate in the proceedings bars consideration of a defence for the merits, even if one exists: *Schill & Beninger Plumbing & Heating Ltd. v. Gallagher Estate* (2001) 140 OAC 353.

2 Accordingly, the appeal is dismissed. Costs to the respondent fixed at $15,000 inclusive of disbursement and applicable taxes. The respondent agrees that the judgment be amended to delete the name "Youngchol Chung".

End of Document

TAB 9

Volvo Rents, a Division of Volvo Group Canada Inc. v. ABCO One Corp., [2014] O.J. No. 731

Ontario Judgments

Ontario Superior Court of Justice

Master C. Albert

February 18, 2014.

Court File No. CV-13-472531

[2014] O.J. No. 731 | 2014 ONSC 1045 | 237 A.C.W.S. (3d) 612 | 35 C.L.R. (4th) 314 | 2014 CarswellOnt 1822

RE: Volvo Rents, a Division of Volvo Group Canada Inc., and ABCO One Corporation and The City of Toronto

(31 paras.)

Counsel

A. Assuras, for the defendant ABCO, moving party.

No one appearing for Volvo, responding party, (counsel of record: R. Payne).

ENDORSEMENT

MASTER C. ALBERT

1 Volvo Rents, a Division of Volvo Group Canada Inc. ("Volvo") registered a claim for lien for $18,912.56 on December 10, 2012 and issued an action against ABCO One Corporation ("ABCO") and City of Toronto on January 23, 2013. Volvo noted ABCO in default on April 29, 2013. The lien was vacated upon the posting of security but Volvo has neither discontinued the action against nor noted City of Toronto in default.

2 Now ABCO moves to set aside the noting in default on grounds that Volvo failed to serve the statement of claim in accordance with the rules of civil procedure and that the statement of claim did not come to ABCO's attention until after the time for delivering a statement of defence had expired.

3 Counsel for Volvo did not appear. Its absence may be related to the modest quantum of its claim.

4 Having reviewed the motion materials filed and having heard the submissions of counsel for the moving party, the motion is refused for the reasons that follow.

The test for setting aside noting in default

5 The *Construction Lien Act* (the "Act") provides at section 54 that a defendant noted in default may not contest the claim or file a defence without leave of the court given only upon satisfying the court that there is evidence to support a defence. The Act further provides at section 67 that where the Rules of Civil Practice and the Act conflict, the Act prevails.

6 Under the rules the relevant considerations on a motion to set aside the noting of a defendant in default are:

a) Whether the defendant has a good reason for failing to deliver a defence in time; and

b) Whether the defendant had a continuous intention to defend and acted promptly to set aside the default upon learning of it.

7 Under the Act the defaulting defendant must meet the additional test of leading evidence to show that the defaulting defendant has a meritorious defence.

Applying the tests

a) Does ABCO have a good reason for failing to file a defence?

8 Default will not be set aside if a defendant is aware that a lawsuit has been issued against it, has an opportunity to defend it and fails to explain why it did nothing in the face of that knowledge. A conscious decision by a defendant not to participate in an action is a complete bar to setting aside a default judgment: *Edwards Builders Hardware (Toronto) Ltd. v Aventura Properties Inc.*[1]

9 According to ABCO's notice of motion its reasons for failing to file a defence are that Volvo failed to serve the statement of claim in strict compliance with the rules of civil procedure and the statement of claim did not come to ABCO's attention. ABCO's evidence is given by its general manager Bogden Tkach (affidavit sworn November 10, 2013).

10 Mr. Tkach deposes that the statement of claim was not served in accordance with the rules. He provides no evidence of ABCO's second ground for the motion, namely that the statement of claim did not come to ABCO's attention. Mr. Tkach deposes that ABCO's registered business address and his personal home address are both 448 Centre Street East, Richmond Hill. This business address is corroborated by a corporate profile report dated July 30, 2013. He attaches as an exhibit to his affidavit the affidavit of service of the statement of claim which provides that on February 12, 2013 Adrienne Hunt, Process Server, attended at 448 Centre Street East, Richmond Hill, Ontario L4C 1B7 for the purpose of serving ABCO with the statement of claim and certificate of action. Ms Hunt deposes:

> "I was unable to affect *(sic)* service on ABCO ONE CORPORATION, as the company was not located there as recorded with the Ministry of Consumer and corporate Affairs asshown on the Corporate Perofile attached.
>
> "Therefore on February 12 , 2013 I mailed a copy of the Statement of Claim to ABCO ONE CORPORATION, at the above address and served the said company pursuant to Rule 16.03(6) of the rules of Civil Procedure."

11 Mr. Tkach maintains that ABCO maintains an office at 448 Centre Street East, including in February 2013. Her does not depose whether or not an adult was present at that address on February 12, 2013. Nor does he depose whether or not there is any corporate signage at that address to identify it as the place that the ABCO business is located.

12 Mr. Tkach operates the business from his home. His business is construction. He would be away from his residence, perhaps on construction sites, from time to time.

13 It is reasonable that a process server, attending on a residence address that shows no signage of a business would conclude that the company was not located at that address. The process server does not depose that she knocked ont he door or rang the doorbell. However I draw the inference that she did so as it is the usual practice of a process server, upon arriving at an address for service, to make their presence known by either entering the premises (if the address is a typical place of business where members of the public can walk in without requiring someone on the inside to unlock the door to allow them entry), or else they ring the doorbell or knock on the door to get the attention of someone inside the premises.

14 Rule 16.03(6) provides that where the registered office or principal place of business of a corporation cannot be found at the last address recorded with the ministry of Consumer and Commercial Relations, service may be made on the corporation by mailing a copy of the document to the corporation at that address.

15 The process service attended at the last place of business that ABCO had recorded with the Ministry. No one was there to take the document. The process server mailed the document.

16 I find that Volvo's statement of claim was served on ABCO by mail on February 12, 2013 (deemed served five days later) in accordance with the rules of civil procedure.

17 Having been served with the statement of claim, I find that ABCO was aware that this lawsuit had been issued against it, had an opportunity to defend it and failed to explain why it did nothing in face of that knowledge. ABCO made a conscious decision not to defend. The *Edwards Builders* case applies because the test to set aside the noting in default under the Act is the same as the test for setting aside a default judgment in a civil action (and under the Act).

18 In the absence of an agreement or order to extend time ABCO was required to deliver its statement of defence by March 9, 2013 (rule 18.01). ABCO failed to do so and failed to take any steps to respond to the claim for several months thereafter.

19 Mr. Tkach did not depose that he never received the statement of claim. Nor did he depose as to when it first came to his attention. The absence of such evidence by ABCO is a glaring omission. The only evidence of the reason for ABCO's failure to defend is Mr. Tkach's affidavit evidence that the statement of claim was not served "according to the rules".

20 I find that ABCO fails the first test in that it has not adequately explained its failure to deliver a statement of defence prior to April 29, 2013 when it was noted in default.

b) *Did ABCO have a continuous intention to defend and act promptly?*

21 ABCO provided no evidence as to when the statement of claim first came to its attention. Mr. Tkach, who is in the best position to provide such evidence, failed to provide any evidence of when the time begins to run. ABCO's only evidence of whether it had a continuous intention to defend is that ABCO's former lawyer removed himself from the record on May 6, 2013 (coincidentally less than a week after ABCO was noted in default), that ABCO spoke to "various counsel", including Ms Assuras on July 22, 2013, that ABCO retained Ms Assuras on September 19, 2013 and that after retaining Ms Assuras a burst water pipe kept her from practice until October 22, 2013. The relevant period for consideration ends December 2, 2013, the date originally scheduled for the motion hearing and adjourned at the court's request[2].

