Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N:

BANNERS BROKER INTERNATIONAL LIMITED and STELLAR POINT, INC., by their Receiver MSI SPERGEL INC.

Plaintiffs

- and -

RAJIV DIXIT, KULDIP JOSUN, DIXIT HOLDINGS INC., DIXIT CONSORTIUM INC., DREAMSCAPE VENTURES LTD., WORLD WEB MEDIA INC., and REAL PROFIT LIMITED

Defendants

PLAINTIFF'S BOOK OF AUTHORITIES

(*Ex Parte* Motion for a *Mareva* Injunction, Returnable May 31, 2016)

May 30, 2016

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

David S. Ward LSUC #: 33541W
Tel: 416.869.5960
Fax: 416.640.3154
dward@casselsbrock.com

Christopher Horkins LSUC #: 61880R
Tel: 416.815.4351
Fax: 416.642.7129
chorkins@casselsbrock.com

Lawyers for the Plaintiffs

INDEX

INDEX

TAB 1

Most Negative Treatment: Distinguished
Most Recent Distinguished: Geophysical Service Inc. v. Sable Mary Seismic Inc. | 2003 NSSC 73, 2003 CarswellNS 129, [2003] N.S.J. No. 118, 32 C.P.C. (5th) 280, 667 A.P.R. 303, 213 N.S.R. (2d) 303, 121 A.C.W.S. (3d) 945 | (N.S. S.C., Apr 1, 2003)

1985 CarswellMan 19
Supreme Court of Canada

Aetna Financial Services Ltd. v. Feigelman

1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161, 29 B.L.R. 5, 29 A.C.W.S. (2d) 267, 32 Man. R. (2d) 241, 4 C.P.R. (3d) 145, 55 C.B.R. (N.S.) 1, 56 N.R. 241, J.E. 85-192

AETNA FINANCIAL SERVICES LIMITED v. FEIGELMAN et al.

Ritchie*, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

Heard: September 26, 1983
Judgment: January 31, 1985

Counsel: *D.C.H. McCaffrey, Q.C.*, for appellant.
W.P. Riley, Q.C., and *P. Simm*, for respondents.

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Remedies

II Injunctions
II.1 Rules governing injunctions
II.1.e Mareva injunctions
II.1.e.iii Miscellaneous

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.ii Where statutory procedures available

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets

II.2.c.iii.C.1 Relevance of jurisdiction to which assets removed

Headnote

Injunctions --- Rules governing injunctions — Mareva injunctions — General

Injunctions --- Availability of injunctions — Mareva injunctions — Real risk of removal — Relevance of jurisdiction to which assets removed

Injunctions — Mareva Injunctions — Interlocutory order restraining transfer of assets to another province pending trial — Order made against federally incorporated company with exigible assets in other provinces — Order inappropriate in context of Canadian federal system — Plaintiff not exposed to inevitable or irreparable loss: plaintiff having easily enforceable rights under federal legislation in event of defendant's default or winding-up and defendant not removing assets beyond reach of Canadian courts — Intervention by Supreme Court of Canada warranted where court below erring in law in failing to give due consideration and weight to position of courts and parties when dealing with interlocutory quia timet order in federal jurisdiction — Injunction set aside.

Appellant, a federally incorporated company with head office in Montreal and offices in Toronto, factored accounts receivable for its clients on a recourse/non-recourse basis. Its operations for its Manitoba clients were largely contracted to its Montreal office as its now-closed Manitoba office had been primarily to promote business. The asset in question, valued at about $270,000, had been acquired from collection in receivership proceedings concerning appellant's other Manitoba client and was about to be transferred to one of appellant's offices out of Manitoba. Appellant had appointed a receiver when respondent Pre-Vue defaulted on debentures issued to and held by it. Respondent Pre-Vue and its stockholders later brought an action for unliquidated damages arising from the allegedly improper appointment of the receiver and obtained an ex parte interlocutory order from the Court of Queen's Bench enjoining the movement of assets out of Manitoba. An application to set aside the *Mareva* injunction was dismissed but the injunction's terms were modified to set a ceiling to the value of the assets affected. The Court of Appeal found this type of injunction to be available and varied the injunction granted only to the extent of allowing its discharge through the posting of security. The three threshold issues here are: (a) is a *Mareva* injunction available in Manitoba as a matter of law; (b) is it available in these circumstances; (c) is the discretion of the court of first instance properly reviewable on appeal?

Held:

The appeal should be allowed.

The rightful removal of assets in the ordinary course of business by a resident respondent to another part of the federal system will not of itself trigger an exceptional remedy such as the *Mareva* injunction. The gist of the *Mareva* action is the right to freeze exigible assets when found in the jurisdiction, wherever the defendant may reside, providing there is a cause of justiciable action between the plaintiff and defendants in the courts of the jurisdiction. Unless there is a genuine risk of disappearance of assets, however, either inside or outside the jurisdiction, the injunction will not issue. The harshness of the *Mareva* injunction, which is usually issued ex parte, is relieved against or justified in part by the Rules of Practice which allow the defendant an opportunity to move against the injunction immediately. The injunction is in personam and affords no priority to the potential creditor.

Neither the presence nor the absence of legislation granting remedies similar to the *Mareva* injunction precludes the issuance of a protective injunction. The entitlement to issue a *Mareva* injunction springs from the authority of the court at law to make the order and the qualification of the respondents under the rules and tests applied by the courts in doing so.

One factor considered below was the intention of appellant to transfer assets to Quebec. Assets exceeding the value of assets affected by the order under appeal are in Ontario, a province with which Manitoba has arrangements for the reciprocal enforcement of judgments. As well, Quebec accords a means of enforcement of Manitoba judgments rendering ineffective any argument that the respondent would be exposed to some inevitable or irreparable loss if the assets of appellant were transferred from Manitoba to Quebec. In addition, respondent had extensive and easily enforceable rights under the Bankruptcy Act and the Canada Business Corporations Act in the event of an attempt to defraud creditors through a business default or a winding-up of the company.

While the superior provincial courts undoubtedly have the statutory power to issue a *Mareva* injunction, the rules as developed in England do not properly reflect the federal concern in these circumstances. Considerations of jurisdiction — *Mareva* cases were to prevent removal of assets from the jurisdiction and the subsequent defeat of a creditor's claim — are more complex in the federal context than in a unitary state. In some ways "jurisdiction" in these circumstances extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. In the Canadian federal system, appellant, a federally incorporated company, was not a foreigner or even a non-resident in that it was capable of residing throughout Canada and did so in Manitoba. Appellant did not intend to default on its obligations. It did not seek to defraud its Manitoba creditors or the legal processes of the Manitoba courts through a clandestine transfer of its assets and it did not remove those assets from the national jurisdiction in which it maintained its corporate existence. Finally, there are the procedures of pursuit open to the respondent in tracing these assets through to their destination in Quebec or in recovering from the assets of the appellant in Ontario.

An appellate court should not intervene and alter a discretionary order issued by a court of first instance where no sufficient error in law on the part of the courts below has been revealed. The appeal court here, however, did not give due consideration and weight to the position of the courts and of the parties when dealing with an interlocutory quia timet order in a federal jurisdiction. For this reason the court must intervene where, apart from this consideration, intervention would be unwarranted. [Headnote from the Supreme Court of Canada reproduced by permission of the Minister of Supply and Services Canada.]

Table of Authorities

Cases considered:

Amer. Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.) — *considered*

Aslatt v. Southampton Corp. (1880), 16 Ch. D. 143 — *considered*

Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 (Ch.D.) — *considered*

Bedell v. Gefaell, [1938] O.R. 726, [1938] O.W.N. 437, [1938] 4 D.L.R. 443 (C.A.) — *referred to*

Bekhor (A.J.) & Co. v. Bilton, [1981] 2 W.L.R. 601, [1981] 2 All E.R. 565 (C.A.) — *referred to*

Bradley Bros. (Oshawa) Ltd. v. A to Z Rental Can. Ltd., [1970] 3 O.R. 787, 64 C.P.R. 189, 14 D.L.R. (3d) 171 (C.A.) — *considered*

B.P. Explor. Co. (Libya) v. Hunt, [1981] 1 W.W.R. 209, 16 C.P.C. 168, 114 D.L.R. (3d) 35 (N.W.T.S.C.) — *considered*

Burdett v. Fader (1903), 6 O.L.R. 532, affirmed 7 D.L.R. 72 (C.A.) — *referred to*

Campbell v. Campbell (1881), 29 Gr. 252 — *considered*

C.P. Airlines Ltd. v. Hind (1981), 32 O.R. (2d) 591, 14 B.L.R. 233, 22 C.P.C. 179, 122 D.L.R. (3d) 498 (H.C.) — *referred to*

Chesapeake & Ohio Ry. Co. v. Ball, [1953] O.R. 843, appeal quashed [1953] O.W.N. 877 (C.A.) — *considered*

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

Cretanor Maritime Co. v. Irish Marine Mgmt. Ltd.; The Cretan Harmony, [1978] 1 W.L.R. 966, [1978] 3 All E.R. 164 (C.A.) — *referred to*

De Beers Consol. Mines Ltd. v. U.S.; Soc. Inc. Forestière du Congo v. U.S., 325 U.S. 212, 89 L. Ed. 1566 (1945) — *referred to*

Ferguson v. Ferguson (1916) 26 Man. R 269, 10 W.W.R. 113, 29 D.L.R. 364 (K.B.) — *referred to*

Great Western Ry. Co. v. Birmingham & Oxford Junction Ry. Co. (1848), 2 Ph. 597, 41 E.R. 1074 (L.C.) — *considered*

Hepburn v. Patton (1879), 26 Gr. 597 — *referred to*

Humphreys v. Buraglia (1982), 135 D.L.R. (3d) 535, 39 N.B.R. (2d) 674, 103 A.P.R. 674 (C.A.) — *considered*

Iraqi Min. of Defence v. Arcepey Shipping Co. S.A., [1980] 2 W.L.R. 488, [1980] 1 All E.R. 480 (Q.B.D.) — *referred to*

Law Soc. of Upper Can. v. MacNaughton, [1942] O.W.N. 551 (C.A.) — *considered*

Liberty Nat. Bank & Trust Co. v. Atkin (1981), 31 O.R. (2d) 751, 20 C.P.C. 55, 121 D.L.R. (3d) 160 (H.C.) — *referred to*

Lister & Co. v. Stubbs, 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (C.A.) — *applied*

Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A., [1980] 1 All E.R. 213 (C.A.) — *considered*

Mills v. Petrovic (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.) — *referred to*

Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 74, [1975] 3 All E.R. 282 (C.A.) — *considered*

OSF Indust. Ltd. v. Marc-Jay Invt. Inc. (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446 (H.C.) — *referred to*

Pac. Invt. Co. v. Swan (1898), 3 Terr. L.R. (C.A.) — *referred to*

Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L.D. (1982), 141 D.L.R. (3d) 498, 53 N.S.R. (2d) 338, 109 A.P.R. 338 (T.D.) — *referred to*

Pivovaroff v. Chernabaeff (1977), 16 S.A.S.R. 329 (South Austrialia S.C.) — *considered*

Quinn v. Marsta Cession Services Ltd. (1981), 34 O.R. (2d) 659, 16 B.L.R. 126, 24 C.P.C. 214, 113 D.L.R. (3d) 109, leave to appeal to Div. Ct. granted 37 O.R. (2d) 373, 16 B.L.R. 131, 37 C.P.C. 78 (H.C.) — *referred to*

Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, [1980] 3 All E.R. 409 (C.A.) — *referred to*

Rasu Maritime S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] Q.B. 644, [1977] 3 All E.R. 324 (C.A.) — *considered*

Robinson v. Pickering (1881), 16 Ch. D. 660 (C.A.) — *referred to*

Rosen v. Pullen (1981), 16 B.L.R. 28, 126 D.L.R. (3d) 62 (Ont. H.C.) — *considered*

Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima (1982), 42 B.C.L.R. 1, 33 C.P.C. 42 (C.A.) — *considered*

Third Chandris Shipping Corp. v. Unimarine S.A., [1979] Q.B. 645, [1979] 2 All E.R. 972 (C.A.) — *considered*

Toronto v. McIntosh (1977), 16 O.R. (2d) 238 (H.C.) — *referred to*

Z Ltd. v. A-Z and AA-LL, [1982] Q.B. 558, [1982] 2 W.L.R. 288, (sub nom. *Z. Ltd. v. A.)* [1982] 1 All E.R. 556 (C.A.) — *considered*

Statutes considered:

Absconding Debtors Act, R.S.O. 1980, c. 2, s. 2.

Bankruptcy Act, R.S.C. 1970, c. B-3.

Canada Business Corporations Act, 1974-75-76 (Can.), c. 33, s. 204(7).

Civil Code (Que.), art. 1220.

Code of Civil Procedure, R.S.Q. 1977, c. C-25, arts. 178, 179, 180, 752.

Common Law Procedure Act, 1854 (17 & 18 Vict.), c. 125.

Corporations Act, 1976 (Man.), c. 40 (also C.C.S.M., c. C225), ss. 186 [am. 1982-83-84, c. 5, ss. 11-14], 187 [am. 1980-81, c. 27, s. 22; 1982-83-84, c. 5, s. 15].

Fraudulent Conveyances Act, C.C.S.M., c. F160.

Fraudulent Conveyances Act, R.S.O. 1980, c. 176.

Garnishment Act, C.C.S.M., c. G20.

Judicature Act, R.S.A. 1980, c. J-1, s. 13(2).

Judicature Act, R.S.N. 1970, c. 187, s. 21(*m*).

Judicature Act, R.S.N.B. 1973, c. J-2, s. 33 [am. 1981, c. 6, s. 1].

Judicature Act, 1972 (N.S.), c. 2, s. 39(9).

Judicature Act, R.S.O. 1980, c. 223, s. 19(1).

Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15(4).

Law and Equity Act, R.S.B.C. 1979, c. 224 s. 36.

Queen's Bench Act, C.C.S.M., c. 280, s. 59.

Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45(8).

Reciprocal Enforcement of Judgments Act, C.C.S.M., c. J20.

Supreme Court Act, 1981 (Eng.), c. 54, s. 37(3).

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5), c. 49, s. 45(1).

Rules considered:

Alberta Rules of Court, R. 468.

Federal Court Rules, C.R.C. 1978, c. 663, R. 470(1).

Manitoba Queen's Bench Rules, RR. 330(1), 526 [am. Man. Reg. 138/84, s. 35], 582.

Nova Scotia Civil Procedure Rules, R. 43.02.

Ontario Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, R. 372.

Saskatchewan Queen's Bench Rules, R. 389.

Authorities considered:

21 Hals. (3d) 348, para. 729.

18 Hals. (4th) 166, para. 358.

24 Hals. (4th) 518, para. 918.

Kerr on Injunctions, 6th ed. (1927), p. 6.

McAllister, "Mareva Injunctions" (1982), 28 C.P.C. 1.

Rogers and Hately, "Getting the Pretrial Injunction" (1982), 60 Can. Bar Rev. 1.

Sharpe, Injunctions and Specific Performance (1983), pp. 94-97.

Stockwood, "Mareva Injunctions" (1981), 3 Advocates Q. 85.

Appeal from judgment of Manitoba Court of Appeal, [1983] 2 W.W.R. 97, 36 C.P.C. 20, 143 D.L.R. (3d) 715, 19 Man. R. (2d) 295 , dismissing appeal from judgment of Wilson J. dismissing application to set aside ex parte interlocutory injunction granted by Wilson J.

The judgment of the court was delivered by *Estey J.*:

1 The Manitoba Court of Appeal affirmed the trial judge's order granting an injunction which restrained the appellant from transferring certain identified assets out of Manitoba to the appellant's offices in either Toronto or Montreal [reported at [1983] 2 W.W.R. 97, 36 C.P.C. 20, 143 D.L.R. (3d) 715, 19 Man. R. (2d) 295]. This appeal raises squarely and simply the question of the availability of interlocutory orders restraining a defendant in a civil action from disposing of or handling assets in any specific way prior to trial. In England this is said to have originated in a proceeding now identified by the expression "*Mareva* injunction".

2 The facts are few and simple. The appellant Aetna Financial Services Limited (for convenience hereinafter called "Aetna") is a company incorporated under the Canada Business Corporations Act, 1974-75-76 [Can.], c. 33, with its head office in the city of Montreal and offices in Toronto. At one time it had an office in Manitoba for the promotion of business but not for the processing of business. At the present time the company has contracted its operations largely, if not entirely, to the Montreal office. Its operations consist of the factoring of accounts receivable for its clients on a basis of recourse or non-recourse. In this business Aetna had only two accounts or customers in the province of Manitoba, one of them being the respondent Pre-Vue Company (Canada) Ltd. The asset in question was acquired from the collection in receivership proceedings concerning the second Manitoba customer Sakine. This realization was in the approximate sum of $270,000

which Aetna was about to transfer to its offices outside of Manitoba, either Toronto or Montreal, when these proceedings were commenced.

3 When the respondent Pre-Vue Company (Canada) Ltd. (for convenience hereafter called "Pre-Vue") went into default under the debentures issued to and held by Aetna, Aetna appointed a receiver by extra-judicial unilateral action according to an asserted right under the debenture. The appointment of the receiver was subsequently confirmed by the Court of Queen's Bench in Manitoba. The appointment of the receiver was without prejudice to any action by Pre-Vue or its shareholders against Aetna or the receiver. The action against which the present application for injunction rests arose out of this. By statement of claim dated 30th March 1981 Pre-Vue and its shareholders commenced action claiming unliquidated damages, and alleging, inter alia, that Aetna, in contravention of the terms of the debenture, failed to give Pre-Vue the allotted time to cure its default, and therefore the appointment of the receiver was improper. There may well be issues arising out of this appointment of the receiver but they are not of concern in the disposition of this appeal dealing as it does with the interlocutory injunction only. Some two years after the confirmation by the court of the appointment of the receiver-manager, the respondents applied for and obtained the injunction in question, wherein it was ordered that the appellant be:

> ... restrained and enjoined, until the further order of the Court, from removing from Manitoba or otherwise disposing of or dealing with any of its assets within Manitoba, including and in particular any monies paid to or received by the receiver-manager appointed by the Defendant, Aetna Financial Services Limited, to take control and possession of the property and undertaking of Sekine Canada Ltd., save in so far as such assets do not exceed in value the sum of $997,711.21.

In July 1982 an application to set aside this ex parte interlocutory order was dismissed. The terms of the injunction were modified, however, so as to restrict the movement of assets by Aetna only to the extent of $250,000.

4 In the Court of Appeal, the majority determined that an injunction of the type herein issued by the Trial Division was available under the law of the province of Manitoba and that in the circumstances the exercise of discretion by the learned trial judge should not be the subject of intervention by the Court of Appeal. The majority varied the judgment of the Trial Division only to the extent of "permitting the discharge of the injunction, on the posting of security by Aetna" [p. 111].

5 Huband J.A. dissented, not on the grounds that the so-called *Mareva* injunction is not available in law in the province of Manitoba, but that under the circumstances injunctive relief should not have been granted. His Lordship summarized his position [pp. 119-20]:

> It seems to me that a Mareva injunction should be issued in this jurisdiction only where a strong case has been made out that it is necessary to do so to prevent an imminent injustice.
>
> Far from a strong case, I think the present application for injunctive relief is decidedly weak. It has none of the elements of fraud or sham or movement of assets in order to escape lawful claims which have become part of the jurisprudence justifying Mareva-type injunctions.

6 There are three threshold issues:

> a) As a matter of law, is this type of injunction available in Manitoba?
>
> b) Is this type of injunction available in the circumstances revealed in the record on this appeal?
>
> c) Is the exercise of discretion by the court of first instance properly reviewable on appeal?

7 The rule as to the availability of an interlocutory injunction generally has been variously stated but, in my view, it is convenient to refer to the succinct description of that order as found in *Chesapeake & Ohio Ry. v. Ball*, [1953] O.R. 843 at 854-55, where McRuer C.J.H.C. stated:

> The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff would ever succeed in the action. I may put it in a different way: If on one hand a fair *prima facie* case is made out and there will be irreparable damage if the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.

Reconsideration of requirement that the plaintiff must show a "strong *prima facie* case" has come in the wake of the decision of the House of Lords in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504. However, the other principles enunciated by McRuer C.J.H.C. remain unimpaired. As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the Court prior to trial. Where the injunction maintains the status quo in a way which is fair to both sides, the order is attainable; but, simply because the order would not injure the defendant is not sufficient reason to move the Court to grant what is generally regarded as an extraordinary intervention. In *Law Soc. of Upper Can. v. MacNaughton*, [1942] O.W.N. 551 (C.A.), Rose C.J.H.C. stated at p. 551:

> I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury.

8 A second and much higher hurdle facing the litigant seeking the exceptional order is the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial. Execution in this sense includes judicial orders impounding assets or otherwise restricting the rights of the defendant without a trial. This was enunciated by Cotton L.J. in *Lister & Co. v. Stubbs*, 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 at 799 (C.A.), as follows:

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

Similarly, the limited availability of an injunction to enjoin a defendant from disposing of his assets were referred to in *Burdett v. Fader* (1903), 6 O.L.R. 532 at 533, affirmed 7 D.L.R. 72 (C.A.), by Boyd C.:

> The plaintiff may or may not get judgment in this case, but he proposes to restrain the sale or disposition of this stock by the defendant till that is finally determined.
>
> There is no authority for such a course in an action of tort. If the plaintiff is a creditor before judgment, he can sue on behalf of himself and all creditors to attack a fraudulent transfer. If the plaintiff is a judgment creditor, he can proceed by execution to secure himself upon the debtor's property. But if the litigation is merely progressing and the status of creditor not established, it is not the course of the Court to interfere *quia timet* and restrain the defendant from dealing with his property until the rights of the litigants are ascertained.

