Court File No. CV-18-592103-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED

B E T W E E N:

COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS INC., 593651 ONTARIOLTD., 1031436 ONTARIO INC., ALRAE INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE, DA YID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778 ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M. HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL CONSULTANTS INC., YERUSHA INVESTMENTS INC., MIHAL TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE BANK OF NOV A SCOTIA TRUST COMP ANY IN TRUST FOR BAILEY LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP INC., MAXOREN INVESTMENTS, 2227046 ONTARIO LIMITED, DAST PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUCKONIC and B. & M. HANDELMAN INVESTMENTS LIMITED

Applicants

- and –

ANNIE YERETSIAN, 2399029 ONTARIO INC., 2457674 ONTARIO INC., MOSS DEVELOPMENT LTD. and TERRY WILSON

Respondent

BOOK OF AUTHORITIES OF BRAUTI THORNING LLP

(*Motion for Release of Funds for Outstanding Legal Fees)*

June 4, 2019

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In the Matter of Consumer Proposal of Timothy Maxwell Fines and Mona Lisa McDonough

Reg. Richard W. Cregan

Heard: April 17, 2015
Judgment: November 17, 2015
Docket: 38788, Estate No. 51-1827319, 51-1827320

Counsel: Francyne Louise Hunter, for Allan Marshall Associates Inc. Administrator of the Proposal of Timothy Maxwell Fines and Mona Lisa McDonough

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.xi Specific assignments

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Specific assignments

F and M were indebted to credit union — F and M made consumer proposal under Bankruptcy and Insolvency Act (BIA) — As part of arrangement for paying debt, F and M gave credit union irrevocable direction over proceeds of litigation or sale of property in Ontario — Litigation was resolved and money owed to F was paid to his solicitors in trust after deducting their fees — Parties sought ruling on whether money should be paid to credit union pursuant to direction or to administrator of consumer proposal to be shared by all creditors — Money held in trust belonged to credit union free and clear of any claims — Direction was absolute assignment and not security — Absolute assignment was irrevocable — Money held in trust was not available for consumer proposal.

Table of Authorities

Cases considered by *Reg. Richard W. Cregan*:

Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc. (1996), 39 C.B.R. (3d) 157, 27 B.L.R. (2d) 147, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.*) [1996] 5 W.W.R. 153, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.*) 38 Alta. L.R. (3d) 1, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.*) 11 P.P.S.A.C. (2d) 1, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.*) [1996] 1 C.T.C. 395, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches)*) 196 N.R. 105, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches)*) 184 A.R. 1, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches)*) 122 W.A.C. 1, (sub nom. *Alberta (Treasury Branches) v. Minister of National Revenue*) 133 D.L.R. (4th) 609, (sub nom. *Alberta (Treasury Branches) v. Minister of National Revenue*) [1996] 1 S.C.R. 963, (sub nom. *R. v. Alberta Treasury Branches*) 96 D.T.C. 6245, [1996] G.S.T.C. 17, (sub nom. *R. v. Province of Alberta Treasury Branches*) 4 G.T.C. 6103, 1996 CarswellAlta 366, 1996 CarswellAlta 366F (S.C.C.) — followed

Hughes v. Pump House Hotel Co. (1902), [1902] 2 K.B. 190, [1900-03] All E.R. Rep. 480 (Eng. C.A.) — followed

Wilton v. Rochester German Underwriters Agency Co. (1917), [1917] 2 W.W.R. 782, 11 Alta. L.R. 574, 35 D.L.R. 262, 1917 CarswellAlta 68 (Alta. C.A.) — followed

Statutes considered:

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

Generally — referred to

Judicature Act, R.S.N.S. 1989, c. 240

Generally — referred to

s. 43(1) — considered

s. 43(5) — considered

Personal Property Security Act, S.N.S. 1995-96, c. 13

Generally — referred to

***Reg. Richard W. Cregan*:**

1 Timothy Maxwell Fines and Mona Lisa McDonough made a consumer proposal under the provisions of the Bankruptcy and Insolvency Act, R.S.C 1985, c.B-3 (*BIA*) on January 14, 2014, naming Allan Marshall Associates Inc. as the Administrator.