22 I am not satisfied that this delay in retaining counsel in an action in which ABCO had already been noted in default meets the test of a continuous intention to defend. Nevertheless, were the period of delay from April 29, 2013 to December 2, 2013 the only difficulty on ABCO's part in meeting the applicable tests for setting aside a noting in default against it, I would have allowed the motion. But that is not the case.

c) *Has ABCO provided evidence of a meritorious defence to the claim?*

23 ABCO filed no evidence to persuade me that it has a meritorious defence to Volvo's claim against it. The proposed statement of defence filed with the motion materials is merely a bald denial, as follows:

4. The said Defendant denies it is indebted to the Plaintiff for the amount claimed.
5. The said Defendant alleges that the Plaintiff failed to preserve its lien within the time allowed for doing so under Section 31 of the *Construction Lien Act,* R.S.O.1990, c. C30, and accordingly, the Plaintiff is not entitled to a lien in respect of the premises.
6. The said Defendant further alleges that the Plaintiff failed to perfect its lien within the time allowed for doing so under Section 36 of the *Construction Lien Act,* R.S.O.1990, c. C30, and accordingly, the Plaintiff's lien has expired.

24 ABCO filed no evidence of probative value to support the allegations pleaded in paragraphs 4, 5 and 6 of its statement of defence, contrary to the requirements of section 54 of the Act. The Divisional Court in *Deman Construction Corporation v 1429036 Ontario Inc. et al*[3] found that a motions judge, in making findings of fact based on evidence filed on such a motion, must assess whether there is a meritorious defence.

25 Master Sandler considered the test for setting aside a default judgment in a construction lien case in *St. Clair Roofing & Tinsmithing Inc. v Davidson*[4]. The case is relevant because Master Sandler opines that under the Act the test for setting aside a default judgment is the same as the

test for setting aside the noting of a defendant in default and the moving party must provide evidence of a meritorious defence.

26 ABCO's first denial is that it is not indebted to the plaintiff in the amount claimed. There is no evidence that this defence has any merit.

27 ABCO's second and third denials in its proposed pleading are that the lien was registered and perfected out of time. ABCO filed no evidence to support these "boilerplate" allegations. On the face of the registered construction lien document it was filed in time and the action was issued in time. The action was set down for trial within the two year limitation period.

28 Claims under the Act are intended to be summary in nature. A party seeking equitable relief from the court must put their best foot forward and present their best evidence. A defendant in default who fails to provide evidence of a meritorious defence should not be permitted to drag construction lien proceedings out unnecessarily.

29 ABCO has failed to provide evidence of a meritorious defence to Volvo's claim against it.

Conclusion

30 For all of the reasons given I find that ABCO has not met the test for setting aside a noting in default under the *Construction Lien Act*. The motion is dismissed.

31 Costs: ANCO filed its costs outline at the conclusion of the motion hearing. Volvo did not appear. ABCO was unsuccessful on the motion. There shall be no costs of this motion.

MASTER C. ALBERT

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1 2007 CanLII 37676 (ONSC).

2 To attend a funeral.

3 2004 CanLII 34928 at paragraphs 48 - 55.

4 1992 CanLII 7660.

End of Document

TAB 10

Waxman v. Waxman, [2007] O.J. No. 1688

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

K.M. Weiler, J.C. MacPherson and H.S. LaForme JJ.A.

Heard: April 5, 2007.

Judgment: May 2, 2007.

Docket: C45779

[2007] O.J. No. 1688 | 2007 ONCA 326 | 223 O.A.C. 375 | 42 C.P.C. (6th) 37 | 157 A.C.W.S. (3d) 72 | 2007 CarswellOnt 2714

APPLICATION UNDER sections 106, 207 and 248 of the Business Corporations Act (Ontario) Between Morris J. Waxman, Applicant (Appellant), and Chester Waxman, Robert Waxman, Gary Waxman, Warren Waxman, Lightning Distribution Inc., CHW Holdings Inc., Chesterton Investments Limited, Gawix Financial Corporation, Waxtek Metals Inc., Bailey Waxman, I. Waxman & Sons Limited and Chester Waxman, Wayne Linton and Gary Waxman in their capacities as Trustees of the Chester Waxman Family Trust, Respondent

(46 paras.)

Case Summary

Civil procedure — Judgments and orders — Amendment, rescission and variation — After judgment entered — Final or interlocutory — Appeal from order awarding respondent a further $370,000 of his frozen assets in order to fund his legal fees and expenses for an upcoming reference allowed — Motion judge erred in holding that respondent established that he had no other assets from which to pay the legal expenses.

Appeal by Morris Waxman from an order awarding his brother, Chester Waxman, $370,000 from frozen accounts to fund his legal fees for a component of a long running and expensive family dispute. In the principal litigation between the parties, Morris was awarded half the outstanding shares in a limited company and a certain entitlement to profits earned between 1983 and 2002 to be determined at a later hearing. A freeze of Chester's assets was later ordered pending this determination. Although the court made two later orders to release funds to fund his legal bills for the reference, Chester brought a motion to permit him to access further financial resources from his frozen assets so as to fund legal costs and expenses for the references. He argued that the notices of garnishment hampered his ability to retain expert witnesses and to fund significant fees in connection with the reference. The motion judge held that there was no basis to determine that it was the intention of the trial judge to choose a figure for legal costs that was not subject to variation. Furthermore, there was no reason why Chester could not pursue an appeal and move to vary the order. The fact that Chester had already incurred significantly greater costs that the amount previously ordered released was a material change of fact.

HELD: Appeal allowed and order set aside.

The motion judge had jurisdiction to hear and determine the motion. The motion judge did not err in the exercise of her discretion by hearing Chester's motion in the face of Chester's pending appeal of an order which had been set down for hearing. The principal issue on the appeal of the order was unrelated to the quantum of legal costs for Chester to fund his participation in the reference. However, the motion judge erred in holding that Chester established that he had no other assets from which to pay the legal expenses. Chester and his sons did not meet the onus of establishing on proper evidence that they personally had no other assets available to them.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 59.06(1)

Appeal From:

On appeal from the order of Justice Nancy J. Spies of the Superior Court of Justice dated June 28, 2006, with reasons reported at [2006] O.J. No. 2621.

Counsel

Richard Swan and Gideon Forrest for the appellant.

Edward Babin for the respondent.

The judgment of the Court was delivered by

J.C. MacPHERSON J.A.

A. INTRODUCTION

1 The appellant, Morris Waxman ("Morris"), appeals from the order of Spies J. dated June 28, 2006, in which his brother, the respondent Chester Waxman ("Chester"), was successful in obtaining $370,000 from frozen accounts to fund his legal fees for a component of the long running and expensive family legal saga that has occupied the brothers, their families, their companies and the courts of Ontario for many years.

2 The appeal raises three issues: whether the motion judge had jurisdiction to make the order sought in light of the fact that Farley J. had made a previous order relating to Chester's legal

costs in the proceedings; whether the motion judge should have exercised her discretion to make the order given that an appeal of Farley J.'s order was pending in this court; and whether the relief sought (an order allowing Chester to access further funds to pay for his legal fees) ought to have been granted.

B. FACTS & PROCEDURAL HISTORY

3 There is a long and complicated procedural history in this case that must be described briefly in order to understand the nature of the present appeal.

4 Morris and Chester Waxman have been involved in lengthy litigation against each other, principally concerning the ownership of their family scrap metal business, I. Waxman & Sons Limited ("IWS"). In 2002, Sanderson J. released her decision in the main litigation and restored Morris as a 50% shareholder of IWS. Morris was awarded damages against Chester, Chester's sons and IWS, the precise amount of which was to be determined on a reference to a Master. Solid Waste Reclamation Inc. ("SWR"), a company controlled by Morris' sons, was also awarded damages. The trial judgment was upheld on appeal, save for minor variations, and leave to appeal to the Supreme Court of Canada was refused.