The principle has been restated in modern times in *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 at 193 (Ch. D.), where Megarry V.C. stated:

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction

freezing their assets.

This problem has been stated and restated many times in this country in the courts of Manitoba and elsewhere: *OSF Indust. Ltd. v. Marc-Jay Invt. Inc.* (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446 (H.C.); *Pivovaroff v. Chernabaeff* (1977), 16 S.A.S.R. 329; *Bedell v. Gefaell*, [1938] O.R. 726, [1938] O.W.N. 437, [1938] 4 D.L.R. 443 (C.A.) ; *Hepburn v. Patton* (1879), 26 Gr. 597; *Pac. Invt. Co. v. Swan* (1898), 3 Terr. L.R. 125 (C.A.); *Ferguson v. Ferguson* (1916), 26 Man. R. 269, 10 W.W.R. 113, 29 D.L.R. 364 (K.B.).

9 The general rule in *Lister* has had wide application in the law: see Sharpe, Injunctions and Specific Performance (1983), at pp. 94-97. However, the abhorrence which the common law has felt toward allowing execution before judgment has always been subject to some obvious exceptions:

1. for the preservation of assets, the very subject matter in dispute, where to allow the adversarial process to proceed unguided would see their destruction before the resolution of the dispute:

To a large extent this exception to the *Lister* rule has been codified in the various provincial and federal procedural rules. Rule 330(1) of the Manitoba Queen's Bench Rules is typical and provides:

330(1) The court may, on the application of any party and on such terms as may be just, make an order for the detention or preservation of property, being the subject of the action...

See also: Ontario Rules of Practice, R.R.O. 1980, Reg. 540, R. 372; Federal Court Rules, C.R.C. 1978, c. 663, R. 470(1); Nova Scotia Civil Procedure Rules, R. 43.02; Saskatchewan Queen's Bench Rules, R. 389; Alberta Rules of Court, R 468.

That the courts had jurisdiction to make an order for the preservation of property pending litigation was, however, recognized even prior to passage of the Rules. In *Great Western Ry. Co. v. Birmingham & Oxford Junction Ry. Co.* (1848), 2 Ph. 597, 41 E.R. 1074 (L.C.), Cottenham L.C. observed, at p. 1076, as follows:

It is certain that the Court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the Court prevents by its injunction. Such are the cases *Echliff v. Baldwin* (16 Ves. 267), [603] *Curtes v. Lord Buckingham* (3 V. & B. 168), *Spiller v. Spiller* (3 Swan, 556), per Lord Redesdale in Dow. 440. It is true that the Court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favour of the Plaintiff.

Although the *Great Western Ry.* case was decided before *Lister v. Stubbs*, it is nonetheless still accepted that an injunction to preserve the very subject-matter of the action is not to be equated with an injunction of the *Mareva* variety. This distinction was recently restated by Craig J. in *Rosen v. Pullen* (1981), 16 B.L.R. 28, 126 D.L.R. (3d) 62 at 74-75 (Ont. H.C.):

It is unnecessary for the Court to consider the present case on the basis of a *Mareva* injunction because the very subject-matter of the action is the letter of credit in question. It is not a case of an action against a defendant based on a debt where there is a likelihood that the defendant will remove available assets. See Williston & Rolls, *The Law of Civil Procedure*, vol. 2 (1970), p. 585, cited with approval by Lerner J. in *OSF Industries Ltd. v. Marc-Jay Investments Inc.* (1978), 20 O.R. (2d) 566 at p. 567, 88 D.L.R. (3d) 446 at p. 447, 7 C.P.C. 57, as follows:

> (*a*) An injunction will not be granted to restrain a defendant from parting with or encumbering his property before a creditor has established his right by judgment.

The result would be entirely different if the property likely to be disposed of is the very subject matter of the litigation.

2. where generally the processes of the court must be protected even by initiatives taken by the court itself;

3. to prevent fraud both on the court and on the adversary:

> In *Campbell v. Campbell* (1881), 29 Gr. 252, both the general rule and the exception to it on the basis of fraud, were succinctly stated by Boyd C. at pp. 254-55, as follows:
>
> > Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

More recent cases in which the fraud exception has been applied include *Toronto v. McIntosh* (1977), 16 O.R. (2d) 238 (H.C.); and *Mills v. Petrovic* (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.).

4. quia timet injunctions were generally permitted under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction.

10 Initially the Court of Appeal of the United Kingdom found its jurisdiction to issue this type of quia timet order in a section of the judicature legislation that ultimately became s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925 [(15 & 16 Geo. 5), c. 49] which authorizes the court to issue an injunction where it appears to the court "to be just or convenient" that the order should be made. In the rise of the *Mareva* injunction in the Court of Appeal, the source of authority for the Supreme Court was found to reside in this provision which can be traced back through a succession of statutes reaching back to at least the Common Law Procedure Act, 1854 [(17 & 18 Vict.), c. 125]. In later pronouncements concerning this type of injunction, the jurisdiction to do so has been traced even further back into the antiquity of the London Commercial Court. As we shall see, Canadian legislation has followed the same course as s. 45. *Lister*, supra, and many other authorities, notably *Aslatt v. Southampton Corp.* (1880), 16 Ch. D. 143, have made it clear, however, that these words in the statute do not authorize a court to issue an injunction "because the court thought it convenient" [p. 148]. Nor in the words of the authors of Halsbury's Laws of England, 4th ed., vol. 24, p. 518, para. 918, has this provision altered the general rules applying to the issuance of interlocutory injunctions.

11 Section 19(1) of the Ontario Judicature Act is to the same effect as the United Kingdom provision, as are most of the comparable provisions in the provincial statutes across the country:

> British Columbia, Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36;
>
> Alberta, Judicature Act, R.S.A. 1980, c. J-1, s. 13(2);
>
> Saskatchewan, the Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45(8);
>
> Manitoba, the Queen's Bench Act, C.C.S.M., c. C280, s. 59;

> Ontario, Judicature Act, R.S.O. 1980, c. 223, s. 19(1);
>
> Nova Scotia, Judicature Act, 1972 (N.S.), c. 2, s. 39(9);
>
> New Brunswick, Judicature Act, R.S.N.B. 1973, c. J-2, s. 33 [am. 1981, c. 6, s. 1];
>
> Prince Edward Island, Judicature Act, R.S.P.E.I. 1974, c. J-3, s. 15(4);
>
> Newfoundland, the Judicature Act, R.S.N. 1970, c. 187, s. 21(*m*).

We are here particularly concerned with s. 59(1) of the Queen's Bench Act of Manitoba.

12 The Quebec Code of Civil Procedure, R.S.Q. [1977], c. C-25, provides for interlocutory injunctions in art. 752 "when the applicant appears to be entitled to it". These words, given their plain meaning, clothe the court with at least much authority and latitude as the jurisdiction to enjoin where it is found "to be just and convenient". The article goes on to provide against the very eventuality contemplated by the application for the *Mareva* type of order here:

> ... and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

The authority of the superior court to respond to an application based on the appropriate facts and demonstrated in the manner prescribed by the Code is at least equal to that of the superior courts of the other provinces.

13 The statutory powers of the courts in Manitoba to issue such injunctive relief is undoubted; the question is, as Hamilton J. put it in *Hawes v. Szewczyk*, Man. Q.B., 18th April 1979, unreported, noted at [1979] 2 A.C.W.S. 274, should the jurisdiction be exercised? This question can only be answered by balancing the principles enunciated in *Lister* on the one hand and those of *Rasu* [*Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*Pertamina*), [1978] Q.B. 644, [1977] 3 All E.R. 324 (C.A.)] on the other.

14 In *Lister* itself, the issue turned on the narrow distinction on the facts of that case between the debtor-creditor relationship on the one hand (wherein no judicial intervention would be authorized before trial) and the cestui que trust relationship on the other hand (where judicial intervention would intervene to protect the trust res). *Lister* itself recognized at least three exceptions to the general principle: firstly, where the res of the action was demonstrably the property of the claimant; secondly, where the relationship between the adversaries included a condition whereby the defendant-debtor could not, without the acquiescence of the claimant-creditor, defend the claim; and thirdly, the trustee-beneficiary relationship.

15 While the law has long known exceptions to the *Lister* rule, it was not until a series of maritime disputes arose that the courts consciously began to build up a special code of rules or subrules for the intervention by the court before judgment, and indeed, before trial, where circumstances warranted such action in the interest of the parties, the community and the law generally. Beginning in 1975, these exceptions to the *Lister* rule came into judicial prominence. They have been grouped by the courts, and legal writers generally, under the new legal generic, the *Mareva* injunction.

16 Beginning in early 1975 there were four cases in England arising in the shipping business where the rule in *Lister* was suspended. These are, in their chronological order:

> — *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 74, [1975] 3 All E.R. 282 (C.A.);
>
> — *Mareva Companie Naviera S.A. of Panama v. Int. Bulk Carriers S.A.*, [1980] 1 All E.R. 213 (C.A.);
>
> — *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak, etc.* (*Pertamina*), supra; and
>
> — *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645, [1979] 2 All. E.R. 972 (C.A.).

In the midst of this development process in the United Kingdom came the Australian case, *Pivovaroff v. Chernabaeff*, supra,

which reviewed the English authorities but declined to follow them.

17 In *Nippon* the shipowners, being unable to locate the defendant charterers, commenced an action for overdue hire and moved on an ex parte basis, as the defendants could not be located, for an order enjoining the defendants from transferring out of the jurisdiction moneys known to be in a London bank account in the name of the defendants. The order was granted as asked, Lord Denning M.R. stating, at p. 283:

> It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this court should not make an order such as is asked for here. It is warranted by s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which says the High Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient so to do. It seems to me that this is just such a case.

Lane L.J. agreed because of the danger of the plaintiff losing money "... to which he is admittedly entitled" [p. 284], although no one made such an admission, as the defendant at no stage of the process appeared.

18 *Mareva* followed one month later although it was not reported until 1980. In *Mareva*, the defendant charterers again did not appear and the reference to their argument in Lord Denning's judgment appears to be in error. The ship was out of the jurisdiction, the defendants had disappeared, and the shipowners sought to enjoin the disposal of moneys known to be in a London bank account in the name of the defendants. Because the order in *Nippon* had been made without any reference to the *Lister* case, the High Court, on ex parte application, had refused the injunction. In the Court of Appeal the *Lister* case was avoided by reliance upon s. 45 of the Supreme Court of Adjudicature Act mentioned above in the *Nippon* case and upon a commentary on the resultant powers of the court in Halsbury's. Lord Denning M.R. then continued, at p. 215:

> In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it.

In explanation of this conclusion, the Master of the Rolls stated on the same page:

> There is money in a bank in London which stands in the name of these charterers. The charterers have control of it. They may at any time dispose of it or remove it out of this country. If they do so, the shipowners may never get their charter hire. The ship is now on the high seas.

Lord Roskill, in concurring, distinguished the *Lister* case on the basis that by a clause in the charterparty, the shipowners "have a lien upon ... all sub-freights for any amounts due under this Charter..." [p. 216]. The order in *Mareva*, it can be seen, was therefore based on the broad powers given to the court under its jurisdictional statute and in part, at least in the view of one member of the court, on the existence of a contractual lien by the plaintiffs against the prepaid sub-charterparty revenues temporarily within the jurisdiction of the United Kingdom court.

19 In 1977, the Court of Appeal confirmed the denial of such an injunction in *Rasu*, supra. The defendants were clearly outside the jurisdiction but had some assets, or interest in assets, inside the United Kingdom. The debt claimed by the plaintiff arose under a charterparty between the plaintiff as a shipowner and the defendants as charterers. Some actions taken by the defendants were capable of interpretation as an effort to transfer or deal with their assets which were in the United Kingdom in a manner which would put them beyond the reach of the creditors. The injunction was denied, not because there was not a prima facie case of liability, but because the nature of the goods under attack was such that they were wholly unrelated to the action and the claim arising in the plaintiffs, the title to the equipment in question was unclear, the removal of the goods as planned to Germany increased the likelihood of the plaintiffs being able to obtain a *Mareva*-like injunction there, and the seizure and sale of the equipment would realize only a fraction of their true worth as an integral part of a plant being built by the defendants in Indonesia. What is important in the case is the catalogue of matters which Lord Denning set out in his judgment as being those to be taken into consideration by the court in determining whether the exercise of discretion under statute should occur. These matters are:

1. The plaintiff must demonstrate a good arguable case;

2. The assets in question need not be limited to money but could include goods within the jurisdiction;

3. Where the injunction might compel the defendant to provide security, it might tilt the scales in favour of issuance of the injunction.

In justifying the earlier decisions of *Nippon* and *Mareva*, the Master of the Rolls found roots for such an order in the practice in the courts in the city of London, particularly the commercial courts, where the seizure orders, or injunction orders, were issued substantially to compel the defendant to appear and provide bail or security. The historical prerequisite was absence of the defendant from the jurisdiction. Lord Denning noted that the practice, apparently has long been followed in the United States, except that it has been limited to cases where debt is due from the defendant in a liquidated discernible amount: see *De Beers Consol. Mines Ltd. v. U.S.; Soc. Inc. Forestière du Congo v. U.S.*, 325 U.S. 212 at 222-23, 89 L. Ed. 1566 (1945). Similar remedies have been, and continue to be, in widespread use in the maritime towns of continental Europe. Accordingly, Lord Denning observed, at p. 332:

> Now that we have joined the Common Market it would be appropriate that we should follow suit, at any rate in regard to defendants not within the jurisdiction. By so doing we should be fulfilling one of the requirements of the Treaty of Rome, that is the harmonization of the laws of the member countries.

He then returned to the theme of the *Lister* principle at p. 332 when he stated:

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

There appears to be a discrepancy between these comments of the learned Master of the Rolls and those at p. 336 of the report where His Lordship stated:

> I think the courts have a discretion, in advance of judgment, to issue an injunction to restrain removal of assets, whether the defendant is within the jurisdiction or outside it.

The trial judge in *Rasu* added the further qualification that the plaintiff "has what appears to be an indisputable claim against the defendant" [p. 353] and reference is made with approval to this condition by the Master of the Rolls [p. 334]. In *Rasu*, the turning point in the line of reasoning seesm to be reached when the defendants, unlike the defendants in *Mareva* and *Nippon*, appeared in court to defend the claim.

20 The final dissertation in the Court of Appeal of the United Kingdom on the subject of these injunctions to which I wish, at present, to refer is found in *Third Chandris*, supra, again principally through the judgment of Lord Denning. Here the injunction was issued in the court of first instance and confirmed by the Court of Appeal, apparently because the defendants were outside the jurisdiction, provided no financial returns in the proceedings, or indeed in Panama, the country of registry of the defendants' business, but did have a bank account in London in which had been deposited the proceeds of a sub-charterparty entered into after the execution by the defendants of the charterparty from the plaintiff shipowners. The extraordinary factual feature was that the injunction restrained the removal from the jurisdiction of moneys in the defendants' London bank account, although the evidence clearly indicated that the account was in overdraft. Again, the Master of the Rolls catalogued the hurdles which a plaintiff must surmount in order to obtain this type of injunction. They are much the same in *Rasu* except that (at p. 985) the Master of the Rolls placed more emphasis on the requirement that the plaintiff demonstrated belief in a risk that the assets would be removed before the judgment or award is satisfied. "The mere fact that the defendant is abroad is not, by itself, sufficient." Additionally, a contrast is drawn between a foreign corporation of substance and one operating in a country where no financial disclosure is required and nothing is placed before the court to ascertain the magnitude of the risk of non-payment of any judgment recovered by the plaintiff. In particular, His Lordship went on to observe, at p. 985:

> There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air, as elusive as the Cheshire cat.

Lawton L.J. referred to the fact that the defendant's assets may be ships flying "the so-called flags of convenience" with little or no trace of substantive worth in the defendant, in or outside the jurisdiction. At p. 987 he expressed the sense of risk which must be found by the court to exist before the issuance of these extraordinary injunctions:

> There must be facts from which the Commercial Court, like a prudent, sensible commercial man, can properly infer a danger of default if assets are removed from the jurisdiction.

The mere fact that the defendant was a foreign corporation was not, in the view of Lawton L.J., by itself, sufficient to justify this injunction.

21 In *Pivovaroff v. Chernabaeff*, supra, Bray C.J., of the Supreme Court of South Australia, set aside the injunction which had been granted to a plaintiff to restrain the defendants from disposing of some real estate which was unrelated to the personal injury claims of the plaintiff. The injunction had been granted on the basis of a belief held by the plaintiff that the defendant, upon the sale of such assets, might leave the country before the trial of the action. The Chief Justice did not follow the *Mareva* cases, largely because the defendant resided in the jurisdiction, but His Lordship added at p. 338:

> I am far from satisfied that even in the case of a defendant outside the jurisdiction with assets within it it would be proper to issue an injunction of the type in question here.

The Chief Justice found no escape from the general principle enunciated in *Robinson v. Pickering* (1881), 16 Ch. D. 660 (C.A.) (*per* James L.J. at p. 661):

> You cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property.

The Chief Justice then added, at p. 338:

> Those cases do not contain any exception for defendants outside the jurisdiction.

22 The Australian court referred to the judgment of Schroeder J.A. in *Bradley Bros. (Oshawa) Ltd. v. A to Z Rental Can. Ltd.*, [1970] 3 O.R. 787, 64 C.P.R. 189, 14 D.L.R. (3d) 171, in the Court of Appeal of Ontario, where authorities were applied with the same result. Both courts shied away from the obvious danger of judicial interference with the operations of corporate enterprises where a creditor might see in many management dealings a real risk of loss of assets before the creditor would be able to demonstrate his claim.

23 The United Kingdom *Mareva* rule might, as Lord Denning observed in *Rasu*, find harmony with the British position in the Common Market, but, as pointed out in *Pivovaroff*, that consideration has no relevancy in Australia, nor indeed would it have any relevancy in any country not bound by the Treaty of Rome.

24 As for the asserted jurisdiction founded on the judicature legislation in the United Kingdom, Chief Justice Bray described s. 45 as "a machinery section". In the words of the learned authors of Halsbury's Laws of England, 3rd ed., vol. 21, p. 348, para. 729 (Halsbury's Laws of England, 4th ed., vol. 24, p. 518, para 918), s. 45 "did not alter the principles upon which the court acted in granting injunctions". To the same effect, see Kerr on Injunctions, 6th ed., (1927), p. 6. Furthermore, Chief Justice Bray in *Pivovaroff* thought that (p. 340):

> It would seem unlikely that an alternative process of summary execution in anticipation of judgment, available for unliquidated damages as well as for liquidated debts due and payable, should have been slumbering unsuspected for over a century in the interstices of s. 29 and its predecessor and its analogues.

The learned justice was there referring to the Australian counterpart of s. 45 discussed by the Court of Appeal of the United Kingdom in the *Mareva* cases.

25 What therefore sprang out of the fertile ground of jurisprudence in the mid-1970's in the courts of the United Kingdom as a limited interlocutory injunctive remedy for plaintiffs who were in pursuit of ubiquitous charterers of shipping, has matured into a sub-principle or exception to a general rule of long standing. The plaintiff in the United Kingdom must demonstrate that he has a good arguable case. At least once (*Rasu*, at p. 333), the courts have required the plaintiff to show an indisputable claim against the defendant. There must be assets of the defendant within the jurisdiction susceptible to execution. The defendant need not be outside the jurisdiction. There must be a real risk that the remaining significant assets of the defendant within the jurisdiction are about to be removed or so disposed of by the defendant as to render nugatory any judgment to be obtained after trial. *Mareva* injunctions are therefore available not just to prevent the removal of assets from the jurisdiction, but also disposal within the jurisdiction. This has been made certain by the enactment of s. 37(3), Supreme Court Act, 1981 (U.K.) [c. 54], which reads in part:

> (3) The power of the High Court ... to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

However, Lord Denning is *Z. Ltd. v. A-Z and AA-LL*, [1982] Q.B. 558, [1982] 2 W.L.R. 288, (sub nom. *Z. Ltd. v. A)* [1982] 1 All E.R. 556 at 561 (C.A.), opines that this was the position prior to the enactment. The claim no longer need to be limited to debt or liquidated damages. The general rule requiring that the balance of convenience must favour the issuance of the order still exists. The overriding consideration qualifying the plaintiff to receive such an order as an exception to the *Lister* rule is that the defendant threatens to so arrange his assets as to defeat his adversary, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment. Short of that, the plaintiff cannot treat the defendant as a judgment-debtor, the defendant's right to defend the claim may not be impaired and the defendant in proper circumstances may within such an order, pay current expenses incurred in the ordinary course of his business.