2 Mr. Fines and Ms. McDonough had been indebted to Airline Financial Credit Union Limited (AFCU). As part of the arrangement for paying this debt they provided AFCU with a document the full text of which is as follows:

> **IRREVOCABLE DIRECTION**
>
> To: STULTZ BROWN & SELF PROFESSIONAL CORPORATION
>
> 269 BROADWAY
>
> Orangeville, Ontario
>
> L9W 1K8
>
> Re: Timothy M. Fines
>
> 142 Cherrywood Drive
>
> Newmarket, ON
>
> Airline Financial Account No. 1056
>
> YOU ARE HEREBY IRREVOCABLY AUTHORIZED, DIRECTED AND REQUIRED to pay Airline Financial from the proceeds of any litigation or eventual sale of the property located at 33 Roxborough Road, Newmarket, Ontario arising out of the Application issued in the Ontario Superior Court of Justice, Newmarket, Ontario, bearing court file no. CV-12-0108349-00 through which Timothy Fines seeks a court order for the sale of 33 Roxborough Road, Newmarket, the sum of $41,421.69 or such other, or lesser amount received and controlled by STUTZ BROWN & SELF PROFESSIONAL CORPORATION, for the benefit of Timothy Fines, in connection to the litigation noted herein.
>
> LET THIS BE YOUR AUTHORITY FOR DOING SO.
>
> Dated at Orangeville this 2nd day of March, 2012
>
> | | |
> |---|---|
> | SGD (Illegible)
Fines
Witness | SGD_Timothy

Timothy Fines |

SGD (Illegible)
Witness

SGD Mona McDonough
Mona McDonough

3 I shall refer to this document simply as the "Direction". The litigation referred to relates to a home in Ontario which had been owned by Mr. Fines' mother and had by her death devolved upon Mr. Fines and his sister reserving certain benefits for their brother. The litigation was resolved by his sister buying his interest and taking responsibility for the brother's interest. The money in issue is that which was to be paid to Mr. Fines.

4 By agreement pending resolution of the litigation, Mr. Fines' share was paid to his solicitors, Stutz Brown & Self in trust to be held by them after deducting outstanding fees. The amount was $55,000, with the balance after paying fees being $41,906.00.

5 In effect, the dispute which is to be resolved in this application is whether the money should be paid to AFCU pursuant to the Direction or to the Administrator of the consumer proposal to be shared by all the creditors, which would include AFCU.

6 More technically, the question is whether by the Direction the money was immediately on its delivery absolutely assigned to AFCU or the Direction was simply a form of security for the payment of the debt, not absolute, but with the reservation of an equity of redemption. If the former, the money belongs to AFCU. If the latter, the money must become part of the proposal, because AFCU failed to take proper steps to perfect its security under the Personal Property Security Act, Stat. NS, 1995-96, c. 13, as amended, (*PPSA*) or to properly comply with the requirements of the *BIA* for the assertion of a security interest and did not appeal the Administrator's ruling to that effect.

7 In its dealings with the administration of the proposal AFCU did speak of the Direction as a security interest. I refer to the Proof of Claim dated February 3, 2014 in which one finds the following:

SECURED CLAIM of $44,359.71

8 In its Proof of Claim respecting the amendment to the proposal dated May 29, 2014, AFCU claimed as unsecured $41,355.62 and did not claim any right to priority.

9 A further Proof of Claim was dated July 30, 2014 and was filed for a secured claim of $41,365.62. The security was described as:

IRREVOCABLE LETTER OF DIRECTION

A copy of the Direction was attached.

10 On February 21, 2014 a mortgage on Mr. Fine's interest in the home in favour of AFCU was given by Mr. Fines. It purported to secure $41,421.69. It is to be noted that this was 18 days after the first Proof of Claim was dated. Its release was required to complete the sale of the home. The release was provided. The sale proceeded and the money in issue was deposited in the solicitors' trust account.

11 It could be argued that the Direction was a form of security. But with the failure to comply with the various requirements of the *PPSA* and the *BIA* for the perfection of security, it would be ineffective as such. This in effect is the position of the Administrator. AFCU was relying on the Direction to be paid. In common parlance it would not be unreasonable to speak of it as security, but this does not make it a security as contemplated by the *BIA* and *PPSA*.