5 Throughout the litigation, IWS had paid virtually all of Chester's and his sons' legal fees. In January 2003, Chester and his sons were ordered to repay these fees to IWS.

6 After the trial judgment was rendered, Morris commenced an oppression application against Chester and others with respect to the management of IWS.

7 In January 2004, Farley J. (who was case managing the oppression application and was appointed the r. 37.15 judge) ordered that IWS be restrained from paying Chester's legal fees. IWS was also enjoined from repaying any loans to Chesterton Investments Limited ("Chesterton"), a company solely owned by Chester. The amount that is said to be owing to Chesterton is being held in a notional account at IWS, referred to as the Chesterton Loan Account.

8 In an effort to preserve the assets that would be available to satisfy the main judgment, Morris sought further relief from Farley J. in November 2004. By order dated November 3, 2004, Farley J. froze all of the assets of Chester and his sons, with the exception that they could have access to $100,000 per month for their employment with IWS. This order did not provide for the payment of legal fees and in a subsequent order dated March 2, 2005, Farley J. stated that Chester and his family could use the frozen funds to pay for reasonable legal fees. A protocol was established for the payment of these fees.

9 On September 1, 2005, Farley J. released his judgment in the oppression application. In that judgment, his previous freezing orders were continued. The protocol for the payment of legal fees was also continued.

10 In November 2005, by *ex parte* application, SWR obtained notices of garnishment and served them on a number of banks with whom Chester held accounts. The practical result was that Chester and his family could no longer access the frozen funds to pay their reasonable legal fees. Chester brought a motion to have the notices of garnishment vacated. On December 23, 2005, Farley J. ordered that the notices of garnishment were to be vacated only to the extent necessary to allow Chester and his family to repay certain legal fees to IWS and to access up to

a maximum of $250,000 for the payment of legal fees for the Reference for damages. Additionally, Farley J. ordered that if the frozen funds were insufficient to fund these amounts, the Chesterton Loan Account could be accessed.

11 Chester appealed the December 23, 2005, order. While the hearing of the appeal was pending, Chester brought a motion before Spies J. (she had replaced Farley J. as the r. 37.15 judge in this matter) to allow him and his sons to access further funds in order to pay for the ongoing Reference. The $250,000 allowed by Farley J. had been exhausted and Chester sought an additional $370,000 to be able to complete the Reference.

12 At the time the motion before Spies J. was heard, the damages Reference was well under way before Master Linton. In oral argument before Spies J., the motion was framed as a motion to vary the December 23, 2005, order of Farley J., then under appeal by Chester. In an order dated June 28, 2006, Spies J. granted the requested relief and ordered that Chester be permitted to access up to a further $370,000 from the frozen funds or the Chesterton Loan Account to pay for the reasonable legal fees of the Reference. This is the order that is currently under appeal before this court.

13 To provide further context to this appeal, it is worth noting some of the subsequent procedural history. The appeal of Farley J.'s December 23, 2005, order was dismissed by this court on October 25, 2006. Further, after 25 days of hearing, Master Linton released his report on the Reference on January 4, 2007, assessing the damages owed to Morris, at approximately $52,000,000.

C. THE MOTION JUDGE'S DECISION

14 The motion judge held that she had jurisdiction to vary Farley J.'s order. She concluded that in light of the fact that Farley J. had been the case management judge for some time and that the parties had been before him as many as twenty times, "there is no basis upon which I could determine that the intention of Farley J. was to choose a figure for legal costs that was not subject to variation."

15 The motion judge then considered whether Chester's appeal of Farley J.'s order should incline her to exercise her discretion and not hear Chester's motion until the appeal was heard and determined. She carefully reviewed Chester's appeal and concluded that the gist of the appeal was Chester's claim that Farley J. erred by not determining that the notices of garnishment were invalid; in contrast, Chester's appeal did not attack the $250,000 quantum that Farley J. had excepted from garnishment to pay for Chester's legal costs connected to the Reference. She stated that "in principle, there is no reason why [Chester] cannot both pursue an appeal of the order of Farley J. and move to vary the order, provided the proposed variation does not affect the substance of the appeal." She concluded that the proposed variation did not affect the substance of the appeal and that it was, therefore, preferable that she deal with the motion on its merits.

16 On the merits, the motion judge granted the relief sought by Chester, which permitted him to access a further $370,000 to fund his legal fees associated with the Reference. In her reasons, the motion judge analyzed whether the relief should be granted on two bases. First, she considered it from the viewpoint that Chester was seeking a motion to vary Farley J.'s December 23, 2005, order. Second, she considered the matter *de novo*.

17 In the first part of her analysis, the motion judge held that there were new facts that had arisen that justified a variation of the order under rule 59.06(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. First, the Reference had taken longer than anticipated and second, additional frozen funds had become available for the payment of legal fees. The motion judge then considered what financial resources were available to Chester and his family and observed that questions on this subject were refused by Chester's son Robert during the cross-examination on his affidavit. The motion judge then drew an adverse inference that other family assets (other than the monthly $100,000.00 sum and the frozen funds) were being used to finance the litigation. However, the motion judge refused to give effect to that adverse inference. She stated that the availability of other family resources had not been considered as relevant by Farley J. and, in an effort to keep her decision consistent with his, she declined to attach any relevance to that fact either. As the motion judge held that there were no new arguments that had not been raised before Farley J., she determined that the only issue was whether the amount sought by Chester was reasonable. She held that it was and concluded that the relief could be granted on the basis that she was varying Farley J.'s prior order.

18 In the second part of the motion judge's analysis, she considered the matter *de novo*. Here, the motion judge held that the question of whether provision should be made for the payment of legal fees should be determined on the basis of proprietary injunction principles. Relying on *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business and Technology*, [2003] O.J. No. 40 (S.C.J.), the motion judge held that the test for determining whether a defendant ought to be allowed to access funds subject to a proprietary injunction involves finding that (1) the defendant has no other assets available to him and (2) the injustice of permitting the use of the funds by him is outweighed by the possible injustice to the defendant if he were denied access to those funds. On the first part of the test, the motion judge held that Chester did not have to establish that no other family members could assist him financially. The question was whether Chester personally had funds available to him. Next, the motion judge held that the possible injustice to Chester if he was denied access to additional funds would be the inability to defend himself on the Reference.

19 Therefore, on the basis of the proprietary injunction test, the motion judge determined that Chester and his sons should be able to access the requested $370,000 to continue with the Reference.

D. ISSUES

20 The appellant advances three issues on the appeal:

(1) Did the motion judge have jurisdiction to vary the order of Justice Farley?

(2) If the answer to (1) is 'Yes,' did the motion judge err by hearing and determining the motion when the moving party's own appeal of Farley J.'s order was pending in this court?

(3) If the answer to (2) is 'No,' did the motion judge err by granting the motion and ordering a freeing up of the frozen funds to allow Chester to receive an additional $370,000 to pay for his legal costs associated with the Reference?

E. ANALYSIS

(1) Jurisdiction

21 The appellant contends that Farley J.'s December 23, 2005, order allowing Chester to access up to $250,000 from frozen funds to pay his legal costs related to the Reference was a final order and, therefore, could not be varied by the motion judge.