26 The gist of the *Mareva* action is the right to freeze exigible assets when found within the jurisdiction, wherever the defendant may reside, providing, of course, there is a cause between the plaintiff and the defendant which is justiciable in the courts of England. However, unless there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction, the injunction will not issue. This generally summarizes the position in this country, including the Nova Scotia Trial Division in *Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L. Da.* (1982), 141 D.L.R. (3d) 498, 53 N.S.R. (2d) 338, 109 A.P.R. 338; see also *Liberty Nat. Bank & Trust Co. v. Atkin* (1981), 31 O.R. (2d) 751, 20 C.P.C. 55, 121 D.L.R. (3d) 160, where Montgomery J. of the High Court of Ontario granted a *Mareva* injunction against a domestic defendant and restrained dealing with assets within the jurisdiction. These general rules are summarized by Lord Denning in *Prince Abdul Rahman bin Turki al Turki al Sudiary v. Abu-Taha*, [1980] 1 W.L.R. 1268 at 1273, [1980] 3 All E.R. 409 (C.A.); see also *A.J. Bekhor & Co. v. Bilton*, [1981] 2 W.L.R. 601, [1981] 2 All E.R. 565 (C.A.), and *Z. Ltd. v. A-Z and AA-LL*, supra.

27 The harshness of the *Mavera* injunction, issued usually ex parte, is relieved against or justified in part by the Rules of Practice which allow the defendant, faced by risk of loss, an opportunity to move against the injunction immediately. On the other hand, the Court of Appeal of England seems to have blessed the practice of using this injunction as a means of coercing a vulnerable defendant into providing security in order to head off irreparable loss from the paralysis which follows the issuance of this type of injunction.

28 While the *Mareva* injunction is undoubtedly in personam, it matters not that on occasion the courts have classified it as in rem (see *Cretanor Maritime Co. v. Irish Marine Mgmt. Ltd.; The Cretan Harmony*, [1978] 1 W.L.R. 966 at 974-75, [1978] 3 All E.R. 164 (C.A.)), because the injunction affords no priority to the potential creditor, for to do so would, in the words of Goff J., "rewrite the ... law of insolvency": *Iraqi Min. of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 488 at 494, [1980] 1 All E.R. 480 (C.A.). Unsecured creditors holding a *Mareva* injunction cannot hold a preferred position over other claimants. Hence the practice of including in the order the right to meet legitimate debt payments accruing in the ordinary course of business.

29 The courts in Canada have given this type of injunction a mixed reception. The earlier decisions in the Ontario courts

are reflected in *Bradley Bros.*, supra, where the Court of Appeal continued the principle of *Lister*, supra. Lerner J., in the High Court of Ontario, in a post-*Mareva* decision, maintained the same position: *OSF Indust. Ltd. v. Marc-Jay Invt. Inc.*, supra, p. 448. By 1981 the High Court appeared to assume that a quia timet jurisdiction was available on a more restricted basis than the *Mareva* formula provided in the United Kingdom: see *Liberty Nat. Bank & Trust Co. v. Atkin*, supra; *C.P. Airlines Ltd. v. Hind* (1981), 32 O.R. (2d) 591, 14 B.L.R. 233, 22 C.P.C. 179, 122 D.L.R. (3d) 498 (H.C.), where Grange J., as he then was, while raising the question of the existence of the *Mareva* principle in Ontario, found such dishonesty in the defendant's conduct that it was a certainty that he would dispose of all his assets in order to frustrate the plaintiff; and *Quinn v. Marsta Cession Services Ltd.* (1981), 34 O.R. (2d) 659, 16 B.L.R. 126, 24 C.P.C. 214, 133 D.L.R. (3d) 109 (H.C.), where such an injunction issued on the application of the rules of *Third Chandris Shipping Corp.*, supra. The Court of Appeal of Ontario reviewed the conflicting authorities in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268, and although it refused the injunction in the circumstances of that case, it recognized in a detailed and comprehensive review of the authorities that the jurisdiction existed in the court to grant such a remedy in a proper case. The test there established is somewhat narrower than that generally applied by the courts in the United Kingdom (per MacKinnon A.C.J.O. at pp. 532-33):

> The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

30 The condition precedent to entitlement to the order is the demonstration by the plaintiff of a "strong *prima facie* case" (p. 522) and not merely as stipulated in some of the U.K. authorities, "a good arguable case": per Lord Denning in *Rasu*, supra, and per Megarry V.C. in *Barclay-Johnson v. Yuill*, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 at 195. In summary, the Ontario Court of Appeal recognized *Lister* as the general rule, and *Mareva* as a "limited exception" to it [p. 531], the exceptional injunction being available only where there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets "to avoid the possibility of a judgment..." [p. 532].

31 In other provinces the courts have reached approximately the same result. The New Brunswick Court of Appeal in *Humphreys v. Buraglia* (1982), 135 D.L.R. (3d) 535, 39 N.B.R. (2d) 674, 103 A.P.R. 674 (C.A.), placed the basis for this kind of injunction on the danger that the defendant will abscond or dispose of his assets so as to prevent realization on any ultimate judgment. The earlier view of the Manitoba Court of Queen's Bench was expressed by Hamilton J. in *Hawes v. Szewczyk*, supra, where he concluded that the *Mareva* rule was "a dangerous innovation" and even if technically within the jurisdiction of the court, was one that "should not be exercised". The British Columbia Court of Appeal, in *Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima* (1982), 42 B.C.L.R. 1, 33 C.P.C. 42, recognized the general principles developed around this interlocutory injunction in the courts of the United Kingdom.

32 It has been argued by the appellant that the *Mareva* injunction has no place in the laws of this country because provincial legislation has filled the gap by providing statutory remedies. In Manitoba the appellant points to the Fraudulent Conveyances Act, C.C.S.M., c. F160; the Garnishment Act, C.C.S.M., c. G20; the Court of Queen's Bench Rules, c. XXIV, Attachment R. 582; and Queen's Bench R. 526, "garnishee" procedures. In other provinces, similar legislation and rules are to be found. In Ontario, for example, there is the Absconding Debtors Act, R.S.O. 1980, c. 2, s. 2, which authorizes the seizure of property of a resident of the province who leaves for the purpose of defrauding or defeating creditors; R. 372 of the present Consolidated Rules of Practice [of the Supreme Court of Ontario] which provides for the preservation of the subject matter of the proceeding; and the Fraudulent Conveyances Act, R.S.O. 1980, c. 176, which authorizes preventive orders where the plaintiff establishes a valid claim and prima facie that the conveyance in question was fraudulent. It is said by counsel for the appellant that this type of statute indicates a legislative intent to provide interim relief of a type described in the statutes and no more. On this line of reasoning the courts, it is said, should not "legislate" by adopting the sweeping rules of the *Mareva* line of cases. This should be a matter for the legislature which is better placed to assess the problem, its incidence in the community and the range of solutions available. One should not assume that the British legislature has been entirely silent apart from s. 45, above: see 18 Hals. (4th) 166, para. 358, where reference is made to statutory authority to set aside fraudulent conveyances. However, the United Kingdom legislation is not as far-reaching as appears to be the case in this country.

33 The Manitoba Court of Appeal divided on the relevance of these statutes. The majority, speaking through Matas J.A., took the view that such legislation and rules of court provide for relief in specific circumstances and do not preclude the invocation by the court of s. 59(1) of the Queen's Bench Act for the issuance of a preventive injunction in the nature of the *Mareva* injunction. A similar view has been expressed by Tallis J., now of the Saskatchewan Court of Appeal, in *BP Explor Co. (Libya) v. Hunt*, [1981] 1 W.W.R. 209, 16 C.P.C. 168, 114 D.L.R. (3d) 35 at 58 (N.W.T.S.C.). Huband J.A., in dissent, acknowledged that the aforementioned statutes and rules of court do not assist the respondent here as there is no liquidated demand or debt or a conveyance in fraud of creditors. An attaching order might avail but the rule is more precise in its requirements that the *Mareva* rules as they presently stand. As the respondent was "registered to do business in Manitoba" and has an "authorized agent to accept service" (to quote Huband J.A. [at p. 119]), the respondent could not qualify for an attaching order. In the result, the learned justice would preclude recourse to a *Mareva* order where specific remedies are available at law; and if not so available, then "the courts should be cautious to fill the void by an injunction" [p. 119]. There are helpful discussions as to the significance of these and other provincial statutes in relation to *Mareva* injunctions in Stockwood, "Mareva Injunctions" (1981), 3 Advocates' Q. 85; Rogers and Hately, "Getting the Pre-trial Injunction" (1982), 60 Can. Bar Rev. 1; and McAllister, "Mareva Injunctions" (1982), 28 C.P.C. 1. Reference is made in the British cases to the availability of bankruptcy legislation which would allow the ultimately successful plaintiff to set aside any disposition made in fraud of creditors by way of preference or improper dealing. The same condition exists in this country where the federal Bankruptcy Act [R.S.C. 1970, c. B-3] has uniform application throughout the country.

34 I do not believe the presence of provincial or federal legislation of the type discussed above can preclude the issuance of a protective injunction or narrow the breadth of expression employed in s. 59(1) of the Manitoba Queen's Bench Act. If the court has the authority under such a legislative provision properly construed, then that authority must be expressly reduced by other legislation directed to the problem. Such is not the case here. That answer, of course, does not assist in determining the proper practice of the court when dealing with an application for this type of interlocutory injunction other than to find jurisdiction in the court to respond in a proper case.

35 Before leaving this aspect of the matter, one should make note of the appellant's submission that the Bankruptcy Act of Canada is available to the respondent in the event that improper disposition is made of the appellant's assets followed by an assignment or petition under the Bankruptcy Act. This was a consideration in the early *Mareva* judgments in England. It is not decisive on the point of jurisdiction to make, or the propriety in these circumstances to issue, a *Mareva* injunction. The order was not made for the purpose of protecting the respondent from the consequences of any ultimate bankruptcy procedures. The entitlement springs, if it does at all, from the authority of the court at law to make the order and the qualification of the respondents under the rules and tests applied by the court in doing so. The Bankruptcy Act, which at times may be relevant to the issue presented to the chambers judge on a *Mareva* application, is not a controlling consideration, particularly on the facts in this appeal.

36 The majority of the Court of Appeal considered [at p. 110] that:

> One of the factors which is relevant in this case is the clear intention of Aetna to transfer its assets from Manitoba to Montreal, albeit that the intention is openly expressed. And Quebec is not a reciprocating province with respect to enforcement of judgments.

The Manitoba Reciprocal Enforcement of Judgments Act, C.C.S.M., c. J20, provides the machinery for the enforcement in Manitoba of judgments of the courts in other Canadian provinces which have reciprocal arrangements with the province of Manitoba. The Act also provides for the entry into such arrangements for the registration in other provinces of judgments of the courts of Manitoba. With the exception of Quebec, all the provinces of Canada, the Northwest Territories and the Yukon Territory have entered into such reciprocal arrangements and have like statutes. Twenty-five per cent of the assets of the appellant are in the province of Ontario, exceeding the value of the assets of the appellant in Manitoba which are affected by the order under appeal. The Manitoba Act and the Ontario Act each requires service upon the defendant to have been effected in the province of judgment in order to qualify such judgment for registration and enforcement in the other province (Ontario, in this case). The record here does not expressly show that the appellant was served within the province of Manitoba with a writ or other originating instrument, or with the notice of motion for this injunction. The respondent is, however, a federal company with an office in Manitoba and was at all relevant times doing business in Manitoba. Under the Manitoba Corporations Act, 1976 [Man.] c. 40 [also C.C.S.M., c. C225], such corporations are required to register and to nominate an agent for service, all as noted by Huband J.A. in dissent below. More importantly, the appellant appeared in and thereby

attorned to the jurisdiction of the court in Manitoba. Thus, any judgment which may arise in these proceedings in Manitoba will qualify for registration enforcement under the Ontario statute and hence could be executed there against the Ontario assets of the appellant in the same manner as though judgment had been issued out of the Supreme Court of Ontario.

37 In the province of Quebec, provision is found in the Code of Civil Procedure for action upon judgments outside the province of Quebec.

> 178. Any defence which was or might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada.
>
> 179. Any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered in any other province of Canada, provided that the defendant was not personally served with the action in such other province or did not appear in such action.
>
> 180. Any such defence cannot be pleaded if the defendant was personally served in such province, or appeared in the original action, except in any case involving the decision of a right affecting immoveables [sic] in this province, or the jurisdiction of a foreign court concerning such right.

In such proceedings reliance may be had upon art. 1220 of the Civil Code of the province of Quebec which supplements the procedure under art. 179, supra, by providing for the proof of judgments from courts outside the province of Quebec. The Civil Code differentiates between foreign judgments and those emanating from the courts of other provinces, and provides in the latter case for a limited process where the defendant in the extra-provincial proceeding was served in the province or appeared in a court of that province. The action in Quebec, upon any judgment later obtained in Manitoba by the respondent, would be a formal process of enforcement not different in substance and execution from the proceedings under the Ontario reciprocal statute. In the result, Quebec accords a means of enforcement of Manitoba judgments but the converse (which is of no concern in this appeal) is not the case because the reciprocity machinery in the Manitoba statute has not been brought into play. The access to the enforcement procedures under the laws of Quebec renders ineffective, in my view, any argument that the respondent was exposed to some inevitable or irreparable loss if, at the time any judgment issues in the courts of Manitoba, the assets of the appellant have been transferred from Manitoba to Quebec. Furthermore, Ontario is qualified as a "reciprocating state" under the Manitoba legislation, and the appellant, according to the record herein, had assets in that province in excess of the assets impounded in Manitoba by the order under appeal.

38 A large part of the respondent's factum filed herein, and of argument made in this court, centred upon the winding down of the appellant's business which presumably has created a risk of default by the appellant in meeting its obligations. The factum goes further and says that by reason of this trend, in early 1982, "for all practical purposes, Aetna ceases to exist". The argument is not made that the respondent will go into bankruptcy or be wound up. Essentially, this line of submission must lead to the proposition that while the appellant "will not go into bankruptcy or default" (extract from respondent's factum), there is, in the words of the respondent's factum, "a sufficient risk of Aetna defaulting in its obligations to justify granting of a *Mareva* injunction". Such a default would, of course, invite a petition or force an assignment under the Bankruptcy Act. In either case, the respondent has extensive and easily enforceable rights. One right the respondent does not have, with or without the *Mareva* injunction "in aid", is a priority or preference if indeed the appellant has, as the respondent has elaborately calculated in its submissions in this court, become insolvent. It would not appear from the facts revealed on the record that there is any intention on the part of the appellant to default in any obligation to the respondent or to anyone else. An affidavit filed by the appellant states that "... Aetna is currently meeting all its liabilities as they become due". The deponent in this affidavit, Jean-Paul Lafontaine, was cross-examined by counsel for the respondent generally, but no questions were directed to this bald statement which remains uncontradicted in the record. This statement is obviously vital on the key question of the existence of any real risk of loss in the respondent as a basis for the issuance of this exceptional interlocutory order.

39 However, even assuming the appellant is wound up by its two shareholders, the Traders Group and the Royal Bank of Canada, it is a federal company. If it is solvent, the provisions of the incorporating Act, the Canada Business Corporations Act, 1974-75-76 [Can.], c. 33, apply. Dissolution may be effected only on "discharge of any liabilities". Provision is made for notice to creditors and liquidation is conditional upon "adequately providing for the payment or discharge of all its obligations" (s. 204(7)). All of this procedure is made subject to court supervision on the application of the officer designated

in the statute or "any interested person", which includes a creditor such as the respondent. The Manitoba Corporations Act, ss. 186 and 187, requires a federal corporation to register under the Act and to appoint an agent for service of process in Manitoba. Thus there is a detailed pattern under the combined corporation legislation, provincial and federal, to cover a surrender of charter as a method of avoiding the payment of debts.

40 On the other hand, if the appellant is insolvent, the remedies under the Bankruptcy Act apply and not the procedures under the Canada Business Corporations Act. A *Mareva* injunction can neither advance nor interfere with these procedures.

41 All the foregoing considerations, while important to an understanding of the operation of this type of injunction, leave untouched the underlying and basic question: do the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada? The question in its simplest form arises in the principles enunciated in the earliest *Mareva* cases where the wrong to be prevented was the removal from "jurisdiction" of assets of the respondent with a view to defeating the claim of a creditor. It has been found by the courts below that there was no such wrongdoing here. An initial question, therefore, must be answered, namely, what is meant by "jurisdiction" in a federal context? It at least means the jurisdiction of the Manitoba court. But is the bare removal of assets from the province of Manitoba sufficient? The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the provinces of Manitoba, Quebec and Ontario. No breach of law is asserted by the respondent. No improper purpose has been exposed. It is simply a clash of rights: the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capacity, federally confirmed (and the constitutionality of which is not challenged), to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province, above. None of these vital considerations was present in the United Kingdom where *Mareva* was conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce. In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of "residing" throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. There was no clandestine transfer of assets designed to defraud the legal process of the courts of Manitoba. There is no evidence that this federal entity has arranged its affairs so as to defraud Manitoba creditors. The terminology and trappings of *Mareva* must be examined in the federal setting. In some ways, "jurisdiction" extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. For other purposes, jurisdiction no doubt can be confined to the reach of the writ of the Manitoba courts. These parameters will have to develop in Canada as did the *Mareva* principle in the courts of the United Kingdom. The laws of this country, as developed here for jurisprudence originating in the United Kingdom and variously adopted in some of the provinces, have long included quia timet orders when justice and the protection of the judicial process required. "*Mareva*" is a refinement made necessary to accommodate in the same laws the primary principle of *Lister*. All this is as true in Canada as in the United Kingdom. I conclude that nothing has taken this jurisdiction away from the superior courts in the province. In establishing the rules under which superior courts will issue such interlocutory orders in this country, one must not apply in toto or verbatim the dicta of the decisions in other legal systems though they may have much in common with those of Canada. The *Mareva* consideration arising in this appeal is the effect of a rightful removal of assets in the ordinary course of business by a resident defendant to another part of the federal system. This by itself will not trigger such an exceptional remedy as it well might do in the United Kingdom where the jurisdiction of the court and the boundaries of the country coincide. Even there, it will be seen in *Rasu Maritima*, supra, an interlocutory injunction was not issued on the removal of assets from the United Kingdom in part because the assets were being moved to another country of the Common Market where the law recognized judgment before trial and indeed execution before judgment. That reasoning is much amplified in its introduction into a federal system. The South Australian court, as we have seen in *Pivovaroff*, supra, has declined to adopt the *Mareva* principles.

42 Taking this added federal consideration into account, should the injunction have been issued in the first instance and renewed in the Court of Appeal? The *Mareva* rules of the United Kingdom as developed in our courts, do not, in my view of the circumstances here existing, properly reflect the federal concern. The movement of the assets in question was announced in public pronouncements of the two stockholders of the appellant and by the appellant itself. The respondents were expressly made aware of the impending transfer. There is no finding in either court below of any improper motive behind this transfer of assets. The transfer, indeed, was carried out in the ordinary course of business and reflected the history of the conduct of the appellant's business in the past in Manitoba. The appellant never did retain assets in its Manitoba branch operation, either

before the appellant commenced dealings with respon dent or thereafter. There is no finding of any intention by the appellant to default on its obligations, either generally or to the respondent, if in law such an obligation is later found to exist. The appellant has not been found to be insolvent and the Court of Appeal expressly ruled this element out as a consideration governing the issuance or denial of the injunction. Finally, there is the federal fact and the procedures of pursuit open to the respondent in tracing these assets through to their destination in Quebec, or in recovering from the assets of the appellant in Ontario.

43 There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country. This subrule or exception can lead to serious abuse. A plaintiff with an apparent claim, without ultimate substance, may, by the *Mareva* exception to the *Lister* rule, tie up the assets of the defendant, not for the purpose of their preservation until judgment, but to force, by litigious blackmail, a settlement on the defendant who, for any one of many reasons, cannot afford to await the ultimate vindication after trial. I would, with all respect to those who have held otherwise, conclude that the order should not have been issued under the principles of the interlocutory quia timet orders in Canadian courts functioning as they do in a federal system.

44 Finally, there is the question as to whether the appellate tribunal may properly step in and alter a discretionary order, such as an interlocutory order, issued by a court of first instance where no sufficient error in law on the part of the courts below has been revealed, or where the order in question was issued based upon a wrong or inapplicable principle of law. Where no significant error of law is revealed, in short, an appellate court should not intervene. We do not here have the benefit of reasons from the judge of first instance, Wilson J., issuing the order, but we do have the reasons of the Court of Appeal. That court, with all respect to those members who confirmed the issuance of the order, did not give due consideration and weight to the position of the courts and the position of the parties before those courts when dealing with an interlocutory quia timet order in a federal jurisdiction. Though I would have come to the opposite conclusion even aside from that element of the law involved in these proceedings, interference with the exercise of discretion in issuing the order would, apart from this consideration, be unwarranted. It is, however, in my view an error of law relating to the application of the principles properly governing the execution of the court's discretion in favour of the respondent in issuing the quia timet interlocutory order and, accordingly, I would intervene and set aside such order.

45 I therefore would allow the appeal and set aside the injunction issued in the courts below, with costs to the appellant throughout.

Appeal allowed.

Footnotes

* Ritchie J. did not take part in this judgment.