12 Mr. Fines had an interest in this home which eventually would be converted to money either by the resolution of litigation with his sister and their brother's representative, or by sale.

13 The money in question is clearly identified in the Direction. The law firm to which it is addressed was acting on Mr. Fines' behalf in the matter and was to receive the money and was to pay it to him subject to the deduction of the firm's fees.

14 It was Mr. Fines' money. The Direction was instructions to his solicitors to pay it to AFCU, referred to therein as "Airline Financial" and said, as required by AFCU that the instructions contained in it were irrevocable. He in effect with the delivery of the Direction gave up absolutely any rights he might have to the money. He reserved to himself no equity of redemption. His instructions could not be changed. By this act the money in effect was absolutely assigned to AFCU.

15 The debt remains outstanding on AFCU's books simply because it has not yet received the money. This is a matter of bookkeeping convenience. This is not inconsistent with AFCU's position that the money vested in it with the delivery of the Direction.

16 Counsel for the Administrator suggests uncertainty as to the subject matter. The operative description is:

> the sum of $41,421.69, or such other, or lesser amount, received and controlled by STUTZ BROWN, & SELF PROFESSIONAL CORPORATION for the benefit of Timothy Fines, in connection to the litigation noted herein.

17 I take it that the specific sum was the amount owing on the loan at the time. Such balances are constantly changing with accruing of interest. The entire wording simply addresses this reality. In fact, what was in the solicitors' trust account subject to this direction was $41,906.02, a minor difference. This should not affect the validity of the Direction.

18 Counsel notes that the Direction is not under seal. A seal is not necessary. There was consideration given by AFCU by its maintaining the loan with Mr. Fines.

19 He also notes that the document lacks the word "assign" or any similar words of conveyance. He says that the Direction is simply instructions to counsel. However, specific words of this nature are not needed. The clear overall meaning of the document is to make an absolute assignment. The Direction directs that money belonging to Mr. Fines is to be sent to AFCU and that this Direction is irrevocable. The net effect of the wording of Direction in the context in which it was made is clearly that of an assignment of the money to AFCU when the Direction was delivered. This was before the consumer proposal proceedings were commenced.

20 Counsel brought to my attention *Wilton v. Rochester German Underwriters Agency Co.* (1917), 35 D.L.R. 262 (Alta. C.A.) which considers the distinction between an absolute assignment to creditors and assignment given to creditors as security. It quotes in Paragraph 7, a passage from *Hughes v. Pump House Hotel Co.* (1902), [1902] 2 K.B. 190 (Eng. C.A.) as follows:

> It seems to me clear from its terms that the intention was to pass to the assignees complete control of all moneys payable under the building contract, and to put them for all purposes in the position of the assignor with regard to those moneys. That being so I think unless there be some difficulty created by the decisions on the subject, this instrument may be properly described as an absolute assignment because it is one under which all the rights of the assignor in respect of the moneys payable under the building contract were intended to pass to the assignees and not one which purport to be by way of charge only.

21 The following summary of the law follows in Paragraph 11.

> It seems to be clear under the authorities that the determining question under the section is not the particular fact which gave rise to the assignment of the consideration upon which is founded, but the form in which it is executed. The mere fact that it is taken in security for money owing by the assignor to the assignee even if that fact is spread on its face does not detract from its character as an absolute assignment if its operative words are sufficiently broad to give it that character, but if instead of that it simply charges the fund with payment of the amount which the assignee is entitled to get out of it then it is not within the section.

22 The issue in that case was whether an assignment was absolute and thus enforceable under the provisions of the Judicature Act, which is Nova Scotia would be paragraph 43 (1)(5) of the Judicature Act, R.S.N.S. 1989, c. 240.

23 The distinction between an absolute assignment and a security interest was also considered in *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963 (S.C.C.). I quote from Paragraph 22:

> ...it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.
>
> [Emphasis in original]

24 I am satisfied that these authorities support my conclusion that the Direction is an absolute assignment and not a security. I think that that its irrevocability is decisive on this point.

25 An order will be given confirming that the money in questions is not available for the consumer proposal. It belongs to AFCU free of any claims by Mr. Fines and Ms. McDonough or anyone claiming under them.

Order accordingly.