22 I disagree. The complicated and expensive Waxman litigation was case-managed by Farley J. for several years. The parties appeared in front of him at least twenty times on a variety of issues. Legal costs relating to Chester were dealt with by Farley J. on at least three occasions a January 2004 order restraining IWS from paying Chester's legal fees, a March 2005 order establishing a protocol for the payment of Chester's legal fees, and the December 2005 order releasing an additional $250,000 from frozen funds to pay for Chester's legal costs relating to the Reference.

23 In this context a long running case management process and several orders over almost three years dealing with legal costs it makes no sense to conclude that Farley J.'s December 23, 2005, order was the final word on the question of funding the litigation. In my view, there can be no doubt that in May 2006 Farley J. could have heard a motion to vary his December order dealing with Chester's legal costs for the Reference. Farley J.'s retirement in April 2006 and his replacement as case management judge by the motion judge did not change the picture in the least. The motion judge had jurisdiction to hear and determine the motion. I agree with her analysis and conclusion on this issue.

(2) Discretion - the pending appeal

24 The appellant submits that the motion judge erred, in the exercise of her discretion, by hearing Chester's motion in the face of Chester's appeal of Farley J.'s order to this court, especially since this court had already set a date (October 6, 2006) for the appeal hearing.

25 I disagree. The principal issue on the appeal of Farley J.'s order was unrelated to the quantum of legal costs for Chester to fund his participation in the Reference. Moreover, the Reference was rolling forward by May 2006.

26 It is true that the motion judge could have exercised her discretion in a different way. She could have adjourned Chester's motion until the appeal of Farley J.'s order had been determined. She could even have suggested that Chester take steps to expedite the appeal which, I observe, could have been easily accomplished. However, in spite of this option, I cannot say that the path chosen by the motion judge hearing and determining the motion on the merits while the Reference was actually proceeding constitutes an erroneous exercise of her discretion as case management judge.

(3) The merits

27 In my view, this is the crucial issue in this appeal.

Positions of the parties

28 Before this court, the parties argued over which test should be used to determine whether Chester and his sons should have been allowed to access further funds to pay their legal fees on the Reference, given that their assets had been frozen and certain bank accounts had been garnished.

29 Counsel for Morris argued that special considerations applied since Morris had already been successful in the main litigation and all that had to be determined was the precise amount that was owed to him. In other words, this was not the same situation as one in which a defendant was subject to an interlocutory injunction pending the outcome of a trial. As such, it was argued that any money that was accessed by Chester was actually Morris' money and that Morris should not be forced to pay for Chester's defence absent exceptional circumstances. Specifically, counsel for Morris argued that the test laid out by the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 SCC 2, should apply in a post-judgment context.

30 In *Little Sisters*, the Supreme Court of Canada considered the question of when an advanced costs award should be ordered in public interest cases. Essentially, the majority adopted the approach from *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371. First, the majority stated that the person seeking costs must establish that the case is "special enough to merit this exceptional award": para. 46. In other words, the party must establish *prima facie* merit and public importance. Second, the party must establish that it is impecunious and that, without the award for interim costs, the litigation would be unable to proceed. Counsel for Morris argued that Chester had failed to satisfy this test. It was argued, therefore, that the motion judge erred in allowing Chester to access additional money to pay for his legal fees.

31 In response, counsel for Chester submitted in oral argument that the Mareva injunction test should apply to the case at hand. Counsel for Chester framed his argument as follows. The remedy sought before the motion judge was permission to use funds in the Chesterton Loan Account to pay its legal fees on the Reference. The Chesterton Loan Account was subject to a freezing order in the nature of a Mareva injunction (Morris had no proprietary interest in the Chesterton Loan Account and it had not been garnished). Therefore, the proprietary injunction test employed by the motion judge was inapplicable and the test for determining whether a Mareva injunction should be varied to allow for the payment of reasonable legal fees should apply. This test involves determining whether the defendant has no other assets from which to make the payments. Counsel for Chester argued that this test had been satisfied and that the motion judge was correct to grant the relief. In the alternative, counsel for Chester argued that the more onerous proprietary injunction test had also been met.

Which test should be applied?

32 The issue before this court is which test should be used to determine whether frozen funds can be accessed to pay reasonable legal fees in a post-judgment context. The appropriate test must then be applied to determine whether the motion judge erred in granting the relief in the order under appeal.

33 Counsel for Morris urged this court to adopt the test from *Okanagan* and *Little Sisters*. They

argued that the proprietary injunction test employed by the motion judge was inappropriate in the present case because it required a balancing of the relative strengths of each party's case. It was submitted that this should not be done in the present case where it has already been determined that Chester is liable to Morris. In my view this argument is not persuasive. First, application of the *Okanagan/Little Sisters* test would not address the concern raised by Morris' counsel. Specifically, this test also requires an analysis of the merits of the case: see *Little Sisters* at paras. 37 and 51 and *Okanagan* at para. 40. Both the proprietary injunction test used by the motion judge and the *Okanagan/Little Sisters* test suggested by Morris' counsel start from the viewpoint that the litigation has not yet been determined.

34 Second, the *Okanagan/Little Sisters* test for interim costs awards is concerned specifically with public interest litigation. The present litigation clearly does not fall under this category.

35 Therefore, I conclude that the *Okanagan/Little Sisters* framework is not applicable to the case at hand.

36 It next must be considered if the motion judge erred in applying the proprietary injunction test or if the Mareva injunction test would have been more appropriate. These tests were fully explained by Molloy J. in *Credit Valley, supra*. In that case, Molloy J. had to determine if various injunction orders should be varied to allow the defendant to pay certain expenses, including legal fees. Because some of the injunctions were proprietary and others were Mareva injunctions, Molloy J. considered the principles that apply to both situations. After canvassing the authorities, Molloy J. held that when granting relief from a Mareva injunction, the defendant must satisfy the court that he has no other assets from which to make the required payments: para. 19. In the case of a proprietary injunction, however, the inquiry must go farther. Molloy J. stated at para. 20: "It is one thing to permit payment of ordinary expenses out of money belonging to the defendant but which is frozen by a Mareva injunction. It is another thing altogether to permit the defendant to use the plaintiff's money for the purpose of attempting to defeat the plaintiff's claim." She continued at para. 21:

> The test to be applied in determining whether a defendant ought to be permitted to make payments out of funds subject to a proprietary injunction begins (as does the variation of a Mareva injunction) with a consideration of whether the defendant has established on proper evidence that he has no other assets available to him to pay the expenses. If the defendant passes that hurdle, the court must engage in a balancing exercise "as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence." [Citation omitted.]

37 Justice Molloy summarized the applicable test at para. 26 as follows:

> (i) Has the defendant established on the evidence that he has no other assets available to pay his expenses other than those frozen by the injunction?
>
> (ii) If so, has the defendant shown on the evidence that there are assets caught by the injunction that are from a source other than the plaintiff, i.e. assets that are subject to a Mareva injunction, but not a proprietary claim?
>
> (iii) The defendant is entitled to the use of non-proprietary assets frozen by the Mareva injunction to pay his reasonable living expenses, debts and legal costs.

Those assets must be exhausted before the defendant is entitled to look to the assets subject to the proprietary claim.

(iv) If the defendant has met the previous three tests and still requires funds for legitimate living expenses and to fund his defence, the court must balance the competing interests of the plaintiff in not permitting the defendant to use the plaintiff's money for his own purposes and of the defendant in ensuring that he has a proper opportunity to present his defence before assets in his name are removed from him without a trial. In weighing the interests of the parties, it is relevant for the court to consider the strength of the plaintiff's case, as well as the extent to which the defendant has put forward an arguable case to rebut the plaintiff's claim.