TAB 2

Most Negative Treatment: Not followed
Most Recent Not followed: Interclaim Holdings Ltd. v. Down | 1999 ABQB 260, 1999 CarswellAlta 294, [1999] A.J. No. 382 | (Alta. Q.B., Apr 1, 1999)

1982 CarswellOnt 508
Ontario Supreme Court [Court of Appeal]

Chitel v. Rothbart

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

Chitel et al. v. Rothbart et al.

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

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

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

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

Subject: Intellectual Property; Civil Practice and Procedure; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.i Ex parte injunctions
II.2.b.i.C Threshold test
II.2.b.i.C.2 Irreparable harm

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.E Full and frank disclosure

Headnote

Injunctions --- Rules governing injunctions — Interlocutory, interim and permanent injunctions — General

Injunctions --- Availability of injunctions — Mareva injunctions — Full and frank disclosure

Injunctions — Kinds of injunctions — Mareva injunctions — Mareva injunction available in Ontario where plaintiff can satisfy appropriate criteria.

Injunctions — Ex parte — General — Necessity of full and frank disclosure on application.

In an action for damages and other relief arising out of the alleged conversion of certain securities, the plaintiffs obtained an ex parte injunction restraining the defendants from disposing of their assets. On an application to a Judge in Motions Court to continue the injunction, a reference to the Court of Appeal was directed pursuant to s. 34 of the Judicature Act, to clarify the jurisprudence as to the availability of the Mareva injunction in Ontario. The injunction was continued pending the reference.

Held per MacKinnon A.C.J.O., Arnup and Goodman JJ.A. concurring, the injunction should be dissolved. Whatever view might be taken of the Mareva form of injunction, the plaintiffs' failure to make full disclosure on the ex parte application, with the resulting incomplete and misleading picture of the relationship between the parties, disentitled the plaintiffs to continuance of the injunction.

A Mareva injunction may be granted in a proper case, as a limited exception to the general rule that an interlocutory injunction will not be granted to restrain a defendant from disposing of his assets or removing them from the jurisdiction prior to judgment. The Court considered the following guidelines governing the grant of such an injunction:

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

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

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

(iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy any judgment awarded to him.

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

Guidelines (i), (ii) and (v) are standard requirements on any injunction application, but on an application for a Mareva injunction, the material under items (i) and (ii) must persuade the Court that the plaintiff has a strong prima facie case on the

merits.

Item (iv) of the guidelines must be satisfied by material showing the defendant is removing, or that there is a real risk that he is about to remove, his assets from the jurisdiction, or otherwise dissipating or disposing of his assets out of the ordinary course of business, so as to avoid their exposure to a judgment or render remote the prospect of the plaintiff tracing him. It was important that the Courts exercise care that the Mareva injunction not be used as a weapon to force inequitable settlements from defendants who will face ruin by having their assets tied up for a lengthy time awaiting trial.

Annotation

The decision of Anderson J. is reported at (1982), 27 C.P.C. 91, 36 O.R. (2d) 124. For an exhaustive review of the Mareva jurisprudence predating the present decision, see the article by Debra M. McAllister, at (1982), 28 C.P.C. 1. At the conclusion of the article, the author expresses doubt as to what standard Ontario Courts would apply when considering the merits of the case, and adverts to the test of a "good arguable case," in British Columbia cases. *Chitel v. Rothbart* largely resolves the doubt, in specifying that a strong prima facie case be shown.

Table of Authorities

Cases considered:

Amer. Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.) — *referred to*

Aslatt v. Corp. of Southampton (1880), 16 Ch. D. 143 — *referred to*

Bank of Montreal v. James Main Holdings Ltd.; Re Main and Bank of Montreal (1982), 26 C.P.C. 266, 23 R.P.R. 180, affirmed 28 C.P.C. 157 (Ont. Div. Ct.) — *referred to*

Barclay-Johnson v. Yuill, [1980] 1 W.L.R. 1259, [1980] 3 All E.R. 190 (Ch. D.) — *referred to*

Beddow v. Beddow (1878), 9 Ch. D. 89 — *referred to*

Campbell v. Campbell (1881), 29 Gr. 252 — *referred to*

C.P. Airlines Ltd. v. Hind (1981), 32 O.R. (2d) 591, 22 C.P.C. 179, 14 B.L.R. 233, 122 D.L.R. (3d) 498 (H.C.) — *referred to*

Lister & Co. v. Stubbs (1890), 45 Ch. D. 1, [1886-90] All E.R. Rep. 797 (C.A.) — *referred to*

Mareva Compania Naviera S.A. v. Int. Bulkcarriers S.A.; The Mareva, [1980] 1 All E.R. 213, [1975] 2 Lloyd's Rep. 509 (C.A.) — *referred to*

Mills & Mills v. Petrovic (1980), 30 O.R. (2d) 238, 18 C.P.C. 38, 12 B.L.R. 224, 118 D.L.R. (3d) 367 (H.C.) — *referred to*

N W L Ltd. v. Woods; N W L Ltd. v. Nelson, [1979] 1 W.L.R. 1294, [1979] 3 All E.R. 614 — *referred to*

Nippon Yusen Kaisha v. Karageorgis, [1975] 1 W.L.R. 1093, [1975] 3 All E.R. 282, [1975] 2 Lloyd's Rep. 137 (C.A.) — *referred to*

OSF Indust. Ltd. v. Marc-Jay Invts. Inc. (1978), 20 O.R. (2d) 566, 7 C.P.C. 57, 88 D.L.R. (3d) 446 (H.C.) — *overruled*

Prince Abdul Rahman Bin Turki Al Sudairy v. Abu-Taha, [1980] 3 All E.R. 409 (C.A.)*referred to*

Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), [1978] Q.B. 644, [1977] 3 All E.R. 324, [1977] 2 Lloyd's Rep. 397 (C.A.) — *referred to*

Siskina v. Distos Compania Naviera S.A.; The Siskina, [1979] A.C. 210, [1977] 3 All E.R. 803, [1978] 1 Lloyd's Rep. 1 (H.L.) — *referred to*

Third Chandris Shipping Corp. v. Unimarine S.A.; The Pythis, [1979] Q.B. 645, [1979] 2 All E.R. 972, [1979] 2 Lloyd's Rep. 184 (C.A.) — *referred to*

Yule Inc. v. Atl. Pizza Delight Franchise (1968) Ltd. (1977), 17 O.R. (2d) 505, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) — *referred to*

Statutes considered:

Absconding Debtors Act, R.S.O. 1980, c. 2.

Judicature Act, R.S.O. 1980, c. 223, ss. 19(1), 34(1).

Supreme Court Act, 1981 (U.K.), c. 54, s. 37(3).

Supreme Court of Judicature (Consolidation) Act, 1925 (U.K. 15 & 16 Geo, 5), c. 49, s. 45(1).

Application to continue an interlocutory injunction.

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

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

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

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

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

5 I say at the outset that in my view the affidavit of the plaintiff Leona Chitel did not make the necessary full and frank disclosure of all the relevant facts nor of the expected position of the defendant, required for the obtaining of an ex parte injunction. We were advised during the argument that the plaintiff, at the same time as seeking the ex parte interim injunction, was also seeking an order under the Absconding Debtors Act, R.S.O. 1980, c. 2. Mr. Justice Galligan, while granting the interim injunction, refused to make the order asked for under the Absconding Debtors Act.

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

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

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

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

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

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

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

> MR. HARRIS: You have made in paragraph two of Mrs. Chitel's affidavit, allegations that would indicate and giving flavour, that Dr. Rothbart was the guiding influence of Mrs. Chitel, and I am entitled to show that the exact opposite was in fact the case, and as Mrs. Chitel has already stated, Dr. Rothbart was not experienced in the stock market. My purpose is to show that Mrs. Chitel not only was very experienced in the market, but that she knew all these promoters, she worked with them, she referred to them, as her partners, as she has already testified, that she guided Dr. Rothbart throughout.
>
> MR. COHEN: The only thing that Dr. Rothbart has done in this case, is worked himself into the complete trust of this woman, so that she trusted him.
>
> MR. HARRIS: On the contrary, I am entitled to show that the exact opposite is the case, and that Dr. Rothbart was in the trust, and trusted Mrs. Chitel.
>
> MR. COHEN: Then he had better file an affidavit, because you're not going to be ...
>
> MR. HARRIS: I am entitled to cross-examine on this affidavit, and if you continue to advise the witness not to answer the questions, it will be obvious that your purpose is not to allow the court to see the full truth of this matter for the purposes of this injunction. If you are intent to drop your application for an injunction, and go forward with the law suit, say so on the record.

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

14 Counsel seemed to have confused, in part at least, the right to limit "fishing expeditions" on examination for discovery with a severe limitation on the extent of proper cross-examination. Counsel at trial would not, on any and every pretext, seek to frustrate proper cross-examination. If he did, he would be quickly corrected by the trial Judge. Because a Judge is not present does not mean that a counsel, who is an officer of the Court, should take a different position. He should not answer some obviously significant question himself before the witness answers, unless it is done by agreement with counsel for the

other side, nor lead his witness immediately after the witness has given a damaging answer to explain the answer. Nor should he interrupt and prevent, time after time, questions from being answered, although a legitimate ground has been given for their being asked. It seems to me that this is so in all cases, but particularly where ex parte injunctions have been granted. In such cases the matter is one of urgency which should be determined as quickly as possible by the Court without the party restrained being forced to bring interlocutory motions and appeals in order to get the answers of the deponent to relevant questions. I have digressed to a certain extent but I think it important that a practice not develop which would debase the value of the right to cross-examine and effectively frustrate its legitimate purpose.

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

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

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

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

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

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

The Mareva Injunction

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

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

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

> ... where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of the judgment for the amount claimed.

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

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

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

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

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

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

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

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

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

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

33 In *Nippon Yusen Kaisha v. Karageorgis*, supra, the defendants had chartered a number of the plaintiff's ships. They did not pay the charterparty fee and attempts by the plaintiff to locate the defendants were unsuccessful. The plaintiff

believed "and rightly believe[d]" (p. 283 All E.R.) that the defendants had funds in the banks in London and feared that those funds would be transmitted out of the jurisdiction unless something was done. Accordingly, an ex parte application was brought to restrain the defendants from disposing of or removing any of their assets from the jurisdiction. Donaldson J. refused the application and the plaintiffs appealed. In the course of his short reasons for judgment, Lord Denning M.R. said this (p. 283 All E.R.):

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

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

> So they have applied for an injunction to restrain the disposal of those moneys which are now in the bank. They rely on the recent case of *Nippon Yusen Kaisha v. Karageorgis* [[1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093]. Donaldson J felt some doubt about that decision because we were not referred to *Lister & Co. v. Stubbs* [(1890) 45 Ch. D. 1, [1886-90] All E.R. Rep. 797]. There are observations in that case to the effect that the court has no jurisdiction to protect a creditor before he gets judgment. Cotton LJ said [45 Ch. D. 1 at 13, [1886-90] All E.R. Rep. 797 at 799]:
>
> > I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.
>
> And Lindley LJ said [45 Ch. D. 1 at 15, [1886-90] All E.R. Rep. 797 at 800]: '... we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the Appellants ask us to stretch it...'
>
> Donaldson J felt that he was bound by *Lister & Co v Stubbs* and that he had no power to grant an injunction. But, in deference to the recent case, he did grant an injunction, but only until 17.00 hours today (23rd June 1975), on the understanding that by that time this court would be able to reconsider the position.
>
> Now counsel for the charterers has been very helpful. He has drawn our attention not only to *Lister & Co v Stubbs* but also to s 45 of the Supreme Court of Judicature (Consolidation) Act 1925, which repeats s 25(8) of the Judicature Act 1873. It says:
>
> > A mandamus or an injunction may be granted or a receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient ...

> In *Beddow v. Beddow* [(1878) 9 Ch. D. 89 at 93] Jessel MR gave a very wide interpretation to that section. He said: 'I have unlimited power to grant an injunction in any case where it would be right or just to do so ...'
>
> There is only one qualification to be made. The court will not grant an injunction to protect a person who has no legal or equitable right whatever. That appears from *North London Railway Co v. Great Northern Railway Co* [(1883) 11 Q.B.D. 30]. But, subject to that qualification, the statute gives a wide general power to the courts. It is well summarised in Halsbury's Laws of England [21 Halsbury's Laws (3rd Edn) 348, para 729; see now 24 Halsbury's Laws (4th Edn) para 918]:
>
> > ... now, therefore, whenever a right, which can be asserted either at law or in equity, does exist, then, whatever the previous practice may have been, the Court is enabled by virtue of this provision, in a proper case, to grant an injunction to protect that right.
>
> In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for the exerise of this jurisdiction.

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

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

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

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

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

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

> So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well established that

> the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process to do so.

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

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

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

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

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

41 Shortly after this case, the issue of Mareva injunctions was incidentally raised in the *Siskina v. Distos Compania*

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

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

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

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

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

> (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
>
> (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant.
>
> (iii) The plaintiff should give some grounds for believing that the defendants have assets here.
>
> (iv) The plaintiff should give some grounds for believing that there is risk of the assets being removed before the judgment or award is satisfied.
>
> (v) The plaintiffs must give an undertaking as to damages.

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

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

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

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

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

> It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted. If the assets are likely to remain in the jurisdiction, then the plaintiff, like all others with claims against the defendant, must run the risk common to all, that the defendant may dissipate his assets, or consume them in discharging other liabilities, and so leave nothing with which to satisfy any judgment. On the other hand, if there is a real risk of the assets being removed from the jurisdiction, a Mareva injunction will prevent their removal. It is not enough for such an injunction merely to forbid the defendant to remove them from the jurisdiction, for otherwise he might transfer them to some collaborator who would then remove them; accordingly, the injunction will restrain the defendant from disposing of them even within the jurisdiction. But that does not mean that the assets will remain sterilised for the benefit of the plaintiff, for the court will permit the defendant to use them for paying debts as they fall due: see *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1980] 1 All ER 480 at 486, [1980] 1 WLR 488 at 494 per Robert Goff J.
>
> If, then, the essence of the jurisdiction is the risk of the assets being removed from the jurisdiction, I cannot see why it should be confined to 'foreigners', in any sense of that term.
>
> . . . . .
>
> In the result, I would hold (1) that it is no bar to the grant of a Mareva injunction that the defendant is not a foreigner, or is not foreign-based, in any sense of those terms, (2) that it is essential that there should be a real risk of the defendant's assets being removed from the jurisdiction in such a way as to stultify any judgment that the plaintiff may obtain, and (3) that, in determining whether there is such a risk, questions of the defendant's nationality, domicile, place of residence and many other matters may be material to a greater or a lesser degree.
>
> In addition to establishing the existence of a sufficient risk of removal of the defendant's assets, the plaintiff must satisfy certain other requirements. I shall not attempt any comprehensive survey, particularly in view of the guidelines laid

> down by Lord Denning MR in *Third Chandris Shipping Corp v Unimarine SA* [1979] 2 All ER 972 at 984-985, [1979] QB 645 at 668-669. But I may refer to three of them. One is that it must appear that there is a danger of default if the assets are removed from the jurisdiction. Even if the risk of removal is great, no Mareva injunction should be granted unless there is also a danger of default.
>
> . . . . .
>
> Second, the plaintiff must establish his claim with sufficient particularity, and show a good arguable case, though he need not demonstrate that his case is strong enough to entitle him to judgment under RSC Ord 14: see the *Pertamina* case [1977] 3 All ER 518, [1978] QB 644. Third, the case must be one in which, on weighing the considerations for and against the grant of an injunction, the balance of convenience is in favour of granting it. In considering this in Mareva cases, I think that some weight must be given to the principle of *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886-90] All ER Rep 797....

And, finally he said (p. 195):

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

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

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

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

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

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

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

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

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

53 Section 19(1) is the Ontario counterpart to s. 45(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the

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

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

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

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

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

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

59 Earlier, in another connection, I pointed out that our practice in interlocutory injunctions generally is somewhat different from what occurs in England. My understanding is that it is rare in England for a deponent to be cross-examined on his affidavit in such cases. Here, cross-examination is the rule rather than the exception. Although the ex parte order is made without the benefit of such cross-examination, on the hearing for the continuation of the order the Court usually has the cross-examination on the affidavits that have been filed, including any filed by the defendant. At that time the Ontario Court is in a better position than it would be without such cross-examination to assess the respective merits of the parties both with regard to whether a strong prima facie case has been established on the claim and with regard to whether the "guidelines" have been satisfied.

60 The instant application illustrates what can take place between the ex parte hearing of the original application and the hearing on the application to continue. Mr. Justice Galligan cannot be faulted for granting the original ex parte injunction. On the material before him it appeared that, as a result of a professional medical relationship, the defendant had secured the trust of a woman inexperienced in financial matters who relied on him for financial advice. He then, in abuse of that trust, secured

shares from her by fraud or theft. When she commenced asking for their return he made arrangements to leave Canada and indeed was in the process of leaving and removing all his assets from Canada. She secured the injunction the day before he was to leave Canada for good.

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

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

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

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

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

Application dismissed.

TAB 3

2014 ONSC 557
Ontario Superior Court of Justice

Jajj v. 100337 Canada Ltd.

2014 CarswellOnt 1216, 2014 ONSC 557, 237 A.C.W.S. (3d) 596

Balwant Singh Jajj, Applicant and 100337 Canada Limited c.o.b. as BJ International/BJ Supermarket, Jajj Investment Holdings Ltd., Udham Jajj, Gurmit Jajj and Juejar Jajj, Respondents

Udham Singh Jajj, Gurmit Kaur Jajj, Jajj Investment Holdings Ltd. and 100337 Canada Limited, Applicants and Balwant Singh Jajj, Jaswinder Kaur Jajj, Taljeet Kaur Dosanjh, Gurpreet Singh Jajj, Amarjit Kaur Jajj, Lavender Kaur Jajj and Lakhveer Singh Jajj, Respondents

Spence J.

Heard: November 5, 2013; December 2, 2013
Judgment: January 29, 2014
Docket: CV-13-10220-00CL, CV-13-10221-00CL

Counsel: Christopher H. Wirth, for Applicant / Respondent, Balwant Singh Jajj
Gregory M. Sidlofsky, for Respondents / Applicants
Kenneth M. Alexander, for Respondents, Jaswinder Kaur Jajj, Taljeet Kaur Dosanjh, Gurpreet Singh Jajj, Amarjit Kaur Jajj, Lavender Kaur Jajj and Lakhveer Singh Jajj

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.n Miscellaneous

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.A Strong prima facie case

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Miscellaneous

Interim costs order — Dispute arose in family about transactions involving ownership of corporation and concerns about how applicant dealt with corporate assets — Dispute gave rise to removal of applicant as director of corporations — Applicant brought application for oppression remedy against corporations and individuals — Applicant brought motion for interim costs from corporations — Respondents brought application for damages, accounting and declarations as to ownership of shares and property and sale of properties — Respondents asserted applicant closed bank accounts without notice and transferred money to his own personal accounts — Respondents asserted applicant transferred assets in India belonging to family; removed groceries from corporation's supermarket; and failed to pay his share of bills relating to properties — Respondents asserted applicant was carrying on business in direct competition with corporation — Motion dismissed — No interim costs were ordered — There was no apparent basis for considering removal of applicant as director as oppressive act by other directors — There was strong prima facie case that applicant misappropriated large part of respondent's interest in company and parts of interests of individual respondents in properties — Three directors who supported removal of applicant as director had good prima facie reason to remove applicant as direction because his actions could not be regarded as being in best interests of companies and their shareholders — Removal of applicant as director did not comply with by-law but it was prima facie in best interests of companies and their shareholders — Respondents were ordered to produce records within 30 days.

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

Dispute arose in family about transactions involving ownership of corporation and concerns about how applicant dealt with corporate assets — Dispute gave rise to removal of applicant as director of corporations — Applicant brought application for oppression remedy against corporations and individuals — Respondents brought application for damages, accounting and declarations as to ownership of shares and property and sale of properties — Respondents sought Mareva order against applicant restraining competition and order granting them exclusive possession of residential portions of properties — Respondents asserted applicant closed bank accounts without notice and transferred money to his own personal accounts — Respondents asserted applicant transferred assets in India belonging to family; removed groceries from corporation's supermarket; and failed to pay his share of bills relating to properties — Respondents asserted applicant was carrying on business in direct competition with corporation — Application granted — Interim and interlocutory injunction was granted prohibiting applicant from selling assets in his name — There was strong prima facie case of fraud against applicant with respect to changes in ownership of corporation and properties — Strong prima facie case was made out in respect of applicant closing accounts and taking proceeds for himself — There was real and genuine risk that applicant would put his assets beyond claims of respondents for purpose of avoiding judgment — There was risk of irreparable harm to respondents if Mareva injunction were not granted — Injunction would preserve assets for successful party — Balance of convenience did not favour applicant — If respondents gave notice to applicant that they wish to resume residence at properties applicant was to cause his family to vacate part of property that was previously occupied by respondents — Applicant was not to engage in abusive conduct towards respondents.