TAB 2

Alberta (Treasury Branches) v. Canada (Minister of National Revenue - M.N.R.); Toronto-Dominion Bank v. Canada (Minister of National Revenue - M.N.R.), [1996] 1 S.C.R. 963

Supreme Court Reports

Supreme Court of Canada

Present: La Forest, Cory, McLachlin, Iacobucci and Major JJ.

1995: October 12 / 1996: April 25.

File No.: 24056.

[1996] 1 S.C.R. 963 | [1996] 1 R.C.S. 963 | [1996] S.C.J. No. 45 | [1996] A.C.S. no 45

Her Majesty The Queen, appellant; v. Province of Alberta Treasury Branches, respondent. And between Her Majesty The Queen, appellant; v. Province of Alberta Treasury Branches, respondent. And between Her Majesty The Queen, appellant; v. The Toronto-Dominion Bank, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Taxation — Income tax — Goods and Services Tax — Garnishment — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor — Meaning of "secured creditor" — Income Tax Act, S.C. 1970-71-72, c. 63, s. 224(1.2), (1.3) — Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4).

Bankruptcy — Priorities — General assignments of book debts — Income tax and GST legislation providing for garnishment enabling Minister of National Revenue to intercept monies owed to tax debtors — Whether provisions give Minister priority over creditors who have received general assignment of book debts from tax debtor.

The first case involved in these appeals arose from a loan made by the respondent Alberta Treasury Branches to a hotel operator which was secured in part by a general assignment of book debts ("GABD"). The hotel operator was in arrears to the Minister of National Revenue ("MNR") for unremitted GST, plus interest and penalties. The MNR served requirements to pay under s. 317(3) of the Excise Tax Act ("ETA") on all possible debtors of the hotel operator. That section provides for a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to a tax debtor. It applies to a "secured creditor", defined as "a person who has a security interest in the property of another person". After the hotel operator made an assignment under the Bankruptcy Act, the trustee estimated the realization of the assets of the estate would leave a shortfall to Alberta Treasury Branches. The Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the ETA. In the second case, an excavation company borrowed money from Alberta Treasury Branches and granted it a GABD. After the company completed certain contract work, the client held holdback funds which were claimed by various creditors of the company, including the MNR, to whom the company was indebted for unremitted employee source deductions, interest and penalties. The MNR served two requirements to pay on the client, under s. 224(1.2) of the Income Tax Act ("ITA"), which provides for a garnishment remedy identical to the one provided for in the ETA. On an application to determine priority to the monies in question, the master decided that Alberta Treasury Branches had priority through its GABD. This

decision was upheld on appeal. In the third case, a drilling company borrowed money from the respondent bank which was secured in part by a GABD. The company owed the MNR unremitted GST, interest and penalties. The MNR served requirements to pay under s. 317(3) ETA on the company's trade debtors. Another of its creditors successfully filed a petition under the Bankruptcy Act to have the company declared a bankrupt. In an application to determine priority, the Court of Queen's Bench held that the MNR had priority under the provisions of the ETA. In all three cases the Court of Appeal held that the lending institution had priority over the MNR.

Held (Iacobucci and Major JJ. dissenting): The appeals should be allowed.

Per La Forest, Cory and McLachlin JJ.: The definition of "security interest" is broad enough to include a GABD, and the wording of s. 224(1.2) ITA and s. 317(3) ETA is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the balance of the section applies. Moreover, an assignee of a GABD is a "secured creditor" within the meaning of s. 224(1.3) ITA or s. 317(3) ETA because the assignee holds a security interest "in the property of another person". Each assignment of book debts made in these cases provides that it is to be a "continuing collateral security". Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid, the lending institution would have no further interest in the assignment. Since the assignment by its terms can be redeemed by payment of the debt, it should not be construed as an absolute assignment. Neither the lending institutions nor the debtor companies by their actions gave any indication that the institutions were the owners of the book debts. The lending institutions made no efforts whatsoever to realize upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. So long as the possibility of redemption exists, the GABD remains as collateral security.

When there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts, then the statutory provision must be applied regardless of its object or purpose. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the scheme of the Act, the object of the Act and the intention of Parliament. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

The same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute. A GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This conclusion is supported by s. 63 of the Alberta Personal Property Security Act, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. To conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could result in a change in the ordering of priorities provided by the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Canada Business Corporations Act. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other bona fide creditors could be adversely affected.