38 It is therefore apparent that regardless of whether the injunction is proprietary or a Mareva injunction, the first inquiry is always the same - has the defendant established that he has no other assets from which to pay the expenses? In my view, the present appeal turns on this question. Therefore, it is not necessary to determine whether the source of the funds in the present case was subject to a proprietary injunction (as found by the motion judge) or a Mareva injunction (as urged by counsel for Chester).

39 It is clear from *Credit Valley* that the defendant has the onus of proving that he has no assets, other than those frozen, from which to pay his legal fees. As noted above, the defendant must establish "on the evidence" that he has no other assets: *Credit Valley* at para. 26. In the present case, Chester attempted to meet this burden through the affidavit of his son, Robert Waxman. In that affidavit, Robert stated that "Chester's resources for satisfying legal fees are very limited" (para. 28) and that "since January [2006], my father and I have worked very hard to find an arrangement to fund the outstanding legal fees ... and the fees likely to be incurred during the remainder of the Reference" (para. 29). Robert further deposed that due to Chester's recent diagnosis of late-stage cancer, "all of our family's resources are being conserved to fund Chester's medical treatment" (para. 30). Robert stated that there was an "absence of any third party sources of funds with which to pay Chester's legal and professional expenses in connection with the Reference" (para. 32).

40 Robert was cross-examined on this affidavit. He refused virtually all questions regarding what resources were available to him and his father. The motion judge noted as follows:

> Questions about these other financial resources [i.e. family resources that Chester's wife Bailey or his grandchildren's trust might or might not have] were refused on the cross-examination of Robert Waxman including questions about whether or not any of Chester, Robert or Warren's spouses or children have assets which could be used to pay legal fees, whether they would lend them monies to pay the legal fees, whether anyone other than Chester has paid any of Davies' accounts in respect of the Reference (beyond confirming that neither Robert nor Warren have paid anything in respect of the fees on the Reference) and who is paying for Brian Greenspan's fees for Robert's criminal charges and Alan Lenczner's fees for Robert's OSC hearing (beyond advising that the monies are not coming from frozen or non-frozen funds of Chester, Robert or Warren).

41 The motion judge then drew an adverse inference "that these other family sources have assets and that they have provided financial assistance with respect to the Reference and other legal costs being incurred by Robert." The motion judge concluded, however, that it was not

necessary for Chester to establish that there were no family resources available to pay his legal fees; he just had to establish that he personally did not have any assets from which to pay these fees. There is support for this position in *Insurance Corp. of British Columbia v. Dragon Driving School Canada Ltd.*, [2004] B.C.J. No. 2503 (S.C.), where the court held at para. 10:

> The plaintiff suggests that Mr. Chiu must show not only that he has no assets that are not frozen, but also that he has no other means of paying expenses, such as available lines of credit, or third parties who might voluntarily pay his expenses. I have significant doubt that the test should be expanded in that fashion.

42 In the present case, the motion judge held that it would be an "impossible task" to try to determine if any other family members had available assets before an order could be made varying an injunction for the payment of legal fees. With respect, it appears as though the motion judge proved that it was not an impossible task after all, as she drew the inference that in this particular case other family resources had been used to pay for Chester's and Robert's legal fees.

43 In addition, even if it were inappropriate to look beyond the assets of Chester and his sons to determine whether any funds were available for the payment of legal fees, it can be said that in this case Chester and his sons did not meet the onus of establishing on proper evidence that they personally had no other assets available to them. While Robert stated in his affidavit that he and his father had made efforts to arrange for funding of legal fees, in cross-examination he refused to answer any questions beyond stating that the $100,000 monthly sum was insufficient. I observe that this statement, on its face, would be highly dubious in the eyes of almost any reasonable Canadian. Further, Robert refused to answer any questions about what family resources were being conserved for the payment of Chester's medical fees.

44 Given the motion judge's adverse inference and the many refusals made by Robert, it cannot be said that Chester established on the evidence that he had no assets available to him to pay for his legal fees, other than those frozen by the injunctions. In my view, the motion judge erred to the extent that she held otherwise.

45 Chester therefore did not establish that additional funds should have been made available for the payment of his legal fees on the Reference.

F. DISPOSITION

46 I would allow the appeal, set aside the order of the motion judge, and dismiss the underlying motion. The appellant is entitled to his costs of the appeal which I would fix at $12,000 inclusive of disbursements and GST.

J.C. MacPHERSON J.A.
K.M. WEILER J.A.:— I agree.
H.S. LaFORME J.A.:— I agree.

TAB 11

Western Steel and Tube Ltd. v. Technoflange Inc., [2017] O.J. No. 2202

Ontario Judgments

Ontario Superior Court of Justice

F.L. Myers J.

Heard: April 28, 2017.

Judgment: May 1, 2017.

Released: May 2, 2017.

Court File No.: CV-10-8839-00CL

[2017] O.J. No. 2202 | 2017 ONSC 2697

Between Western Steel and Tube Ltd., Plaintiff, and Technoflange Inc. and Canadian Tire Corporation, Limited and Jiangsu Sainty Sumex Tools Corp. Ltd. also known as Jiangsu Sainty International Group also known as JMET Corporation carrying on business in North America as Sainty International LLC, Defendants

(41 paras.)

Counsel

David A. Seed counsel for the Plaintiff.

*Peter J. Henein, Shane Hardy, and Stefanie A. Holla*nd, counsel for the defendant Canadian Tire Corporation, Limited.

A.J. Esterbauer and Dale E. Schlosser, counsel for the defendant Jiangsu Sainty Sumex Tools Corp. Ltd..

ENDORSEMENT

F.L. MYERS J.

1 defendant Jiangsu Sainty Sumex Tools Corp. Ltd. moves to set aside the default judgment granted by Penny J. dated December 15, 2016 and its prior noting in default.

2 The defendant Canadian Tire also moves to set aside the default judgment or, at least, to vary it so that the *in rem* declarations concerning the plaintiff's intellectual property rights contained in the default judgment are either set aside or clearly stated to be non-binding on Canadian Tire.

3 Penny J. granted the default judgment after an undefended trial that the plaintiff booked and held without notice to counsel for Jiangsu Sainty Sumex or counsel for the co-defendant Canadian Tire.

4 For the reasons set out below, the default judgment must be set aside due to the failure of the plaintiff to make full and fair disclosure of material facts to Penny J. The noting in default of the defendant Jiangsu Sainty Sumex will be set aside on terms.

The Basic Allegations

5 Oversimplifying the facts, Canadian Tire was the plaintiff's biggest customer for its manufactured goods. The plaintiff alleges that Canadian Tire retained Jiangsu Sainty Sumex in China to outright copy the plaintiff's goods, its packaging and design get up, and its copyrighted materials. The plaintiff claims that Canadian Tire and Jiangsu Sainty Sumex have been unlawfully manufacturing and selling the copied goods for the last number of years in violation of the plaintiff's intellectual property rights causing it to suffer damages.

This Proceeding

6 In 2009 the plaintiff sued Canadian Tire and the defendant Technoflange who was then the manufacturer of the allegedly copied goods being sold by Canadian Tire. The proceeding has gone through a number of procedural changes so that the current court file number is dated 2010. The plaintiff added the defendant Jiangsu Sainty Sumex in 2012.

7 Jiangsu Sainty Sumex has been more than coy in its response or its non-response to the proceeding. Although it had local counsel attending court on a watching brief in 2012, it declined to participate. Its local counsel was aware of the plaintiff's motion to validate service against Jiangsu Sainty Sumex in 2014 and it declined to participate. One of the very many entities which may or may not be an alter ego of the Jiangsu Sainty Sumex or an affiliate was served under the Hague Convention in 2014. The Master validated service on Jiangsu Sainty Sumex on November 26, 2014. It did not defend before being noted in default on February 6, 2015. Its counsel threatened to bring a motion to set aside the noting in default from March to November, 2016 without doing anything other than setting up a 9:30 appointment to adjourn a date for its motion that had never been set and without serving any motion materials or even a draft statement of defence.