Table of Authorities

Cases considered by *Spence J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), 1985 CarswellMan 19, 1985 CarswellMan 379, [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145 (S.C.C.) — referred to

Alles v. Maurice (1992), 5 B.L.R. (2d) 146, 9 C.P.C. (3d) 42, 1992 CarswellOnt 132 (Ont. Gen. Div.) — referred to

Broadbear v. Prothero (2011), 2011 ONSC 3656, 2011 CarswellOnt 6129, 6 R.F.L. (7th) 342 (Ont. S.C.J.) — considered

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

McCord v. Robinson (2005), 2005 CarswellOnt 2257, 33 R.P.R. (4th) 148 (Ont. S.C.J.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — referred to

Thomas v. Thomas Health Care Corp. (2013), 2013 ONSC 4404, 2013 CarswellOnt 8990 (Ont. S.C.J.) — referred to

Waxman v. Waxman (2002), 2002 CarswellOnt 3298 (Ont. C.A. [In Chambers]) — referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 249(4) — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 242(4) — considered

APPLICATION by respondents for Mareva order against applicant restraining competition, for order granting exclusive possession of residential properties and for interim costs.

***Spence J.*:**

1 These reasons deal with two motions. Balwant Singh Jajj ("Balwant") seeks an order for interim costs in respect of his application for an oppression remedy against the above-named corporations ("100 Canada" and "Jajj Holding" respectively); his father, Udham Singh Jajj (or "Udham"); his mother, Gurmit Kaur Jajj (or "Gurmit"); and his brother, Juejar Jajj (or "Juejar"). Udham, Gurmit and the two corporations are also referred to below as the "Udham Parties".

2 Udham, Gurmit and the two corporations seek a Mareva Order against Balwant, an interim and interlocutory order restraining competition and an interim and interlocutory order granting Udham and Gurmit exclusive possession of the residential portions of the properties referred to below as the "Gerrard Street Properties". This motion is brought in the

application against Balwant and other members of his family for damages and an accounting and other related relief and declarations as to ownership of shares and the Gerrard Street Properties and the sale of the Gerrard Street Properties and other related relief.

3 The members of the family of Udham Singh have been involved in the operation of a supermarket business and in the ownership of the Gerrard Street Properties and their use for commercial and residential purposes. Originally, the business was solely owned by Udham through his ownership of 100% of the shares of 100 Canada and the Gerrard Street Properties were owned by Udham, Gurmit, Balwant and Juejar.

4 The ownership of 100 Canada was reorganized in 1993 with the result that Udham remained the owner of only 10% of the shares of 100 Canada. Later, based on plans developed by Balwant in 1995, the ownership of the Gerard Street Properties was reorganized with Jajj Holdings in the ways set out below.

5 In 2012, a dispute arose within the family about these transactions and their results, along with concerns about how Balwant had dealt with company assets. This dispute gave rise to the removal of Balwant as a director of 100 Canada and Jajj Holdings, which in turn has given rise to the two applications referred to above and the two motions which these Reasons address.

Background

The Individual Parties and 100 Canada

6 The Jajj parents have five children. They have two sons, Balwant and Juejar, and three daughters, Sulinder Gill ("Sulinder"), Gulvinder Nijjar ("Gulvinder") and Nashater Jajj ("Nashater").

7 The Jajj parents immigrated to Canada from England in 1981. Balwant and his family had previously moved to Toronto.

8 The Jajj parents used their life savings and the proceeds from the sale of their assets abroad to invest in a business that Balwant and the rest of the family could work in. The business is owned by 100 Canada and is carried on as BJ International and BJ Supermarket, which operates in the wholesale and retail ends of the food industry, respectively.

(i) The Gerrard Street Properties

9 The Gerrard Street Properties consist of three separate but adjacent and connecting properties: 1449 Gerrard Street East, 1451 Gerrard Street East and 1447 Gerrard Street East. These properties were acquired between 1982 and 1989 as follows:

(1) 1449 Gerrard was purchased by Udham in 1982;

(2) 1451 Gerrard was purchased by Udham's wife, Gurmit, later in 1982; and

(3) 1447 Gerrard was purchased in 1989 with title taken by Balwant, Juejar and Gurmit.

10 Downpayments for the properties were paid with capital from the Jajj parents and the properties were later paid off from the revenues of the business.

11 The Gerrard Street Properties were modified in 1995 to 1998 under Balwant's direction to provide one large residence for the entire family. At this time, only Juejar and his immediate family and part of the Balwant family remain living at the Gerrard Street Properties. The Jajj parents left the properties to avoid the Balwant family.

(i) BJ Supermarket

12 The supermarket caters mainly to the East Indian community. It operates out of the main floor and basement of 1449 Gerrard and 1451 Gerrard. It has been considered a "family" business and most of the Jajj family members have worked there at one time or another.

13 Up until April 2012, it was the Jajj parents, Juejar and his family, Nashater, certain members of the Balwant family and Sulinder who were working at the supermarket.

14 Balwant exercised control over the division of the revenues from the supermarket among family members.

Contentious Matters

15 The Udham Parties assert the facts set out below. Many of the facts they assert are disputed by Balwant as to their correctness or relevance.

Reorganization of Assets

16 The Udham Parties assert the facts set out below as to the reorganization of assets. The facts which they assert are key to the decision in this case, as set out below.

(i) 100 Canada

17 When 100 Canada was incorporated, Udham owned 100 shares representing 100% of the company. In 1992, Balwant advised the family that certain steps had to be taken regarding the business "in order to reduce taxes". He made it clear to everyone that there would be no change to the ownership of the business and that Udham would still control the business. This was accepted at face value.

18 However, it was discovered in the spring of 2012 that Balwant arranged in 1993 with his lawyers to transfer 90% of the shares of 100 Canada from Udham to himself, Juejar and Gurmit. The result was that Balwant and Juejar each own 25 shares, Gurmit owns 40 shares and Udham only owns 10 shares of 100 Canada.

19 Balwant brought the Jajj parents to a lawyer's office one day and presented Udham with documents in English and told him that he needed to sign them "for tax reasons". Neither of the Jajj parents can read English and the documents were never translated to them or explained to them. Udham simply signed them as Balwant directed. The transfer involving 100 Canada shares was done without Udham's knowledge or approval.

20 Udham was never told to obtain independent legal advice concerning the documents Balwant directed him to sign or concerning any reorganization of 100 Canada's ownership.

21 The effect of the transfer was to reduce Udham's ownership interest in 100 Canada from 100% to 10%.

22 Despite this change in ownership, Balwant maintained in front of family and relatives that Udham had 100% control and ownership of the business.

(ii) Jajj Investments — Gerrard Street Properties

23 It was also learned in the spring of 2012 that in or about 1995, Balwant retained the a firm to give advice on an estate plan involving the Gerrard Street Properties.

24 This estate plan resulted in the incorporation of Jajj Investments. Balwant instructed his lawyers to give him an interest in Jajj Investments.

25 Balwant then had Udham and Gurmit sign transfers of 70% of their interests in the commercial portions of the Gerrard Street Properties to Jajj Investments.

26 No one explained to the Jajj Parents the estate plan that Balwant was implementing and no one explained to them or translated the agreement of purchase and sale or the transfer documents that they were signing. Balwant told the Jajj Parents that the documents for the transfers related to taxes and that they needed to sign them.

27 The Jajj parents only speak and read Punjabi. They were never told to obtain independent legal advice concerning the transfers.

28 The Jajj parents only learned in the Spring of 2012 about the 100 Canada and Gerrard Street Properties reorganizations when there was a breakdown in the relationship with Balwant. The daughters, Sulinder and Nashater, then reviewed the minute books. Sulinder advised the Jajj parents about the true ownership structure of the companies.

The Breakdown in the Relationship with Balwant

(i) Apparent Theft at the Supermarket

29 The family's relationship with Balwant started to deteriorate when it was discovered, via video evidence, that various members of the Balwant family were taking money for themselves from the cash collected at the supermarket. There were also other instances of missing cash that were not caught on video but which the Udham Parties attribute to certain Balwant family members as they were on duty and operating the cash register at the times in question.

30 The apparent thefts were raised with Balwant and he responded that the funds taken would be accounted for from his share of the business income. Balwant never implemented any measures to protect the business from further thefts, nor did he impose any consequences such as demanding that the stolen cash be repaid or preventing access to the cash register by the family members in question. He also never accounted for what was taken by his family members. This became a major source of contention for the Jajj parents and Juejar as they considered they could no longer trust Balwant's family.

(ii) Dispute Over Working Hours and Contributions to the Supermarket

31 Over the course of the issues about last several years, Balwant started to cut down the hours that he was working at the supermarket, which meant that Juejar had to work more hours to keep the supermarket going.

32 It was also a source of contention that Balwant's children, unlike Juejar's family, were not expected to help or contribute financially toward the business or to household expenses.

(iii) The April 15, 2012 Family Meeting

33 As a result of the issues about the apparent thefts and the dispute over working hours and contributions, on April 15, 2012, an emergency family meeting was held to discuss the future of the supermarket.

34 Juejar told Balwant that under the circumstances he did not want to continue with the business any longer. He and the Jajj parents wanted the business to be sold. In order to accomplish this, Balwant was advised that the business and the Gerrard Street Properties would be valued and sold and that Balwant could purchase whatever he wanted.

35 In the interim, as a result of the apparent thefts by Balwant's family members from the supermarket, Balwant was told that those who were caught stealing would not be welcome at the supermarket. Balwant and Juejar were advised that to make the workload equitable, each one was expected to work 6 hours per day.

(iv) Removal of Balwant as a Director

36 Balwant asserts, and does so correctly, that at that meeting the directors of the two corporations purported to remove Balwant as a director. This action is key to Balwant's claim for an oppression remedy.

37 Balwant has not worked at the supermarket since April 15, 2012. Balwant provided a doctor's note on or about June 4, 2012 stating that he could not return to work until June 10, 2012. He did not return to work. Balwant considers that it was made clear to him he was not welcome to return.

38 At the April 15 meeting, Balwant was not personally excluded from the business. Balwant was only told that his wife and children were no longer welcome to be on the retail premises of the supermarket (because they were considered to have been caught stealing from the supermarket as set out above).

39 Neither Balwant's wife nor any of their children is a shareholder of the corporations. Nor are any of them officers or directors.

40 Balwant admitted in his cross-examination that the Udham Parties only objected to Balwant's wife attending at the supermarket. Balwant testified that it was his wife who was asked to leave the supermarket, not him.

41 Balwant testified on cross-examination that he decided that he was not going to work in the supermarket. He considers himself to be retired.

(v) Hostility within the Family Residence

42 Since the issues arose about apparent stealing from the supermarket, the Udham Parties assert that Balwant has often been hostile and even physically abusive to various family members, including his elderly parents. Balwant disputes these assertions.

43 Udham and Gurmit are 91 years old and 78 years old, respectively. Both of them are in poor health and the living arrangements and business dealings with Balwant continue to cause them a great deal of stress.

44 The police have been called on two occasions with respect to Balwant's treatment of his parents. There is no allegation that any charges have been laid.

45 The Udham Parties assert that Balwant, when in his parents' presence, would yell at them, threaten them and call them names.

46 In the course of these disputes, the Jajj parents have left the property for their own well-being.

47 Balwant asserts that he and his family have no other place to live other than the residential part of the Gerrard Street Properties.

48 The Udham Parties say that the Balwant family has other places where they can live. They say Balwant has been staying outside of the Gerrard Street Properties for several days at a time and for extended periods of time, including from June 23rd to July 9th, August 31st to September 15th, 2012 and from June 8 to June 16, 2013. Balwant disputes that there are other places where the Balwant family can take out continuing residence.

49 Gurmit, following the April 15, 2012 meeting, suffered several heart attacks and has undergone a quadruple bypass. She has been hospitalized eight times and had numerous emergency room visits since the dispute with Balwant erupted. Udham has been hospitalized four times since the dispute with Balwant started.

50 The Udham parties assert that Balwant also deliberately put Udham's health at risk after the April 15, 2012 meeting by ceasing to administer Udham's medications and telling him not to take his medications.

51 Balwant and his children have now taken over additional rooms in the Gerrard Street Properties. This has been done by removing the Jajj parents' belongings from rooms that Balwant and his family members wanted for themselves, and not

removing personal belongings from the rooms that Balwant's family members have moved out of.

52 There are 12 bedrooms at the Gerrard Street Properties. Of the 12 bedrooms, the Balwant family is occupying 7 of the rooms. There are only two adult children and Balwant and his wife living at the Gerrard Street Properties. Balwant and his family have also occupied three of the five available bathrooms.

53 The rooms and washrooms that Balwant, his wife and two adult children take up are located entirely in the residential properties originally owned 100% by Udham and Gurmit respectively and now owned by them and Jajj Holdings. Balwant and his family pay no rent and contribute nothing to the expenses of the properties.

Alleged Converted Funds and Property

54 The Udham Parties assert the following facts. Balwant disputes the correctness or relevance of many of these facts. As noted in the second part of these reasons, certain of these asserted facts are key to the decision set out below.

(i) Improper Transfer from Bank Accounts

55 As soon as the relationship between the family members broke down, Balwant closed the main joint family account from which most expenses were paid. He did so without giving any notice to the respondents and he transferred the money to his personal accounts.

56 Balwant also closed the family's US account with RBC and transferred the balance to his personal account.

57 Balwant also changed the address on the account in which the Jajj parents' pensions were being direct deposited. He proceeded to empty the account without their consent and has kept the money for himself.

58 When additional pension payments were deposited into the pension account, Balwant took additional funds ($644.17 and $140.35) from the account.

59 From an ICICI Bank account, Balwant gave $10,000 to his daughter, Taljeet. This money was not Balwant's to deal with as he pleased; it belonged to the whole family.

60 Juejar has a joint account with Balwant at the ICICI Bank. Balwant withdrew $350 cash on August 17, 2012. This money was family money.

(ii) Improper Transfers to India

61 Since the breakdown in the relationship with Balwant, the Udham Parties say they learned that Balwant transferred over $300,000 belonging to the Jajj family to India.

62 Balwant admitted that dealing with the assets in India was his responsibility.

63 After finding deposits with the Union Bank of India in the amount of approximately CDN$12,000, Juejar contacted their call centre on September 29, 2013. They were not willing to send him statements, but advised him that the current balance was approximately CDN$1,000. They could not give Juejar information on what Balwant had done with the rest of the money that had been deposited into the account.

64 The Union Bank account of India ought to have been receiving deposits from a rental property of approximately CDN$1,000 per month, net of expenses, since August 2010. Based on this income, there should have been approximately CDN$35,000 on deposit at the Union Bank of India, but there is only $1,000.

65 None of the Udham Parties have made any withdrawals from the Union Bank of India account. The only people that

could have withdrawn the funds were Balwant and his wife, whom he added to the account without advising the Udham Parties.

66 Balwant has refused to provide any information concerning the Union Bank of India account when asked after the dispute with him arose or on cross-examination.

(iii) Other Disputed Transfers

67 In particular the Udham Parties say they have discovered that:

(1) over $32,000 was taken by Balwant and spent on son's wedding in Vancouver in January 2012. There were additional withdrawals for airfare and jewellery;

(2) $13,500 was taken by Balwant and spent on jewellery for Balwant's daughter-in-law;

(3) over $33,000 was taken by Balwant and spent on Balwant's daughter's wedding in June 2010; and

(4) amounts were taken to pay for Balwant's daughter's credit card debt.

(iv) Unauthorized Taking of Groceries

68 Balwant and his wife continue to attend at the supermarket and take whatever items they want over the objections of the Udham Parties.

69 Balwant and his wife are taking groceries that clearly exceed their own personal needs. Despite living upstairs, they are taking the groceries elsewhere, likely to their children. Their conduct has been recorded on store video cameras and the value of the items taken is estimated at well over $8,000 as at September 17, 2013.

(v) Refusal to Pay Living Expenses

70 Balwant has failed to pay his share of the bills relating to the Gerrard Street Properties since April 15, 2012. Balwant, his wife and children refuse to contribute any money toward:

(1) property taxes, which are over $12,000 per year for the residential portion of the Gerrard Street Properties;

(2) utilities; and

(3) general upkeep costs, including recent roof repairs.

(vi) Tohana Property in India

71 The Jajj parents owned a property in Tohana India that the Udham Parties say is estimated to be worth over $2,000,000. Balwant has never contributed any capital toward the property. The Udham Parties say Balwant transferred ownership of the Tohana property to himself and Juejar and took control of the land in Tohana.

Balwant Competing Against 100 Canada

72 The Udham Parties say that Balwant and his family are now carrying on business as "Judge Trading Limited", trading

on the "Jajj" name. The company is working in direct competition with BJ International.

73 Balwant's son, Gurpreet, is named in the corporation profile report for Judge Trading Limited. However, Gurpreet is employed full time in the information technology field and resides in California.

74 Balwant testified in cross-examination that he had no knowledge of Judge Trading until he read the application record and that he had no involvement in arranging financing for the company. This is false according to Gurpreet.

75 Gurpreet testified that he discussed the business with Balwant when he asked Balwant for a $25,000 loan to start the business. It is now admitted that Balwant actually wrote a cheque for $25,000 payable to Judge Trading to fund its start-up in November of 2012.

76 The contact telephone number for Judge Trading is Balwant's cell phone. When Balwant receives calls for Judge Trading, Gurpreet testified that Balwant takes a message or tells the caller to call Gurpreet or his siblings.

77 Gurpreet admitted on cross-examination that Balwant and Judge Trading share the same post office box where they receive their mail. Gurpreet testified that his parents might have applied for the post office box, but the application has not been produced. In contrast, Balwant testified that he did not know if Judge Trading receives mail at the post office box.

78 Juejar has provided evidence that in discussions with specific named suppliers and customers, they have identified Balwant as the person who told them about Judge Trading. Suppliers have confused Judge Trading and BJ International, sending invoices to BJ International but naming Judge Trading.

79 Balwant, in cross-examination, responded to Juejar's evidence by saying simply that he, Balwant, might have met with these people as "friends".

Access to Records

80 The Udham Parties deny that Balwant has been refused access to records that he was entitled to review as a shareholder. They say that it was Balwant who took tax records from the corporate accountants and that prior to the dispute, he and his daughter also destroyed many years' worth of data claiming he needed to "clean up" the space.

Balwant's Assets

81 The Udham Parties make the following submissions:

(i) Assets Balwant Disclosed

82 Balwant's affidavit filed in support of his motion for interim costs only discloses the existence of one bank account with RBC, a line of credit and his RRSPs. Balwant included the statements for the bank account only from October 12, 2012 until September 12, 2013.

83 Balwant has refused to produce the cheques identified as coming out of his bank account. Further, despite undertaking to do so, Balwant has failed to produce any of his bank statements from April 2012 through to October 12, 2012.

(ii) Additional Bank Accounts Identified by the Udham Parties

TD Bank Account

84 The Udham Parties identified an additional bank account that Balwant has with the TD Bank. The Udham Parties learned of the account from a postcard received at the Gerrard Street Properties from the TD Bank in or about September or

October 2013, thanking Balwant for opening a new account.

85 Balwant acknowledged the TD account on cross-examination, but has refused to produce the statements for the account despite requests that he do so.

ICICI Bank Accounts

86 Balwant failed to disclose Canadian accounts he has with the ICICI Bank.

87 From the ICICI Bank account, it shows that Balwant transferred $10,000 to his daughter, Taljeet, on August 21, 2012.

Another RBC Account

88 After the break down in the family relationship in April 2012, Balwant provided Juejar with an account number and demanded that Juejar transfer $40,000 into it.

89 Juejar refused to transfer the funds, but it is clear that the account existed and Balwant does not mention it in his affidavit. Further, despite being requested, Balwant has refused to produce the statements pertaining to this account.

ING Account

90 Balwant did not disclose an account he has with ING, despite admitting in cross-examinations that he still has the account. The most recent statement found for the account is from April 2012 and it indicates that Balwant had $16,349.91 on deposit in the account. Despite being requested, Balwant has refused to produce any statements for the account.

(iii) Other Undisclosed Assets

91 Balwant admitted in cross-examination that he is aware of accounts outside of Canada that are only in his name. Despite that, he did not disclose any of them. Despite being requested, Balwant has refused to produce bank statements from these accounts in his name.

92 Balwant also admitted that he has a fixed deposit investment in India on his name, but refused to find out how much it is worth.

93 Balwant did not disclose in his affidavit that contrary to receiving support from his children, he is actually owed money by them. Gurpreet owes Balwant $5,000 from a loan that Balwant provided to start up Judge Trading in November 2012.

94 Balwant's affidavit also failed to disclose that he, together with Juejar, are the owners of a property in India valued at CDN$2,000,000.

95 The Udham Parties have also discovered fixed deposit accounts in India at the Union Bank of India, at ICICI (India) and the Oriental Bank of Commerce India for which Balwant is an account holder.

96 Balwant has refused to provide the respondents with any information concerning what is on deposit in these accounts or what their current status is.

97 None of the Udham Parties have made any withdrawals from the Union Bank of India account. The only people that could have withdrawn the funds were Balwant and his wife, whom he added to the account without advising the respondents.

98 Balwant has refused to provide any information concerning the Union Bank of India account when asked after the

dispute with him arose or on cross-examination.

(iv) Travel

99 The Udham Parties dispute Balwant's claims of impecuniosity made by him with respect to his motion for interim costs. They assert that after April 15, 2012, Balwant and his wife travelled to India (Balwant went there twice, once for two weeks with his wife and again for one week), British Columbia (Balwant went once for one month, his wife went twice, including a one-month stay) and Montreal.

100 Balwant acknowledges using his own money to travel. He also acknowledges paying for his son to travel from California and paying for his daughter to go to British Columbia, all after April 15, 2012.

101 Balwant lent $25,000 to Gurpreet in November 2012 and is still owed $5,000. The payments Balwant identifies in his bank statements as showing his son's contributions toward Balwant's living expenses are actually loan repayments that were owed to Balwant.

102 Despite Balwant giving evidence in his affidavit that the $25,000 was loaned to his son to purchase a condominium, and despite Balwant testifying in cross-examination that he did not know how is son used the money, it later emerged that the $25,000 cheque Balwant provided to his son was payable to Judge Trading, the competing business to 100 Canada.

Quantum of Costs Claimed for Interim Costs

103 The Udham Parties make the following submissions.

104 The cost estimates Balwant relies on in support of his motion for interim costs include costs related to the court action commenced by his wife for wrongful dismissal and in which Balwant is a defendant by counterclaim. Balwant also includes items that relate to the application brought by the Jajj parents in which Balwant is a respondent. These other proceedings do not fall within Balwant's oppression claim.

105 The Udham Parties submit that the two corporate respondents do not have the resources to pay the costs that Balwant is asking for, having both incurred losses for 2011 and 2012.

Analysis of Facts and Law

Motion for Interim Costs

106 Balwant seeks an order that 100 Canada and Jajj Holdings pay his interim costs in his application for an oppression remedy pursuant to s. 249(4) of Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA") and/or s. 242(4) of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (the "CBCA").

107 Section 249(4) of the OBCA provides:

> In an application made...under this Part, the court may at any time order the corporation or its affiliate to pay to the complainant interim costs, including reasonable legal fees and disbursements, for which interim costs the complainant may be held accountable to the corporation or its affiliate upon final disposition of the application or action.

108 Section 242(4) of the CBCA is the corresponding section under the federal legislation and permits an applicant to seek the same relief as provided for in section 249(4) of the OBCA.

109 A party seeking interim costs under the oppression sections of the relevant statutes must establish:

(1) that there is a case of sufficient merit to warrant pursuit; and

(2) that the applicant is genuinely in financial circumstances which, but for an order for interim costs, would preclude the claim from being pursued.

(See: *Alles v. Maurice*, [1992] O.J. No. 297 (Ont. Gen. Div.) at p. 5; *Waxman v. Waxman*, [2002] O.J. No. 3805 (Ont. C.A. [In Chambers]) at para. 20; and *Thomas v. Thomas Health Care Corp.*, [2013] O.J. No. 3036 (Ont. S.C.J.) at para. 26.)

110 The inability to fund an otherwise meritorious lawsuit is fundamental to the court's power to make an order for interim costs under section 249(4) (see: *Alles*, *supra*, at p. 5).

111 The courts do not have unfettered discretion to make an order for interim costs. If the court is inclined to grant such relief, the usual practice is to award costs for a specific purpose or for a limited duration, with an opportunity for review if necessary (see: *Thomas*, *supra*, at para. 34).

Merits of the Oppression Claim — Removal as Director

112 Counsel submitted that Balwant has a case of sufficient merit because he is a shareholder and was removed as a director by the other directors. Under the 100 Canada and the Jajj Holding by-laws the power to remove a director is accorded to the shareholders, not the directors. The four directors of each of the companies are its four shareholders. Three of the directors supported the removal of Balwant. The removal occurred after they had discovered the nature and consequences of the transactions in the shares of 100 Canada and the reorganization of Jajj Holdings. In order to assess whether the removal of Balwant presents a case of sufficient merit, it is necessary to consider the claims that the Udham Parties make against Balwant for misappropriation of family assets.

Prima Facie Case of Misappropriation: The Shares in 100 Canada

113 Sulinder Gill's Affidavit of September 17, 2013, at paras. 1, 2, 27 and 32 to 35 states as follows:

1. I am the daughter of the applicants Udham Jajj ("Udham" or "father") and Gurmit Jajj ("Gurmit" or "mother") and as such I have knowledge of the matters to which I hereinafter depose.

2. I am giving evidence in this matter as my parents are elderly, are suffering from severe health problems and do not speak English. My mother has suffered multiple heart attacks and my father also suffers from heart problems. Their health problems have been exacerbated by the breakdown in the relationship of the parties that led to the within application.

. . .

27. When 100 Canada was incorporated, my father, Udham, owned 100 shares representing 100% of the company. In 1992, Balwant advised the family that certain steps had to be taken regarding the business "in order to reduce taxes". He made it clear to everyone that there would be no change to the ownership of the business and that my father would still control the business. We accepted this at face value.

. . .

32. My parents advise me, and I believe, that Balwant brought them to a lawyer's office one day and presented my father with documents in English and told him that he needed to sign them "for tax reasons". Neither of my parents can read English and my parents advise me and I believe that the documents were never translated to them or explained to them. My father simply signed them as Balwant directed. My father advises me, and I believe, that the transfer involving 100 Canada shares was done without his knowledge or approval.

33. Further, my father advises me and I believe that he was never told to obtain independent legal advice concerning the

documents Balwant directed him to sign or concerning any reorganization of 100 Canada's ownership.

34. The effect of the transfer was to reduce my father's ownership interest in 100 Canada from 100% to 10%.

35. Despite this drastic change in ownership, Balwant maintained in front of family and relatives that my father had 100% control and ownership of the business. It is clear from the documents Balwant had his lawyers prepare that this is not correct.

114 The supporting affidavit of Gurmit Jajj was sworn September 14, 2013, three days before the Affidavit of Sulinder was affirmed. The Affidavit of Gurmit states, at para. 2, that she reviewed the Affidavit of Sulinder and adopts its contents as her own. On the day she swore the Affidavit, Gurmit cannot have seen the sworn affidavit of Sulinder in its affirmed form. Gurmit does not say that the affidavit was affirmed. The Affidavit may have been the draft of the Affidavit that was affirmed. The facts stated in the Affidavit paragraphs set out above which support the conclusion that there was no informed consent are not contradicted by Balwant in his affidavit. So, the mismatch in the dates of the Affidavits of Sulinder and Gurmit were respectively affirmed and sworn does not provide a reason to disregard or discount the Affidavit of Sulinder Gill in this respect.

115 Balwant's Affidavit of September 9, 2013, at para. 12, states:

In or around September of 1992, again pursuant to Sikh family tradition, my mother requested that additional family members be added as directors and shareholders of 100337 (myself included). These instructions were followed and shares of the company were allocated to those individuals and me accordingly.

116 This is the only statement by Balwant in his Affidavits with regard to the matters addressed in Sulinder Gill's affidavit set out above. It does not deny that Udham's interest in the company was reduced from 100% to 10% without his informed consent.

117 For this reason, there is a strong *prima facie* case that Balwant misappropriated a large part of Udham's interest in the company.

Prima Facie Case of Misappropriation of Assets: re the Gerrard Street Properties

118 Sulinder Gills' affidavit of September 17, 2013 at paras. 36 to 43 states as follows:

36. We also learned in the spring of 2012 that in or about 1995, Balwant retained the law firm of Armel, Cohen, Stieber to give advice on an estate plan involving the Gerrard Properties. Attached hereto as Exhibit "E" are various letters that we located that are from lawyers involving this estate plan and confirming Balwant's instructions on how to proceed. The letters are dated November 22, 1995, October 18 and November 20, 1996, January 15, March 11 and May 1, 1997 and March 11, 1998.

37. This estate plan resulted in the incorporation of Jajj Investments. Balwant instructed his lawyers to give him an interest in Jajj Investments. Attached hereto as Exhibit "F" is the current share register for Jajj Investments. Attached hereto as Exhibit "G" is a copy of the bylaws for the company.

38. Balwant then had Udham and Gurmit sign transfers transferring 70% of their interests in the commercial portions of the Gerrard Properties to Jajj Investments. Attached hereto as Exhibit "H" are the agreement of purchase and sale and various transfer documents that Balwant had my parents execute transferring the interests in the Gerrard Properties to Jajj Investments.

39. Attached hereto as Exhibit "I" is a copy of the current property abstracts for the Gerrard Properties showing the parties registered on title.

> 40. My parents advise me, and I believe, that no one ever told them about or explained the estate plan that Balwant was implementing and no one explained to them or translated the agreement of purchase and sale or the transfer documents that they were signing. They advise me, and I believe, that Balwant simply put the documents in front of them and told them that they related to taxes and that they needed to sign them.
>
> 41. As stated above, my parents only speak and read Punjabi. They advise me and I believe that they were never told to obtain independent legal advice concerning the transfers. To the contrary, my parents advise me, and I believe, that these transfers involving Jajj Investments were done without their knowledge or approval.
>
> 42. My family members and I only learned about the 100 Canada and Gerrard Properties reorganizations when there was a breakdown in the relationship with Balwant and Balwant wanted to take the minute books of the Companies out of the Gerrard Properties. My siblings and I got suspicious and reviewed their contents. That was not until the spring of 2012. It was then that I reviewed the minute books and discovered the true ownership structure of the companies. I then advised my parents who were shocked and very troubled by the revelation.
>
> 43. The information in the minute books was contrary to what Balwant had told family members, myself included, at family meetings previously when he said that our parents owned everything.

119 As a result of the above transactions, Jajj Holdings acquired a 70% interest in the three Gerrard Street Properties.

120 The shareholdings in Jajj Holdings were as follows: Balwant and Juejar owned 50 common shares and Udham, Gurmit, Balwant and Juejar owned the preference shares. As a consequence of the transfers to Jajj Holdings, each of Udham and Gurmit lost 70% of the interests they had held in two of the properties and Balwant, Juejar and Gurmit lost 70% of the one-third interest they each held in the third property and the three of them received shares in Jajj Holdings instead. Balwant gave up 70% of his one-third interest in the third property and acquired shares in Jajj Holdings instead. In the case of Udham and Gurmit, these changes were done without their informed consent.

121 For this reason, there is a strong *prima facie* case that Balwant misappropriated part of the interests of Udham and Gurmit in the Gerrard Street Properties.

Whether the Removal of Balwant was Oppressive

122 On the analysis set out above, the three directors who supported the removal of Balwant as a director had a good *prima facie* reason to remove Balwant as a director, since his actions could not be regarded as in the best interests of the companies and their shareholders.

123 The removal did not comply with the by-law requirements, but it was at least *prima facie* in the best interests of the companies and their shareholders. Since that is the case, there is no apparent basis for considering the removal to have been an oppressive act by the other directors.

Loss of Compensation

124 Balwant alleges that he has been "cut off from any remuneration flowing from his shareholdings or position at 100 Canada or Jajj Holdings and has been mistreated in other respects as well. It does not appear that the Udham Parties have taken any action to interfere with his entitlement to distributions payable to shareholders. His role in management has been altered but, to the extent that that is because of actions taken by the board and not himself, it does not give rise to a claim for an oppression remedy unless a motion is made for his recognition as a complainant and no such motion has been made and granted in this case.

Withholding Records

125 In para. 14 of his Factum, Balwant states that records have been withheld from him that set out resolutions outlining the actions of counsel to the companies in the months identified in that paragraph. The Udham Parties are hereby ordered to produce those records within 30 days, subject to any order of the court to the contrary.

Other Considerations

126 Balwant states, as grounds for an oppression remedy, that the companies are paying the fees of counsel in these applications. However, it is not shown that the companies should not pay such fees in respect of litigation in which the companies are parties.

127 Under the oppression remedy provisions in both the OBCA and the CBCA, an application for relief may be made where the conduct is oppressive to "the interests of any security holder, creditor, director or officer of the corporation". The Factum of Balwant itemizes a number of other complaints asserted by Balwant with respect to the treatment he and members of his family have received since his ouster, but these other complaints do not relate to his identity as a security holder, creditor, director or officer of the corporations.

128 Also important here is the fact that the statutory provision for interim costs is an exception to the established practice of the courts that costs are awarded only after the disposition of the case and the power granted by the provision to the courts to award interim costs is explicitly stated to be discretionary to the courts.

129 In the present case, there is a strong *prima facie* case that the directors acted properly in removing Balwant. The cessation of Balwant's management role appears to have been consequential to his removal as a director. For these reasons it would not be appropriate to exercise the discretion of the court in his favour on the basis of his removal as a director.

130 In view of this conclusion, it is not necessary to consider the other two parts of the test for interim costs.

Motion for Mareva Injunction

131 In order to obtain a Mareva injunction, the moving party must establish:

> (1) that there is a strong prima facie case of fraud;
>
> (2) there is a real and genuine risk that the respondent will put his assets beyond his creditors for the purpose of avoiding judgment;
>
> (3) the moving party will suffer irreparable harm; and
>
> (4) the balance of convenience favours the moving party.

(See: *Chitel v. Rothbart*, 1982 CarswellOnt 508 (Ont. C.A.), p. 17, para. 56; and *Aetna Financial Services Ltd. v. Feigelman*, 1985 CarswellMan 19 (S.C.C.).)

132 As found above, there is a strong *prima facie* case of fraud against Balwant with respect to the changes made in the ownership of 100 Canada and the Gerrard Street Properties. A strong *prima facie* case of fraud is also made out in certain other respects noted below. One of these is that Balwant has closed accounts belonging to his parents and taken the proceeds for himself. Another is the banking transactions with the ICICI Bank and in India referred to below.

133 The Udham Parties submit that the banking records that have been found to date identify at least $300,000 that Balwant has transferred to India and not accounted for.

134 Sulinder Gill states in her Affidavit, sworn September 17, 2013 at paragraph 70, as follows:

> From the information we have been able to find, we have discovered that Balwant opened numerous accounts that we had no knowledge of previously and in which he was depositing money that he was transferring from the joint personal account. He has used these accounts to transfer hundreds of thousands of dollars to accounts in India and, I believe, to transfer substantial amounts to his children. Attached hereto as Exhibit "K" are a summary and supporting records that we have been able to obtain showing these substantial transfers. Unfortunately we do not have access to most of the bank statements.

135 Exhibit K sets out a list of entries in Balwant bank accounts totalling $336,903.89. These entries include a number of transfers to accounts described as "BJ Personal Account in Hissar India". Two of the entries record transfers from "family joint account" or "joint account" to "ICICI bank for transfer to India".

136 In paragraph 86 of the Factum of Balwant, it is submitted that the accounts that the Udham Parties have submitted do not show any recent removal of assets from the jurisdiction, but even if this is so, it does not by itself assist Balwant. It is also submitted that these removals of assets were not made in a manner distinct from the usual course, but even if this is so it does not in itself assist Balwant since it does not say what the "usual course" means in this case. It is also submitted in paragraph 86 that it was established that,

> ...the movement of funds in these accounts was tested on cross-examination and it was established that these accounts were operated with the full knowledge of Juejar, Sulinder, Gurmit and Udham and used to transact legitimate Jajj family business.42

137 Footnote 42 at the end of paragraph 86 refers to the following materials:

> Cross-examination of Sulinder Gill, Transcript Book, Tab F, pages 61-63, Q. 320-324; cross-examination of Juejar Jajj, Transcript Book, Tab D, pages 115-116, Q. 647-652; Answers to Undertakings of Balwant Jajj, Applicant's Record, Tab 7-5; Respondents' Motion Record of October 4, 2013 at Tab K; and cross-examination of Juejar Jajj, Transcript Book, Tab D, pages 115-116, Q. 647-651.

The last two items referred to in the footnote are set out in items 17 and 18, respectively of the Applicant's (*i.e.* Balwant's) Compendium.

138 All that the materials referred to in footnote 42 show is that Balwant carried out banking transactions in bank accounts that bore his name. They do not show that "these bank accounts were operated with the full knowledge of Sulinder, Gurmit and Udham". Nor do they show that they were "used to transact legitimate Jajj family business".

139 It is not submitted by Balwant that the amounts in these accounts came from his own personal resources. The amounts must have come from "family funds", as the factum of Balwant acknowledges. There is no suggestion that the transfers of amounts out of the accounts in Exhibit K to the Affidavit of Sulinder Gill were made to family accounts or for the benefit of the family. On this basis, the only conclusion that can be reached is that Balwant was removing funds from the family accounts to his personal accounts in India for his own benefit. This determination is key to the issue of the appropriateness of a Mareva injunction.

140 Based on this finding, there is a real and genuine risk that Balwant will put his asset beyond the claims of the Udham Parties for the purpose of avoiding judgment.

141 It is submitted for Balwant that an adverse inference should be drawn against the Udham Parties with respect to the legitimacy and urgency of the request for a Mareva injunction because they have delayed for at least one year in asserting their rights. The Udham Parties knew enough by April 15, 2012 to decide to remove Balwant as a director. That action did not involve resort to the Court. The Application Record, dated September 15, 2013, made by the Udham Parties involves a number of issues, such as the bank accounts relating to India, that are not necessarily part of the basis for the decision to remove Balwant as a director. It is reasonable to consider that the decision to launch the application would take more time for

preparation of the case and the application. As well, both Udham and Gurmit have serious health issues which would provide a good reason to move very cautiously before undertaking the inevitable stress and cost of major litigation. So it is understandable that about a year and a half passed before the application was launched. In these circumstances, the delay, if it can be called that, does not suggest that the Udham Parties considered that asserting their rights was not legitimate and urgent.

142 It is submitted for Balwant that there is no risk to the Udham Parties in any event because Balwant has substantial assets tied up in the family business which are available for set-off if necessary. However, if Balwant is unsuccessful on the application he could be left without any interest in 100 Canada and only a one-third interest in one of the three Gerrard Street Properties and substantial costs to pay. It was argued for Balwant on his motion for interim costs that he is in a state of financial hardship. If that is so, there is no basis to conclude that Balwant has the resources to pay a judgment that could amount to some hundreds of thousands of dollars. There are the bank accounts in India, but to access them may well be difficult. Moreover, without a Mareva injunction, the assets in those accounts could be moved to more inaccessible places.

143 Accordingly, there is a risk of irreparable harm to the Udham Parties if a Mareva injunction is not ordered. The injunction will preserve those assets for the successful party. Since that is so and in view of the *prima facie* case against Balwant, the balance of convenience does not favour Balwant.

144 In determining the terms and scope of a Mareva injunction, the Ontario Court of Appeal has given the following direction in *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.) at p. 21:

> ... The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law.

145 On the materials before the Court, there is a material risk is that Balwant may deal with family assets by using the ICICI Bank or other intermediaries in India to shield assets from the possibility of tracing and access through the jurisdiction of the Court.

Injunction Prohibiting Competing Business

146 The test for an injunction requires the party seeking the injunction to establish:

> (1) that there is a serious question to be tried;
>
> (2) that the party seeking the injunction will suffer irreparable harm if the injunction is not granted; and
>
> (3) that the balance of convenience favours the party seeking the injunction.

(See: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 (S.C.C.) at paras. 78-80.)

147 The Udham Parties submit that there is a serious issue to be tried in that Balwant committed a breach of his fiduciary duty to 100 Canada by starting the business of Judge Trading, a business that competes with 100 Canada, at a time when he was still a director and general manager of 100 Canada. It is submitted that Balwant started the competing business of Judge Trading by providing a cheque for $25,000 on November 12, 2012. Judge Trading Limited was incorporated on October 24, 2012. Balwant was removed as a director on April 15, 2012. The Udham Parties submit that Balwant has not worked at 100 Canada since that date. On these facts, Balwant ceased on April 15, 2012 to hold or execute any position or responsibilities that could have given him fiduciary duties to the company. If he started up a competing business in November 2012, he was not restricted by any fiduciary duty from doing so. So there is no serious question to be tried.

Exclusive Possession of the Gerrard Street Properties

148 The Udham Parties seek an order granting Udham and Gurmit exclusive interim possession of the residential portions of the Gerrard Street Properties where, until recently, they were residing with Balwant and his family.

149 At present, the two properties on which the residential portions are located are owned as to an undivided 70% by Jajj Holdings and as to an undivided 30% by Udham in one case and by Gurmit in the other.

150 The only cases cited in favour of the authority of the Court to make the order requested are: *McCord v. Robinson*, [2005] O.J. No. 4492 (Ont. S.C.J.) and *Broadbear v. Prothero*, [2011] O.J. No. 3136 (Ont. S.C.J.). In those cases, the Court made an order to allow continued occupancy of the premises by one party where a sale of the premises has been ordered by the Court. In the present case, no sale order has yet been made and the outcome of the application for such an order cannot be determined. The finding made above is that there is a strong *prima facie* case that Udham and Gurmit have been defrauded by Balwant into entering into the transfer of part of their interests in the properties to Jajj Holdings. In their application, the Udham Parties seek a declaration rescinding the interests of Jajj in the properties and directing their sale.

151 At present, the occupation by Balwant is a result of what was originally an informed consensus with his parents and brother, which has now broken down.

152 The order that is sought here is an interim interlocutory order so it must be shown that there is a serious issue to be tried. As found above, there is a serious issue to be tried as to whether Udham and Gurmit have been defrauded of part of their interests in the properties and therefore whether they are entitled to have those interests restored to them.

153 Udham and Gurmit moved out of the premises. It is submitted that they did so because of physical abuse and threats from Balwant, which are denied. It is likely that there was abusive conduct and that it is a material factor in their not returning to the premises.