8 There were active discussions among counsel for the parties in November, 2016 as to the timing of a motion to set aside the noting in default. Without notice to either defendant, the plaintiff obtained a date and held an undefended trial against Jiangsu Sainty Sumex on December 15, 2016. Thereafter, although the plaintiff had a judgment in hand, it did not disclose the judgment to counsel for Jiangsu Sainty Sumex who continued to inquire about dates for a motion to set aside the noting in default. In fact, the defendants only learned of the judgment from the court staff when they tried to book a hearing and were told that judgment had already been obtained.

The Position of Canadian Tire

9 The default judgment was granted only against Jiangsu Sainty Sumex. Canadian Tire has been defending throughout. It has completed examinations for discovery of the plaintiff.

Canadian Tire is not in default. However the terms of the default judgment are significantly broader than just an *in personam* judgment for damages against Jiangsu Sainty Sumex.

10 At the plaintiff's request, the default judgment includes declarations that:

a. the plaintiff is the owner of a trade-mark in the unregistered distinguishing guise for its products;

b. the plaintiff has established goodwill in Canada for the appearance of its products as packaged;

c. the plaintiff's designs, specifications and pricing were confidential information that has been improperly received and used by Jiangsu Sainty Sumex;

d. Jiangsu Sainty Sumex directed public attention to its wares in such a way as to cause or be likely to cause confusion in Canada between its wares and those of the plaintiff contrary to s. 7 (b) of the *Trade-marks Act;*

e. Jiangsu Sainty Sumex has engaged in unfair competition by making unauthorized use of the plaintiff's confidential information, get-up, reputation, and unregistered trade-mark;

f. Jiangsu Sainty Sumex sold its own goods in association with images of the plaintiff's goods contrary to s. 7 (b) of the *Trade-marks Act*;

g. copyright subsists as literary works in the plaintiff's shop drawings for its goods and the unique tooling required to make them;

h. Jiangsu Sainty Sumex infringed the plaintiff's copyright by copying the plaintiff's shop drawings and allowing its goods to be sold in association with images of the plaintiff's goods.

11 The declarations that the plaintiff has trade-marks and copyright are *in rem* determinations. They bind the world including the defendant Canadian Tire. Yet Canadian Tire has defended expressly and put in issue the plaintiff's allegations that support the declarations. Moreover, the transcript of the undefended trial reveals that several allegations of wrongdoing, such as directing public attention to the wares of Jiangsu Sainty Sumex in association with images of the plaintiff's products, are actually based on evidence adduced and submissions made by the plaintiff against Canadian Tire either solely or in conjunction with the Jiangsu Sainty Sumex. Similarly, if Jiangsu Sainty Sumex "received" confidential information, implicitly Canadian Tire must have possessed the plaintiff's confidential information and unlawfully disclosed it to Jiangsu Sainty Sumex.

12 Canadian Tire has defended and denied all of those allegations in this proceeding to the plaintiff's knowledge. The plaintiff's counsel made no mention to Penny J. that he was seeking findings of fact and law that had a direct effect on the legal position of Canadian Tire and which had been put in issue in the proceeding expressly by Canadian Tire.

13 At the hearing of this motion, the plaintiff for the first time undertook to refrain from using the *in rem* declarations in the default judgment against Canadian Tire.[1] Yet, even if that is so, the judge hearing the trial will still be asked to make a decision that is directly contrary to the existing *in rem* declarations. If Canadian Tire succeeds at trial, there will be two inconsistent *in*

rem judgments of this Court on whether the plaintiff holds valid intellectual property rights in Canada.

14 Canadian Tire was plainly affected in its legal and direct economic interests by the relief sought by the plaintiff before Penny J. Yet the plaintiff failed to give Canadian Tire notice that the plaintiff was seeking relief against it at the undefended trial. The plaintiff also failed to disclose to Penny J. that Canadian Tire would be affected by the relief sought including the *in rem* relief. It is trite law that all persons affected by a proposed order are entitled to notice of the proceeding including, or especially, in an *in rem* case. *Union Natural Gas Co. v. Chatham Gas Co.*, 1917 CarswellOnt 104 (Ont. Sup. Ct.) at p. 3. Whether a default trial is properly regarded as an *ex parte* proceeding *vis-a-vis* the defaulting defendant, the plaintiff's request for *in rem* relief was certainly *ex parte* to Canadian Tire. The plaintiff should have notified Canadian Tire before seeking that relief from Penny J. *Coulson v. Secure Holdings Ltd.* (1978), 1 CPC 168 (Ont CA)

15 It is apparent that, at minimum, the default judgment cannot bind Canadian Tire.

The Position of Jiangsu Sainty Sumex

16 In addition to the declarations of right listed above, the default judgment also contains an award of damages, including punitive damages, costs, and interest against Jiangsu Sainty Sumex in the aggregate amount of $1,976,153.10. That is an *in personam* judgment binding only Jiangsu Sainty Sumex.

(a) *The Plaintiff Failed to Disclose to Penny J. the Trademark Opposition Board decision against it.*

17 In obtaining its judgment, both the *in rem* declarations that it owns intellectual property and the *in personam* award of damages for injury to the goodwill associated with the distinguishing guise of its goods, the plaintiff failed to mention to Penny J. that on August 31, 2015, the Trademark Opposition Board had ruled that the elements of the plaintiff's goods for which its alleges a trade-mark are primarily functional and did not have a distinctive or distinguishing guise. As such, the plaintiff was denied registration of its claimed trade-mark.

18 The plaintiff argues that enforcing an unregistered trade-mark at common law in Ontario is different than registering a trade-mark under the *Trade-marks Act,* RSC 1985, c T-13. But the Supreme Court of Canada has held that a purely functional design is not distinctive of the owner for trade-mark purposes. It held expressly that a functional guise cannot form the basis of either a registered or an unregistered trade-mark at common law. *Kirkby AG v Ritvik Holdings Inc.*, 2005 SCC 65 at para. 3. Similarly, an element that is functional cannot be "distinctive" for the purposes of passing off. In *Kirkby*, the Supreme Court of Canada noted that "[t]he doctrine of functionality goes to the essence of what is a trade-mark."

19 The plaintiff asked Penny J. to declare that it is the owner of a trade-mark in the unregistered, distinguishing guise of its products and to declare that the distinguishing guise has established goodwill without telling the Penny J. that the Trademark Opposition Board had held that the elements making up that guise were functional and were not distinctive. It did not tell Penny J. that in light of that holding, the Supreme Court of Canada has held that there can be no common law or unregistered trade-mark nor damages for passing off. I do not need to decide whether Penny J. was bound by those holdings or if the doctrine of issue estoppel prevented the

plaintiff from contesting them. It is enough to find that the plaintiff failed to tell the court a fact (the existence of the Board's finding) that is plainly relevant, if not fundamental, to the facts and legal issues that it put before the court without notice to the defendants

(b) *The Plaintiff Failed to Disclose to Penny J. that it has an Expired Patent*

20 In addition, the facts in the *Kirkby* case concerned the issue of whether trade-mark protection can exist in goods after a patent over the goods has expired. The Supreme Court of Canada held in that case that trade-mark protection was unavailable to extend the expired monopoly provided by the patent. The plaintiff did not tell Penny J. that a patent over its goods had expired as well. The plaintiff argues that the patent covered elements of its goods that were not the same as those that it says make up its distinctive guise. It argues that the patent is therefore irrelevant. But those facts are clearly in dispute. The plaintiff denied Penny J. the opportunity to rule on the relevancy of the patent. *In Parke, Davis & Co. v. Empire Laboratories Ltd.*, [1964] SCR 351, the Supreme Court of Canada held that in a trade-mark contest where there is a factual issue as to whether a claimed guise is functional rather than distinctive, the existence of an expired patent is relevant as it provides some evidence that the elements were considered functional by the owner to support its application for the patent. It was not up to the plaintiff to decide to keep relevant evidence from the court. Neither was it acceptable for Mr. Seed to make a narrow, technical relevancy call to justify withholding relevant facts from the court ignoring that the facts that he relied upon are disputed.