154 If the order requested is made and Balwant is evicted, Udham and Gurmit will presumably feel comfortable to return to their residence. They could return now, but it is understandable that they would not feel comfortable about doing so. In the meantime, they have made temporary living arrangements outside the premises with Sulinder. If Balwant is evicted, he would have to find new accommodation. It is difficult to assess which party would suffer the greater inconvenience.

155 In the circumstances, it is better not to grant the eviction order sought immediately, but instead to address first the specific concerns addressed by Gurmit in her cross-examination, namely that Balwant should not behave in an intimidating way. Accordingly, there should be an order against Balwant to constrain such conduct. However, if Udham and Gurmit resume residence in the property and Gurmit decides that cohabitation with Balwant is not acceptable, she may give notice to him that he and his family are to vacate the properties within 30 days of the notice and they are to do so. Also, there must be an order to Balwant to vacate the part of the premises which Udham and Gurmit occupied before they moved out.

Conclusion

156 For the reasons set forth above, orders are to go as follows:

(1) An order that the motion that Balwant Jajj be granted interim costs is dismissed;

(2) An interim and interlocutory order granting to Udham Singh Jajj, Gurmit Kaur Jajj, Jajj Investment Holdings Ltd. and 100337 Canada Limited a Mareva injunction prohibiting Balwant from selling, transferring or otherwise dealing with assets in his name, which injunction shall be modelled on and contain the terms and provisions set out in the model Mareva Order approved for use in Commercial List matters with such changes as may be approved in writing by counsel for parties or by the Court.

(3) An interim and interlocutory order directing that if Udham and Gurmit give notice to Balwant that they wish to resume residence at the Gerrard Street Properties:

(i) Balwant shall cause his family to vacate promptly the part of the property that was previously occupied by Udham and Gurmit before they moved out;

(ii) Balwant shall not engage in abusive or intimidating conduct towards Udham or Gurmit and he shall otherwise keep the peace while they and he and/or his family reside at the Gerrard Street Properties; and

(iii) if subsequently Gurmit decides that cohabitation with Balwant is not acceptable, she may give notice to him that he and his family are required to vacate the property entirely and they shall do so within 30 days of the notice.

157 If submissions on costs are necessary, they may be made to me in writing with a copy by e-mail to my assistant. The first submissions are to be made within 10 days of the release of these reasons, any response within the 10 days thereafter and any reply within the 10 days after that.

Order accordingly.

End of Document

TAB 4

2006 CarswellOnt 5787
Ontario Superior Court of Justice

Sabourin & Sun Group of Cos. v. Laiken

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

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

S.N. Lederman J.

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

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

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.A Strong prima facie case

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.B Assets within jurisdiction

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.C Real risk of removal of assets
II.2.c.iii.C.3 Miscellaneous

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.D Undertaking as to damages

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.E Full and frank disclosure

Securities

III Trading in securities
III.7 Miscellaneous

Headnote

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

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Assets within jurisdiction

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

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Undertaking as to damages

Remedies --- Injunctions — Availability of injunctions — Mareva injunctions — Threshold test — Full and frank disclosure

Securities --- Trading in securities — Miscellaneous

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

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

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

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

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

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

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

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

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

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

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

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

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

5 No affidavit from the Sabourin Group has been filed to contest any of these allegations. Rather, they take the position that there had been a serious material non-disclosure to the Court when Laikin obtained the *ex parte* order. In particular, they allege that she did not disclose to the Court that in a Family Law application against her ex-common law husband, Godfrey Tanku Tatsanbong ("Tanku") she blamed her entire loss on Tanku and not on the Sabourin Group and has indicated that he was solely responsible for the loss of her money and not the Sabourin Group. They also allege that there was a failure to disclose to the Court various emails from Laikin to the Sabourin Group which indicated that she, in fact, had a high degree of sophistication and knowledge about trading securities and in particular, taking short positions in the market. Such evidence is consistent, the Sabourin Group submits, with the fact that their defence has been that from the beginning, Laikin lost all of her money in high risk trades on margin, taking short positions that relied upon their success on her and Tanku's gamble that the market would fall when, in fact, it did just the opposite. The Sabourin Group's position in essence, is that Laikin and/or her ex-common law husband, Tanku, proceeded to trade away all her money, mainly by adopting short positions on stocks in a rising market and, thus, were the authors of their own misfortune.

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

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

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

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

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

> a) establish a strong *prima facie* case;
>
> b) make a full and frank disclosure of all matters in her knowledge which are material for the motions judge to know;
>
> c) give some grounds for believing that the defendants have assets in the jurisdiction; and
>
> d) give grounds for believing that there is a risk of the assets being removed before any judgment can be satisfied.

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

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

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

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

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

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

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

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

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

End of Document

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2004 CarswellOnt 3246
Ontario Superior Court of Justice

SLMsoft.com Inc. v. Rampart Securities Inc. (Trustee of)

2004 CarswellOnt 3246, [2004] O.J. No. 3290, 132 A.C.W.S. (3d) 105, 132 A.C.W.S. (3d) 980, 4 C.B.R. (5th) 105

SLMSOFT.COM INC. (Plaintiff) and ERNST & YOUNG INC., IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF RAMPART SECURITIES INC. (Defendant)

ERNST & YOUNG INC., IN ITS CAPACITY AS TRUSTEE OF THE ESTATE OF RAMPART SECURITIES INC. (Plaintiff by Counterclaim) and SLMSOFT.COM INC., GOVIN MISIR, DEV MISIR, 1237108 ONTARIO LTD., 1237156 ONTARIO LTD., MISIR HOLDINGS LTD., MOLLY MISIR, JOHN ILLIDGE, DAVID CATHCART, PATRICIA McLEAN, NICOLAS TSACONAKOS, ATLAS SECURITIES INC., ST. JAMES SECURITIES INC. AND ST. JAMES CAPITAL CORPORATION (Defendants by Counterclaim)

Ground J.

Heard: April 2, 15, 16, May 12, 13, June 23-25, 2004
Judgment: August 9, 2004
Docket: 31-OR-206788-T

Proceedings: refused leave to appeal *SLMsoft.com Inc. v. Ernst & Young Inc.* (2005), 2005 CarswellOnt 6489 (Ont. Div. Ct.)

Counsel: Jeffrey Dermer, Craig J. Hill, Brent Mescall for Defendant / Plaintiff by Counterclaim
Peter M. Daigle for Defendant by Counterclaim, St. James Securities Inc.

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

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Business associations

III Specific matters of corporate organization
III.1 Directors and officers
III.1.i Miscellaneous

Business associations

IV Powers, rights and liabilities
IV.10 Liability of corporations

Civil practice and procedure

XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.b Application
XXIII.10.b.iii Material in support

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.F Miscellaneous

Headnote

Injunctions --- Availability of injunctions — Mareva injunctions — Threshold test — General

Trustee in bankruptcy of bankrupt securities firm R Inc. brought counterclaim against various defendants who had maintained accounts with R Inc. — R Inc. had paid out substantial funds to defendants to counterclaim who had accumulated substantial margin debts in their R Inc. accounts which they had no ability or intention to repay — Counterclaim alleged that defendants, including another bankrupt securities corporation SJ Inc., were active participants in fraudulent conspiracy to misrepresent value of certain illiquid securities in order to obtain value and/or margin loans from R Inc. with intention or knowledge that their actions would strip value or capital out of R Inc., causing injury to R Inc. and contributing to its insolvency — Counterclaim was for damages in amount of $25,000,000 — Trustee in bankruptcy brought motion for Mareva injunction restraining SJ Inc. and its officers, directors and employees etc. from in any way disposing of assets of corporation — Motion granted — Trustee was almost certain to succeed at trial in establishing elements of conspiracy by defendants to counterclaim as pleaded — Trustee was not required to show that there were no other causes contributing to ultimate insolvency of R Inc. — Overwhelming evidence existed as to litany of transactions entered into by defendants to counterclaim with regard to accounts transferred from SJ Inc. to R Inc. involving overvaluations of net worth of customers or value of securities — Real risk existed that SJ Inc. would dissipate or dispose of its assets so as to defeat any attempt by trustee to realize on judgment it might obtain against SJ Inc. in counterclaim — Fact that SJ Inc. was indirectly owned and controlled by persons who were active participants in allegedly fraudulent transactions comprising alleged conspiracy led to conclusion that there was real possibility of SJ Inc. dissipating or disposing of its assets.

Business associations --- Powers, rights and liabilities — Liability of corporations

Change in composition of board of directors or senior officers of corporation does not absolve corporation for unlawful or actionable activities or transactions entered into by corporation under direction of previous boards of directors or senior officers.

Business associations --- Specific corporate organization matters — Directors and officers — Miscellaneous issues

Change in composition of board of directors or senior officers of corporation does not absolve corporation for unlawful or actionable activities or transactions entered into by corporation under direction of previous boards of directors or senior officers.

Table of Authorities

Cases considered by *Ground J.*:

Aetna Financial Services Ltd. v. Feigelman (1985), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161, [1985] 2 W.W.R. 97, 56 N.R. 241, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, 1985 CarswellMan 19, 1985

CarswellMan 379 (S.C.C.) — considered

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

Kingston Technology Co. v. Orr (2001), 2001 CarswellOnt 2172 (Ont. S.C.J.) — considered

MOTION by trustee in bankruptcy for Mareva injunction.

***Ground J.*:**

Nature of the Proceeding

1 The motion before the court is brought by Ernst & Young Inc., Trustee in Bankruptcy of Rampart Securities Inc. (the "Trustee") within the Counterclaim brought by the Trustee in this action commenced by SLMsoft.Com Inc. ("SLM") against the Trustee alleging that certain guarantees held by the Trustee of a number of related accounts at Rampart Securities Inc. ("Rampart") were altered after they had been executed and are void and unenforceable.

2 The motion seeks:

> an interlocutory Order in the form of a *Mareva* injunction restraining St. James Securities, its officers, directors, employees, agents and assigns, and any other persons having notice of the Order, until further Order of the Court, from directly or indirectly in any manner whatsoever:
>
> > (a) removing, disposing of, selling, dissipating, alienating, transferring, assigning or encumbering any assets of St. James Securities, wherever situate,
> >
> > (b) instructing, requesting, assisting, counseling, demanding, or encouraging any other person to do so, and
> >
> > (c) facilitating, assisting in, or participating directly or indirectly in any manner whatsoever in any acts the effect of which is to do so,
>
> with the exception of the delivery and/or payment to Robert Salna of such number of shares of TSX Group Inc. (the "TSX Shares") and certain proceeds connected therewith pursuant to a settlement agreement in respect of Commercial List Court File No. 01-CL-4300 (the "Oppression Action").

3 The delivery and payment to Robert Salna has been completed and the Oppression Action settled except as against the Trustee.

Background

4 The Trustee has filed an Amended Statement of Defence and Counterclaim (the "Counterclaim") in this action, naming SLM, Govin Misir, Dev Misir, 1237108 Ontario Ltd., 1237156 Ontario Ltd., Misir Holdings Ltd., Molly Misir, John Illidge

("Illidge"), David Cathcart ("Cathcart"), Patricia McLean ("McLean"), Nicolas Tsanconakos, Atlas Securities Inc., St. James Securities Inc. and St. James Capital Corporation as Defendants to the Counterclaim. Each of the Defendants to the Counterclaim maintained accounts with Rampart.

5 St. James Capital Corporation ("St. James Capital") which is now bankrupt, is the holding company of Illidge, who is also now bankrupt, holding securities in various investments including St. James Holdings Inc. ("St. James Holdings"). At all material times, Illidge was an officer and director of St. James Capital and St. James Holdings, the parent of St. James Securities Inc. ("St. James Securities").

6 St. James Securities carried on business from 1996 to November, 1999 as a securities broker in Toronto. At all material times, Illidge and Cathcart were officers and/or directors of St. James Securities. Cathcart was a registered representative ("RR") with the Investment Dealers Association of Canada (the "IDA") at St. James Securities. McLean was a consultant with St. James Securities between September, 1999 and November, 1999.

7 St. James Securities is now controlled by McLean, its sole officer and director.

8 As St. James Securities was winding down its business in November 1999, it entered into an agreement with Northern Securities Inc. ("Northern") pursuant to which Northern would accept the transfer of the customer accounts of St. James Securities. Northern determined not to accept the transfer of certain of the St. James Securities accounts because these accounts had "concentration problems" and significant unsecured debits. These accounts were invariably connected to the Defendants to the Counterclaim.

9 On November 29, 1999, Illidge joined Rampart Mercantile Inc. ("Rampart Mercantile") as Vice-Chairman. Thereafter, Cathcart joined Rampart as an officer and RR and McLean joined Rampart as a consultant. Rampart Mercantile is the parent of Rampart.

10 Rampart subsequently purchased substantial quantities of illiquid securities on margin from St. James Securities or such illiquid securities were transferred into the Rampart accounts of the Defendants to the Counterclaim and an account at Rampart held by St. James Capital. The illiquid securities purchased by Rampart and/or transferred into the Rampart accounts had little, if any, value.

11 Rampart paid out substantial funds to the Defendants to the Counterclaim and the Defendants to the Counterclaim accumulated substantial margin debts in their Rampart accounts which they had no ability or intention to repay.

12 St. James Capital used $1.1 million of value, which it received through margin loans from Rampart, to buy out the minority shareholders of St. James Holdings, leaving Cathcart, Illidge and McLean directly or indirectly holding substantially all of the shares in St. James Holdings.

13 The Trustee did not originally name St. James Securities as a Defendant to the Counterclaim as, at that time, St. James Securities had only a single asset being the shares of TSX which were subject to hotly contested litigation in the Oppression Action and which were subject to a *Mareva* injunction order issued by O'Driscoll, J. The value of the TSX shares held by St. James Securities has increased substantially during the currency of the within action resulting in significant proceeds beyond those required to settle the Oppression Action leaving substantial funds available for disposition by St. James Securities. The TSX shares and any cash proceeds resulting from the disposition of the TSX shares are highly liquid assets. It is the position of the Trustee that there is a real threat that such assets will be dissipated quickly in order to prevent the Trustee from collecting on any judgment it may obtain against St. James Securities in the Counterclaim in the within action. As a result of the issuance of certain debt securities by St. James Securities and St. James Holdings which apparently remain outstanding and as a result of a Memorandum of Agreement dated July 26, 2002, (the "Memorandum of Agreement") entered into to resolve certain disputes with respect to the ownership of the shares of St. James Holdings, McLean, the estate of Illidge, the estate of St. James Capital and Cathcart will substantially benefit from any distribution of assets made by St. James Securities.

Test for Mareva Injunction

14 The parties appear to agree that there is a two-prong test to be satisfied for the issuance of a *Mareva* injunction order. The first prong is that the moving party must satisfy the court that it has a strong *prima facie* case in the sense that it is "clearly right" in its allegations made against the responding party in the action or that it is "almost certain to succeed at trial" in respect of those allegations. The second prong of the test has been variously stated in decisions of Canadian courts commencing with *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.) and *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 (S.C.C.). In my view, the second prong of the test is most clearly stated by Estey, J. in *Aetna Financial*, *supra*, where he stated at pages 160 and 162:

> "The overriding consideration qualifying the plaintiff to receive such an order as an exception to the *Lister* rule *is that the defendant threatens to so arrange his assets as to defeat his adversary*, should that adversary ultimately prevail and obtain judgment, in any attempt to recover from the defendant on that judgment".
>
> . . .
>
> "In summary, the Ontario Court of Appeal recognized *Lister* as the general rule, and *Mareva* as a "limited exception" to it, the exceptional injunction being available only where there is a real risk that the defendant will remove his assets from the jurisdiction or dissipate those assets "*to avoid the possibility of a judgment* ..."

Strong Prima Facie Case

15 In the within action, the Trustee in its Counterclaim has claimed damages in the amount of $25,000,000 against the Defendants to Counterclaim, including St. James Securities, for conspiracy. The specific allegations of conspiracy in respect to St. James Securities are as follows:

> Through their actions, each of the Defendants to Counterclaim, SLM, Govin Misir, Dev Misir, Misir Holdings, 1237108 Ontario Ltd., 1237156 Ontario Ltd., Molly Misir, Illidge, Cathcart, McLean, Tsaconakos, Atlas Securities, St. James Securities and St. James Capital (the "Co-conspirators"), conspired together and were active participants in a fraudulent conspiracy to fraudulently misrepresent the value of the illiquid securities in order to obtain value and/or margin loans from Rampart with the intention or knowledge that their actions would strip value or capital out of Rampart, causing injury to Rampart and contributing to Rampart's insolvency.
>
> . . .
>
> The Co-conspirators conspired to strip value and/or capital out of Rampart for their own personal benefit and/or for the benefit of corporations, which they owned and/or controlled. The particulars of the conspiracy are as follows:
>
> > . . .
> >
> > securities, which the Co-conspirators had full knowledge had little or no real value, were sold to Rampart and/or deposited into the accounts of the Co-conspirators at Rampart;
> >
> > . . .
> >
> > the Co-conspirators influenced, authorized or permitted the extension of loan value from Rampart to other Co-conspirators based on the fraudulently concocted value of the said securities;
> >
> > . . .
> >
> > from time to time, and in particular prior to the bankruptcy, the Co-conspirators transferred securities (and related margin debits) to other accounts at Rampart to attempt to shift liability to other persons, knowing that such other persons may not have any ability or liability to pay the margin debits to Rampart; and

> . . .
>
> the Co-conspirators carried out trades in their accounts for the benefit of others. The particulars of such trades were not disclosed to Rampart and are known only to the Co-conspirators. The Co-conspirators thereafter denied liability with respect to indebtedness to Rampart relating to such trades.
>
> . . .
>
> As a direct result of the foregoing, a capital deficiency was experienced which Rampart was unable to remedy as a result of its inability to dispose of the illiquid securities in the accounts of the Co-conspirators or to collect the margin debt from the Co-conspirators. The insolvency of Rampart was a direct result of the actions of the Co-conspirators.

16 Submissions were made by counsel for St. James Securities on the hearing of this motion that, in order to establish a strong *prima facie* case, the Trustee would have to establish that the actions of the Co-conspirators, including St. James Securities, was the direct case of the insolvency of Rampart and that this could not be established in view of the lack of evidence before the court as to other transactions involving Rampart and other financial difficulties and indebtedness of Rampart. I do not agree. It appears to me from a careful reading of the Trustee's Counterclaim that the elements of the conspiracy are the allegedly fraudulent transactions entered into by the Co-conspirators, which are particularized in paragraph 50, and the resulting injury to Rampart. In order to establish that conspiracy, it does not appear to me to be necessary for the Trustee to establish that there were no other causes contributing to the ultimate insolvency of Rampart. In any event, the only evidence before the court was that Rampart, although apparently operated in a rather slipshod manner and encountering some problems with the IDA with respect to compliance with IDA rules and regulations, was able to survive prior to suffering the negative impact of the actions of the Co-conspirators but that the bankruptcy of St. James Securities followed the negative impact on St. James Securities of the transactions entered into by the Co-conspirators. The evidence before this court is that, during the period of the transactions entered into by the Co-conspirators, the capital deficiency of Rampart, based upon documents issued by the IDA and examinations by the IDA, increased from $253,000 to $8,219,000.

17 As to a strong *prima facie* case with respect to the elements of the conspiracy by the Co-Conspirators alleged in the Counterclaim, there is overwhelming evidence presented to this court as to a litany of transactions entered into or devised by the Co-Conspirators with regard to accounts transferred from St. James Securities to Rampart involving in many cases an overvaluation of the net worth of customers or the value of securities. A typical example was an account opening statement prepared for the account of St. James Holdings at Rampart which indicated a total net worth for the company of $4,000,000 when the financial statements of the company clearly indicted net current assets of approximately $30,000 and a capital deficit of $17,000. The evidence presented to this court, in my view, clearly establishes fraudulent misrepresentations made to Rampart by the Co-Conspirators in relation to the opening of customer accounts at Rampart and in relation to the value of securities deposited into accounts opened by the Co-Conspirators at Rampart or accounts opened for companies in which the Co-Conspirators had substantial investments. The evidence before this court further establishes that, in reliance upon such fraudulent misrepresentations, Rampart extended margin loans to the customers in whose names such accounts were opened. The evidence further establishes that the Co-Conspirators removed funds from such accounts with Rampart and used the margin loans provided by Rampart for speculative investments including the purchase and resale of securities of corporations controlled by them. A significant number of these accounts had huge debit balances at the date of the bankruptcy of Rampart. As a result of these transactions, Rampart was left holding securities of minimal value as collateral for margin loans advanced by it and has suffered a resultant loss approaching $20,000,000. In one of her affidavits filed with this court, McLean acknowledges that funds were "improperly stripped, transferred and withdrawn" by the Co-Conspirators from their accounts at Rampart as a result of unauthorized or improper credits and increased margin debts. Statements made by Illidge and Cathcart also filed in evidence with this court further acknowledge various improprieties with respect to the trading in the accounts opened by the Co-Conspirators or their associates with Rampart.

18 On the basis of the substantial evidence presented to this court I must conclude that the Trustee is almost certain to succeed at trial in establishing a fraudulent conspiracy by the Co-Conspirators and the resulting injury to Rampart as alleged in the Counterclaim.

19 Counsel for St. James Securities does not dispute the existence of a fraudulent conspiracy and injury to Rampart but

maintains that St. James Securities was not a participant in such a conspiracy. He notes that very few transactions were put through the St. James Securities account at Rampart and that the account at no time had a debit balance or any margin loans. He further submits that there is no evidence that St. James Securities received any benefit from the allegedly fraudulent transactions entered into by the other Co-Conspirators. Aside from the admissions in affidavits of Illidge and Cathcart filed with this court that transactions on behalf of St. James Securities were put through the St. James Capital account at Rampart, there is, in my view, further evidence that St. James Securities participated in the alleged fraudulent transactions. St. James Securities obviously participated in the transfer to Rampart of the "Illidge accounts" at St. James Securities, which Northern was not willing to accept, the result of such transfer being that the debit balances in the customer accounts at St. James Securities were liquidated. It is not reasonable to conclude that St. James Securities was unaware of the fraudulent misrepresentations made in the account opening statements at Rampart with respect to the net worth of the account holders and the value of securities in such accounts, particularly when a number of those statements were signed by Illidge who was then a Director and President of St. James Securities. In addition, the evidence before this court is replete with incidents of the participation by Illidge and Cathcart, in their capacity as officers of St. James Securities, in various aspects of the transactions constituting the alleged conspiracy. There is no allegation or evidence that Illidge and Cathcart were acting beyond the scope of their authority in entering into these transactions and St. James Securities clearly benefited from a number of the allegedly fraudulent transactions constituting the alleged conspiracy.

20 The benefits to St. James Securities as a result of these allegedly fraudulent transactions were that uncollectible debits totaling several million dollars in customer accounts at St. James Securities were liquidated as a result of the transfer of these accounts to Rampart and that St. James Securities was able to negotiate a settlement with the IDA of its investigation into St. James Securities by transferring such accounts to Rampart and Rampart was accordingly permitted by the IDA to de-register as a member of the IDA with no further penalty imposed.

21 Submissions were also made by counsel for St. James Securities that, even if St. James Securities was an active participant in the conspiracy during the time that the allegedly fraudulent transactions took place, this should not constitute a basis for the issuance of a *Mareva* injunction against St. James Securities today. Counsel for St. James Securities submits that, whereas during the period of the conspiracy St. James Securities was controlled by a Board of Directors composed of Illidge, one Ireland, and one Ing, St. James Securities is today controlled by McLean as a sole officer and director. I am unable to accept these submissions. I do not accept that a change in the composition of the board of directors or senior officers of a corporation absolves that corporation for unlawful or actionable activities or transactions entered into by the corporation under the direction of previous boards of directors or senior officers. In addition, in the case at bar, the sole shareholder and creditor of St. James Securities is St. James Holdings and the evidence before this court is that the vast majority of the debts of St. James Holdings, and possibly up to 97% of the shares of St. James Holdings, are held by persons who are alleged to have been Co-Conspirators in the conspiracy.

22 More significantly, the fact that McLean is the sole director and officer of St. James Securities as of today gives the court little comfort. The evidence before this court clearly implicates McLean as an active participant in a number of peculiar and allegedly fraudulent transactions entered into as part of the alleged conspiracy and which involved documents which were manifestly false, in several cases overstating the net worth of customers or the value of securities by hundreds of thousands of dollars. These transactions and documents have not been denied or even convincingly explained by McLean in her affidavits filed with this court. It is also significant that the affidavits filed by McLean and statements made by McLean in the course of the IDA investigations, the Oppression Action and this action are, in many instances, not only unconvincing but inconsistent and appear to have been tailored to meet the particular occasion.

23 The fact that St. James Securities, as of today, is indirectly owned and controlled by persons who were active participants in the allegedly fraudulent transactions comprising the alleged conspiracy and the fact that St. James Securities is directly controlled as of today by McLean leads me to conclude that there is a real possibility of St. James Securities dissipating or disposing of its assets so as to defeat any attempt by the Trustee to realize on any judgment it may obtain against St. James Securities in the Counterclaim in the within action.

24 Accordingly, I find that the Trustee has met the two prongs of the test for the issuance of a *Mareva* injunction in that I have found that the Trustee is almost certain to succeed at trial in establishing the elements of the conspiracy by the Co-Conspirators as pleaded and that there is a real risk of St. James Securities dissipating or disposing of its assets so as to defeat any attempt by the Trustee to realize on any judgment it may obtain against St. James Securities in the Counterclaim in

the within action.

25 Although, in my view, it is not established in the case law that the balance of convenience is one of the criteria to be considered on an application for a *Mareva* injunction, in the case at bar, it is evident that the balance of convenience clearly favours the Trustee. If the *Mareva* injunction is not issued, there is, as found above, the real risk that St. James Securities may dispose of the TSX shares or cash proceeds of such shares held by it, such shares and cash being classic liquid assets, so as to defeat any judgment obtained by the Trustee in this action. The only inconvenience to St. James Securities of the issuance of a *Mareva* injunction would be its inability to access its assets for the payment of legitimate liabilities and expenses but this can be authorized by specific motion to this court for approval of any such payments. During the currency of the *Mareva* injunction the TSX shares may be sold with the approval of the court and all proceeds of the sale and any other cash assets of St. James Securities will be invested and the income from such investments payable to the successful parties in this action.

Delay

26 Counsel for St. James Securities submits that the delay by the Trustee in bringing this application for the *Mareva* injunction should militate against the issuance of the *Mareva* injunction. He points out that the Trustee did not advise St. James Securities of its intention to add St. James Securities as a Defendant to Counterclaim or to seek the issuance of a *Mareva* injunction until January, 2004 being more than two years after the commencement of the Oppression Action and more than 20 months after the commencement of the within action. I am not satisfied that such delay should preclude the issuance of the *Mareva* injunction order. In *Kingston Technology Co. v. Orr*, [2001] O.J. No. 2386 (Ont. S.C.J.) Swinton J. stated at paragraph 8:

> In my view, it would not be appropriate for me to dismiss the motion for a *Mareva* injunction despite the lengthy delay in bringing it on for a hearing on the merits. While delay is clearly a factor that courts consider in determining whether a *Mareva* injunction should be granted, so, too, are the merits of the case and the prejudice to the plaintiff (R.J. Sharpe, Injunctions and Specific Performance, 3d ed. at para. 1.840).

27 In the case at bar, as stated above, the merits of the case clearly support the issuance of the *Mareva* injunction and the failure to issue the injunction would substantially prejudice the Trustee as a result of the real risk of the disposition or dissipation of its assets by St. James Securities. In addition the delay by the Trustee in bringing the application is, in my view, explained by the fact that the sole asset of St. James Securities being the TSX shares was the subject of highly contested litigation in the Oppression Action and was subject to a *Mareva* injunction order issued by O'Driscoll J. in that action. The possibility of such action being settled as against most of the defendants, and accordingly the *Mareva* injunction order of O'Driscoll J. being terminated, was not imminent until late 2003 or early 2004 when a settlement was reached with Salna.

Order

28 Accordingly, an order will issue restraining St. James Securities, its officers, directors, employees, agents and assigns, and any other persons having notice of the order, until further order of the Court, from directly or indirectly in any manner whatsoever:

> (a) removing, disposing of, selling, dissipating, alienating, transferring, assigning or encumbering any assets of St. James Securities, wherever situate,
>
> (b) instructing, requesting, assisting, counseling, demanding, or encouraging any other person to do so, and
>
> (c) facilitating, assisting in, or participating directly or indirectly in any manner whatsoever in any acts the effect of which is to do so.

29 The parties may make brief written submissions to me as to the cost of this motion on or before September 20, 2004.

Motion granted.

End of Document

TAB 6

2007 CarswellOnt 1131
Ontario Superior Court of Justice [Commercial List]

Innovative Marketing Inc. v. D'Souza

2007 CarswellOnt 1131, 155 A.C.W.S. (3d) 672, 42 C.P.C. (6th) 328

Innovative Marketing Inc. (Plaintiff) and Marc Gerard D'Souza, Maurice D'Souza, Marina D'Souza, Conrad D'Souza, Leonard D'Souza, Elvira Martinez-Romero, 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. (Defendants)

Pepall J.

Judgment: February 26, 2007
Docket: 07-CV-327940 PD3

Counsel: J. Brian Casey, Matthew J. Latella, Carlos M. de Vera for Plaintiff / Moving Party
A. Gaertner, A. Torgov for Defendant / Respondents, Marc Gerard D'Souza, Maurice D'Souza, Marina D'Souza, Conrad 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., Scorgem, PTE, Ltd.

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.c Mareva injunctions
II.2.c.iii Threshold test
II.2.c.iii.F Miscellaneous

Headnote

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

Plaintiff was corporation designing software products marketed through other corporate web sites and generating revenue through website credit card purchases — Corporation generated revenue of over USD$88 million between 2004 and 2006 — Defendants included individual, family members and various electronic payment entities — Personal defendant M allegedly had agreement with corporation fixing compensation for marketing efforts — Following M's suggestions, corporation

established merchant bank accounts in numerous countries to receive revenue stream from sale of products and M was responsible for supervising accounts and releasing funds — By summer of 2006, corporation contested M's alleged failures to satisfactorily account for and provide supporting documentation regarding accounts and M's refusal to release amounts of money — Later in 2006, corporation alleged that information from M's e-mail disclosed scheme by M and other family members to forge signatures to defraud corporation and transfer corporation money to M's personal accounts — Corporation brought application for interim worldwide Mareva injunction restraining defendants from disposing of assets — Application granted — Corporation established strong prima facie case and real risk existed that defendants would dissipate assets to defeat judgment — Corporation met all requirements for injunctive relief including undertaking as to damages — Defendants failed to identify location and quantum of subject funds — Evidence relating to forged signatures supported conclusion that real risk existed and removal of funds had already begun.

Table of Authorities

Cases considered by *Pepall J.*:

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

Federal Bank of the Middle East Ltd. v. Hadkinson (2000), [2000] 2 All E.R. 395 (Eng. C.A.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 45.02 — referred to

APPLICATION by plaintiff for Mareva injunction.

***Pepall J.*:**

Relief Requested

1 The plaintiff, Innovative Marketing Inc. ("IMI"), seeks an interim worldwide Mareva injunction restraining the defendants from, amongst other things, disposing of their assets worldwide and an interim preservation order. This motion was brought with notice and no request was made for an adjournment. There have been no cross-examinations. The defendants brought a motion for security for costs and a forum non conveniens motion. As these motions were served on the morning of the motion, I declined to hear them at that time. Accordingly, this endorsement only addresses the relief requested by the plaintiff. The other two motions are adjourned to a date to be fixed by the Commercial List Office. I already granted the order requested by the plaintiff in an amended form and indicated that my written endorsement would be provided the next day. This is my endorsement.

2 The case involves a fledgling e-commerce business that, according to IMI, has generated over USD $88 million in gross

sale revenues in the years 2004 to 2006. The software products designed by IMI are the primary source of revenue of the business. The products are marketed through other corporate websites and revenue is generated through website credit card purchases by the public.

3 Although no facta were filed, counsel agree that the court has the jurisdiction to grant a worldwide Mareva injunction, or freeze order as it is sometimes called. That said, counsel differ on the appropriate outcome of this particular motion. Examples they both relied on included *Case Selection Wine Society v. Nadeau et al*, a 1997 decision of Farley J and *Hollinger Inc. v. Ravelston Corp. Ltd.*, a 2006 decision of Campbell J.

The Evidence

4 Affidavits were filed by Sam Jain and Daniel Sundin on behalf of the plaintiff and by Marc D'Souza and Conrad D'Souza in response. The following highlights only some of the evidence advanced by these individuals. IMI is a corporation incorporated pursuant to the laws of Belize and carries on business as a designer, developer, marketer and distributor of Internet based products, much of which is said to be security software. According to the evidence filed by the plaintiff, in April, 2002, Mr. Jain and Kristy Ross approached Mr. Sundin about collaborating on a business venture. Mr. Sundin had expertise in computer programming, e-commerce and software design amongst other things. He recognized the other two as being effective marketing experts in e-commerce business ventures. The three decided to work together. He subsequently incorporated IMI and is the sole shareholder and director of the company. He injected cash and debt financing into IMI and Mr. Jain also lent money to IMI. Mr. Jain says his compensation and that of Ms. Ross was deferred.

5 Mr. Jain had worked with the defendant, Mr. D'Souza, since 2002. Mr. D'Souza was then in law school. There is a difference in the evidence as to where Mr. D'Souza resides, the plaintiff stating that he is a Canadian citizen and resident whereas he describes himself as being of the Kingdom of Bahrain.[1] Mr. Jain states that when he joined IMI, he brought Mr. D'Souza with him. Mr. D'Souza says that neither Mr. Jain nor he was ever employed by IMI. Mr. D'Souza says that he was originally paid by Mr. Jain's companies, Gito Inc. and PMMCI. According to Mr. Jain, Mr. D'Souza agreed to a particular formula for his compensation and this agreement was adopted by IMI. Mr. D'Souza would receive 1% of all collected net profits up to the first USD $200,000 per month and 20% of all collected net profits above that figure and it was retroactive to March, 2002. Mr. D'Souza maintains that this formula was only applicable while he was in law school.

6 According to the plaintiff, Mr. D'Souza suggested that a significant amount of money could be saved by using his father's connections in the merchant banking industry and that a local business entity and director would be required in each location. His father, Maurice D'Souza, is also a defendant as are the other business entities. The public would use credit cards to purchase software product and the payments would go through the merchant banking accounts that were established. Mr. D'Souza states that he simply expressed his view that it would be prudent to diversify their merchant banking relationships. In any event, in the end result, merchant bank accounts were set up across the world including in Bahrain, the United Arab Emirates, Singapore and Canada. These accounts received the revenue stream generated from the sale of IMI products (and, according to Mr. D'Souza, some others as well). IMI would send Mr. D'Souza documentation about IMI's accounts payable and he would then release funds for payment. Mr. D'Souza states that he made it clear to Mr. Jain from the outset that his father and the D'Souza companies "expected to be paid for the services they performed for the business." The defendants do not say how these payments were to be calculated.

7 By the summer of 2006, Mr. Jain states that he was frustrated with Mr. D'Souza's failure to respond to requests for an accounting and supporting documentation. There is evidence of requests being made of Mr. D'Souza by IMI with respect to online access to bank accounts but Mr. D'Souza states that all information sought was made available. In October, 2006, Mr. Jain demanded that Mr. D'Souza release $20 million. Mr. Jain maintains that Mr. D'Souza stalled and for the first time wanted to renegotiate his compensation formula. The two men then discussed Mr. D'Souza's compensation arrangements in an online conversation that has been reproduced. In that conversation, Mr. D'Souza states, "You said I agreed to 20 over 200". Mr. D'Souza maintains that this was a short term arrangement and Mr. Jain states that it was long term. Mr. D'Souza did not release the $20 million and the request for funds was renewed in December, 2006. After repeated demands and receipt of some information, Mr. Jain states that from October to December of 2006, the gravity of the situation became clearer as Mr. D'Souza refused to send any proper accounting or to wire even 50% of IMI's funds that he and his father had placed under their control. On December 6, 2006, Mr. D'Souza did send $5 million, however, IMI states that this is a small fraction of IMI's profits.

8 On December 13, 2006, Mr. D'Souza delivered a proposal stating that there would be a fair distribution of the ultimate profits among "partners" corresponding to their contribution during the periods in question. The proposal was divided in two parts. Firstly, he stated that $10 million was not in dispute. Of this amount, Mr. Jain had drawn $5 million and the remaining $5 million could be shared between Mr. Sundin and Ms. Ross. The second category related to the distribution of profits from 2004 to present. Ms. Ross was to take 5% from 2004, 10% from 2005 and 15% in 2006 from the "collective partnership". Mr. Sundin was to take a settlement of up to 10% of profits to date "mostly apportioned to his active contributions to projects in 2004 and 2005 and mindful of his mostly inactive role in 2006." The remaining profits were then to be shared equitably between Mr. Jain and Mr. D'Souza.

9 Mr. Sundin claims that IMI experienced difficulties obtaining an accounting from the D'Souzas. He also alleges that the individual defendants forged his signature. There is a curious e-mail exchange between Mr. D'Souza and his father which Mr. Sundin describes as them appearing to practice how to correctly forge signatures including his own. Mr. D'Souza responds by stating that he does not have a specific recollection for the existence of this e-mail but that none of the signatures was ever used. Mr. Sundin believes that Mr. D'Souza and his father are refusing to release IMI's assets as leverage to negotiate a more favourable share of the profits.

10 Mr. Jain and Mr. Sundin state that they obtained access to Mr. D'Souza's e-mail accounts operated on IMI's servers and that they revealed a scheme by Mr. D'Souza, his father and others to defraud IMI. The plaintiff suggests that these e-mails reveal significant transfers of money belonging to IMI to the D'Souzas' personal accounts. In addition, they reveal that since December 18, 2006, USD $2.6 million has been inexplicably removed from one of the Singapore accounts. Mr. D'Souza states that he believes this money was used to pay the business' expenses between December 14, 2006 and February 2, 2007 and that in the "goodness of time", he will provide records that substantiate these payments.

11 Mr. Jain states that based on the calculations they have made, it is believed that Mr. D'Souza and his father continue to retain approximately USD $48 million of IMI's money. IMI's accounting department has data showing that approximately USD $22 million of IMI's money has gone into accounts in the names of the D'Souzas personally. Indeed, $18 million is stated to have gone into accounts in Mr. Maurice D'Souza's name. He is a resident of Ontario. Some of his accounts are in Ontario.

Positions of the Parties

12 The plaintiff submits that it has met the test for the relief requested.

13 The defendants maintain that IMI has not met the test for a Mareva injunction. In particular, counsel for the defendants submits that there is insufficient evidence to establish a strong prima facie case that the funds belong to IMI. Rather, Mr. D'Souza describes the business arrangement as a joint venture in his affidavit materials. In argument, his counsel acknowledged that the majority of sales arose from products authored by IMI but he argued that distribution was key to the business. The defendants also argue that there is insufficient evidence on which to base a conclusion that the defendants are a flight risk. With respect to Rule 45(02), counsel for the defendants submits that there is no identifiable specific fund, a requirement for such an order.

14 No affidavit of Mr. Maurice D'Souza was filed nor did the respondents identify how much money generated from the business they are holding. No evidence was advanced with respect to the aforementioned USD $2.6 million.

Discussion

15 Given that it is requesting a Mareva injunction, the plaintiff is required to establish a strong prima facie case: *Chitel v. Rothbart*.[2] Applying that test to this motion, I am satisfied that the plaintiff has established a strong prima facie case. I accept the defendants' argument that there is a paucity of paper relating to the business of IMI. There are no business cards, no financial statements and no tax returns that describe or reflect IMI's role. That said, this was an e-commerce business which by its nature may not be paper intensive. In an excerpt of a chatline conversation between Mr. Jain and Mr. D'Souza on November 12, 2006, the two argue about Mr. D'Souza's compensation. In that conversation, Mr. Jain refers to Mr. D'Souza

not having invested anything into "the company" unlike Mr. Sundin and states "without Daniel's [Sundin's] contribution, there would only be a shell company today with significantly reduced revenues." He then goes on to state that Mr. D'Souza was delusional because no one agreed with him "in the company." No one argued that the company referred to any organization other than IMI. It is conceded by the defendants' 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. The plaintiff has met all of the other requirements for injunctive relief including the provision of an undertaking as to damages. In *Federal Bank of the Middle East Ltd. v. Hadkinson*,[3] Mummery LJ stated,

> It is necessary to ... identify the purpose of making the freezing order. A freezing order is only available in cases where the claimant can show that there is a real risk that the defendant will dissipate his assets. The application and the order are often made on incomplete information about the nature, extent, location and value of the assets and funds which the defendant may have. The order is designed to prevent injustice to a successful claimant by preserving assets and funds and guarding so far as possible against the risk that they will be disposed of or dissipated before a judgment is satisfied so as to render ineffective the claimant's attempts to recover what is due to him. Ancillary orders may be made in re-enforcement of the freezing order by requiring full disclosure of the nature, location and value of assets and funds and the dealings with them.

17 The plaintiff requests an order with ancillary provisions and I have granted such an order. As I have granted the relief requested, I do not propose to address the plaintiff's alternative argument based on Rule 45(2). The form of order I granted has already been released to counsel. In addition, the plaintiff is to report back to the court on the status of the matter during the week of March 26, 2007, if not before.

Application granted.

Footnotes

1 The processing agreement for one of the merchant banks in Canada shows Mr. D'Souza's address as being in Thornhill, Ontario.

2 (1982), 39 O.R. (2d) 513 (Ont. C.A.).

3 [2000] 2 All E.R. 395 (Eng. C.A.).

BANNERS BROKER INTERNATIONAL Ltd. by its receiver, MSI SPERGEL INC., et al
Plaintiffs

and

RAJIV DIXIT et al

Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

PLAINTIFF'S BOOK OF AUTHORITIES

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

David S. Ward LSUC #: 33541W
Tel: 416.869.5960
Fax: 416.640.3154
dward@casselsbrock.com

Christopher Horkins LSUC #: 61880R
Tel: 416.815.4351
Fax: 416.642.7129
chorkins@casselsbrock.com

Lawyers for the Plaintiffs