(c) *The Plaintiff Failed to Disclose to Penny J. that Jiangsu Sainty Sumex has counsel.*

21 In addition, the plaintiff did not tell Penny J. that Jiangsu Sainty Sumex has counsel and that they were in discussions, albeit lengthy, unproductive discussions, with that counsel concerning a motion date to set aside the noting in default of Jiangsu Sainty Sumex. Mr. Seed argues that he truly believed that Jiangsu Sainty Sumex was not going to defend and that it was just playing a stalling game while it continues to sell its goods through Canadian Tire for as long as it can until trial. I note that he did not file any evidence to support that factual submission. However, that view is consistent with the steps taken (or more particularly, not taken) by Jiangsu Sainty Sumex and its counsel for several years. However, once again, it was not for him to make that decision instead of making proper disclosure to Penny J. that Jiangsu Sainty Sumex was represented and was playing a tactical game of hide and seek.

22 Mr. Seed made the following submissions to Penny J. at the trial:

> And I don't know why the defendants, they've not come forward. They carry on business in Canada. They have no presence here. So, they've not come forward; they're taking their chances. [Emphasis added.]

23 And in asking Penny J. to award punitive damages, Mr. Seed submitted "The fact that they've, sort of, been in the shadows; they've avoided service; they were served; they didn't show up."

24 Both of these submissions were technically true but incomplete. While Jiangsu Sainty Sumex had not formally appeared, Penny J. might well have found it important to know that it had counsel who was claiming that he intended to move to set aside the noting in default. I expect that Penny J would have required Mr. Seed to provide notice of the undefended trial to

counsel opposite. This is consistent with best practices as discussed by D.M. Brown J. (as he then was) in *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 (CanLII) at para. 10. The court frequently requires notice to be provided in default proceedings although the *Rules* do not technically require it.

25 Noting a party in default without notice to opposing counsel violates *The Principles of Civility for Advocates,* endorsed by the Advocates' Society and the Court of Appeal. *Male v. The Business Solutions Group*, 2013 ONCA 382 (CanLII). Para. 19 of *Principles of Civility for Advocates* provides:

> Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

26 At the very least, the plaintiff should have disclosed to Penny J. that Jiangsu Sainty Sumex had counsel. Moreover, prior to moving for default judgment, it ought to have given notice to counsel for Jiangsu Sainty Sumex that it would not wait any longer for it to bring its threatened motion. It should have set a deadline and brought its own case management conference before a judge to push the defendant to get on with its motion to set aside the noting in default or to defend.

(d) *The Answer to Inappropriate Tactics is not More Inappropriate Tactics*

27 While Mr. Seed believed that counsel opposite was playing games, the plaintiff was doing so as well. Counsel for Jiangsu Sainty Sumex had been asking whether the plaintiff would consent to set aside the noting in default. The plaintiff and Mr. Seed made a deliberate decision to decline provide a position Instead, Mr. Seed asked the defendant a string of questions about the reasons for its default. Rather than simply consenting or declining to consent, it strung counsel opposite along through months of correspondence with no substantive purpose but to play out the plaintiff's own tactical game to try to smoke out evidence that it could use to defend the threatened motion to set aside the noting in default.

28 The fact that Mr. Seed had a willing participant in unproductive letter writing and delay in counsel opposite is not an answer. Default proceedings are not to be used for tactical gains. At para. 7 of *Nobosoft Corporation v. No Borders, Inc.,* 2007 ONCA 444 (CanLII), the Court of Appeal adopted the following eloquent statement of policy written by Malloy J. at para. 2 of *McNeill Electronics Ltd. v. American Sensors Electronics Inc.* (1996), 5 CPC (4th) 266 (Ont. Gen. Div.), reversed on other grounds (1998), 1998 CanLII 17693 (ON CA), 108 OAC 257 (C.A.):

> Motions to extend the time for delivery of pleadings and to relieve against defaults are frequently made and are typically granted on an almost routine basis. Usually opposing counsel will consent to such relief as a matter of professional courtesy. Where there is opposition to a motion of this kind, it is usually related to additional terms which are sought as a condition to the indulgence being granted or to issues of costs...It is not in the interests of justice to strike pleadings or grant judgments based solely on technical defaults. Rather, the Court will always strive to see that issues between litigants are resolved on their merits whenever that can be done with fairness to the parties.

29 Jiangsu Sainty Sumex is by no means innocent in this gamesmanship. Its reliance on technicalities to avoid service and its argument that it did not need to defend until the plaintiff obtained a further order extending the time for service were disingenuous and unworthy. The Master validated service and authorized the plaintiff to act on it. If Jiangsu Sainty Sumex says that legally it has the right to copy the plaintiff's goods because the plaintiff has no intellectual property rights in them, as ethically unappealing as such an argument may be, it should step up and have its defence adjudicated. Its games with its corporate name(s) and claiming to use local "agents" rather than admitting a presence, sending counsel on a watching brief but not filing a Notice of Intent to Defend for years after being served, threatening a motion for six months without delivering materials or even a draft statement of defence, are obvious stalling tactics that undermine its professed *bona fides*.

30 In *Canadian Imperial Bank of Commerce v. Petten*, 2010 ONSC 6726 (CanLII), Corbett J. discussed the importance of recognizing the harm done to the plaintiff and to the administration of justice by allowing defendants to game the system. He wrote,

> [6] The analysis of relative "prejudice", then, is seen in the context of the overall goal of orderly and efficient processing of cases, and not just the immediate impact on the parties to the dispute. An atomistic analysis of the "prejudice" to the moving party and to the responding party will almost always favour the moving party: if the motion is dismissed, the moving party will have lost the case and be liable for the claim. If the motion is allowed, the responding party will be delayed but may yet obtain and enforce its judgment, if it succeeds on the merits. Where it can be shown that a responding party's position may deteriorate if the motion is allowed, this may be addressed by terms, for example: expediting the trial, securing a potential judgment, or preserving evidence. Thus if the over-arching principle under Rule 19.08 is "relative prejudice", the "principles established by the authorities", the three-part test, would be rendered largely nugatory. This concern arises in this case: the defendants will be prejudiced if the order is not granted, in that judgment will remain against them without a decision on the merits. There is no evidence that CIBC would be prejudiced by further delay provided its executions remain in place.
>
> [7] Civil litigation is slow. The *Rules of Civil Procedure* are the framework within which a plaintiff may bring its action and move that action forward to eventual judgment. This process is an essential feature of an ordered society under the Rule of Law. Those fundamental principles are compromised if the process for obtaining judgment is too slow and too costly. And those fundamental principles are compromised if defendants may defy the process for months or years, thereby delaying a just resolution, on the merits.
>
> [8] Thus it is that a default judgment resulting from a defendant "gaming the system" or taking a "calculated risk" in not defending will not be set aside:
>
> > While debtors have rights, so too do creditors. It is not open to an alleged debtor to turn his back deliberately on a claim initiated against him and then, when it suits his purposes (and his pocket book) seek to do that which he should have done a good year before. Such conduct, in my view, is simply an attempt by a debtor to game the system and no interest of justice is served by rewarding such conduct.[5]
>
> [9] Certainly where the court can conclude that there is an oblique motive by a defendant in failing to defend a claim, then a motion to set aside a default is unlikely to succeed. But there does not have to be an oblique motive. Indeed, the court may pile insult on top of

> misery in making such a finding where, as is often the case, debtors fail to defend because of stress and anxiety. There is an objective standard of reasonableness to be applied to the totality of circumstances giving rise to the default, and any delay in moving to set the default aside. Where a defendant has not acted reasonably, the court should not set aside the default, even if the court cannot determine why the defendant has proceeded as he did.
>
> [10] In the case before me, I conclude that the defendants cannot satisfy the first two branches of the three-part test. They have a very weak case on the merits. And in these circumstances, I conclude that it would permit the defendants to "game" the system to set aside the default judgment. On the record before me, I am satisfied that this is what they are doing. But even if I could not go quite so far as to impute this oblique motive to the defendants, their conduct is not reasonable, and, to "preserve the overall integrity of the administration of justice", the default judgment should stand. [Notes omitted.]

Setting Aside the Default Judgment

31 I do not need to deal with the five part test for setting aside a default judgment in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII) as I have concluded that the default judgment cannot stand in light of the plaintiff's failure to give notice to the defendants and its failure to make full and frank disclosure of important facts to Penny J. In any event I am satisfied on balance on the five point test (other than the reason for the default). However, that still leaves the noting in default of Jiangsu Sainty Sumex to be considered.

32 With respect to the concern articulated by Corbett J. in *Petten*, in my view, the risk that the defendant has behaved inappropriately does not allow a plaintiff to fail in its duties to give notice and make full and fair disclosure. Moreover, I can deal effectively with the efforts by Jiangsu Sainty Sumex to delay the determination of the plaintiff's claim as part of the motion to set aside the noting in default. The judgment that required notice and was obtained without disclosure of material facts cannot be allowed to stand in this case.

Setting Aside the Noting in Default

33 Jiangsu Sainty Sumex argues that the plaintiff will not be prejudiced by setting aside the noting in default and allowing it to participate in the proceeding. The plaintiff has to go to trial on the merits in any event. While I agree that a trial is required on notice to all who are affected by the plaintiff's claims, Rule 19.05 (4) allows for a motion for default judgment to be deferred to the main trial. One possible outcome then is to set aside the judgment but decline to set aside the noting in default of Jiangsu Sainty Sumex. That would avoid the risk of inconsistent verdicts and reflect the failure of Jiangsu Sainty Sumex to participate properly in the proceedings.

34 The plaintiff has been prejudiced by the tactics employed by Jiangsu Sainty Sumex. The plaintiff has incurred costs chasing Jiangsu Sainty Sumex abroad and suffered years of delay in getting to trial to have its rights adjudicated upon while Jiangsu Sainty Sumex continues to sell into Canada from behind a wall of tactical games. I am convinced however, that Jiangsu Sainty Sumex is here now and wishes to participate. Its delay, while long, can be made excusable by appropriate terms. Because of the need for a full trial in any event, I am not prepared to find that the efforts of Jiangsu Sainty Sumex to game the system have succeeded. Moreover, the answer to its tactics is not more inappropriate procedural tactics. As discussed by Molloy J. above, the

goal of civil justice is to reach a fair result on the merits, to which the law now adds the modifiers "in an efficient, affordable, and proportional process."

35 It is clear to me that there are triable issues as to whether the plaintiff has the rights that it asserts so as to render the copying alleged against the defendants actionable. If the plaintiff has no intellectual property in its goods, the defendants may well be lawfully entitled to copy them. While I am very dubious, I am not prepared to assess without full evidence on the merits whether the plaintiff is correct in submitting that the decision of the Court of Appeal in *Orkin Exterminating Co. Inc. v. Pestco Co.*, 1985 CanLII 157 (ON CA), creates a provincial law right for a plaintiff to claim damages upon proof of deliberate copying alone in the absence of an underlying common law or statutory IP monopoly that prohibits copying.

36 Production of documents and a knowledgeable witness for discovery by Jiangsu Sainty Sumex will assist the court and the parties in determining the truth. Allowing Jiangsu Sainty Sumex to participate on terms to ensure that the trial proceeds with alacrity and that Jiangsu Sainty Sumex is truly present will provide fairness to all parties and lead to the earliest, just, and final resolution of the parties' disputes on their merits.

37 Jiangsu Sainty Sumex is a business that is participating in the Ontario economy. To that extent it is subject to our laws and enforcement processes. It has now appeared before the court and attorned to the jurisdiction. It can no longer hide abroad and it cannot be allowed to defend only to retreat to avoid the outcome of the litigation in which it has now decided to participate. Therefore, the court only sets aside the noting in default of the defendant Jiangsu Sainty Sumex when and if it complies with the following terms under Rules 1.05, 19.03(1), and 19.08(3) of the *Rules of Civil Procedure*, RRO 1990, Reg 194:

a. On or before May 31, 2017, Jiangsu Sainty Sumex pays to the accountant of the court the sum of $1,976,153.10 to stand charged as security for the outcome of the litigation plus $500,000 to stand charged as security for the plaintiff's costs if it receives an award of costs at trial. These sums are to be posted in cash or by an unconditional bond or letter of credit of unlimited duration drawn on a bank listed in schedule 1 to the *Bank Act*, SC 1991, c 46;

b. On or before June 16, 2017, Jiangsu Sainty Sumex delivers to the plaintiff's counsel a sworn and complete affidavit of documents together with copies of all documents listed in Schedule "A" to that affidavit;

c. On a date that is before July 31, 2017, to be chosen cooperatively by counsel for the parties, Jiangsu Sainty Sumex produces a witness for examination for discovery in Toronto who has firsthand knowledge of its actions in contracting with Canadian Tire and in manufacturing the goods that are the subject of this action.

38 While there is significant evidence and arguments to question the amount of damages asserted by the plaintiff, the amount adjudged represents the plaintiff's outer goalpost in November, 2016. Its damages may continue to mount. It is appropriate for there to be security posted for the full range of possible outcomes. If the plaintiff does not obtain judgment for the full amount posted, then the rest will be returned to Jiangsu Sainty Sumex.

39 The plaintiff acknowledges that its effort to set the matter down for trial has to be set aside to

accommodate further discoveries. Accordingly, if the noting in default is set aside upon Jiangsu Sainty Sumex complying with the foregoing terms, the action is then removed from the trial list.

40 Counsel are to schedule a case conference before me in the week of August 21 or 28, or before then if Jiangsu Sainty Sumex fails to comply with any of the listed terms on a timely basis, in order to schedule the next steps to get this action to trial. Counsel should agree on a date and then contact my Assistant to book the case conference.

Costs

41 The plaintiff may file no more than five pages of submissions on costs, including costs thrown away to date, its costs outline, and any offers to settle on which it relies by May 12, 2017. The defendants may each file no more than five pages of submissions on costs, their costs outlines, and any offers to settle on which they rely by May 26, 2017. All materials will be filed in searchable pdf format as an attachment to an email to my Assistant. No case law or statutory material is to be delivered. References to case law and statutory material, if any, shall be by hyperlink to CanLII embedded in the submissions.

F.L. MYERS J.

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1 Para. 93 of the plaintiff's affidavit falls far short of the clear undertaking given by Mr. Seed at the hearing.

ASTRAZENECA CANADA INC. Plaintiff	-and- SAMEH SADEK also known as SAM SADEK et al. Defendants	Court File No. CV-18-602745-00 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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