Per Major J. (dissenting): A GABD falls within the definition of "security interest" in s. 224(1.3) ITA. The phrase an "assignment . . . of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals. The lending institutions, however, do not fall within the definition of "secured creditor" because they do not hold a security interest "in the property of another person". An

assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor. The assignments in each of the three cases involved here all contain language which makes it clear that they are immediate and absolute. The fact that the GABD is referred to as "continuing collateral security" in the instruments does not make the GABD anything less than absolute. While the tax debtor retains an equity of redemption upon an assignment of its book debts, here the value of the loans secured by the book debts far exceeds the value of the debts themselves and there is thus no value in the equity of redemption. Further, an absolute assignment of book debts makes those book debts the property of the assignee, and they remain the property of the assignee until the assignor actually exercises his equitable right to redeem. In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the court must interpret the word in its plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. In the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation. In the context of these appeals, the interpretation urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation of property that, absent the security interest, is the property of another person. In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. If there is an ambiguity in the meaning of the word "property", then the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondent lending institutions.

Per Iacobucci J. (dissenting): While the general principles of statutory interpretation outlined by Cory J. were agreed with, the general assignments of book debts in this case were tantamount to an absolute transfer of property, as found by Major J.

Cases Cited

By Cory J.

Referred to: Friesen v. Canada, [1995] 3 S.C.R. 103; Pembina on the Red Development Corp. v. Triman Industries Ltd., [1991] 6 W.W.R. 481; Thermo King Corp. v. Provincial Bank of Canada (1981), 34 O.R. (2d) 369, leave to appeal refused, [1982] 1 S.C.R. xi; Bonavista (Town) v. Atlantic Technologists Ltd. (1994), 117 Nfld. & P.E.I.R. 19; Bank of Montreal v. Baird (1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v; R.V. Demmings & Co. v. Caldwell Construction Co. (1955), 4 D.L.R. (2d) 465; R. in Right of B.C. v. F.B.D.B. (1987), 17 B.C.L.R. (2d) 273; Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd. (1958), 27 W.W.R. 38; Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061; Canada v. National Bank of Canada, [1993] 2 F.C. 206; TransGas Ltd. v. Mid-Plains Contractors Ltd. (1993), 101 D.L.R. (4th) 238, aff'd [1994] 3 S.C.R. 753; Berg v. Parker Pacific Equipment Sales, [1991] 1 C.T.C. 442; Lundrigans Ltd. (Receivership) v. Bank of Montreal (1993), 110 Nfld. & P.E.I.R. 91.

By Major J. (dissenting)

Royal Bank of Canada v. R. (1984), 52 C.B.R. (N.S.) 198, aff'd (1986), 60 C.B.R. (N.S.) 125; Lloyds Bank of Canada v. International Warranty Co. (1989), 68 Alta. L.R. (2d) 356, rev'g (1989), 64 Alta. L.R. (2d) 340; Re Lamarre; University of Calgary v. Morrison, [1978] 2 W.W.R. 465; Attorney General of Canada v. Royal Bank of Canada, [1979] 1 W.W.R. 479, aff'g (1977), 25 C.B.R. (N.S.) 233; Pembina on the Red Development Corp. v. Triman Industries Ltd., [1991] 6 W.W.R. 481; Concorde International Travel Inc. v. T.I. Travel Services (B.C.) Inc.

(1990), 72 D.L.R. (4th) 405; Royal Bank of Canada v. Saskatchewan Power Corp., [1991] 1 W.W.R. 1, aff'g [1990] 2 W.W.R. 655; Touche Ross Ltd. v. M.N.R. (1990), 71 D.L.R. (4th) 648; Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd. (1958), 27 W.W.R. 38; Lettner v. Pioneer Truck Equipment Ltd. (1964), 47 W.W.R. 343; Toronto-Dominion Bank v. Minister of National Revenue (1990), 39 F.T.R. 102; Friesen v. Canada, [1995] 3 S.C.R. 103; Johns-Manville Canada Inc. v. The Queen, [1985] 2 S.C.R. 46.

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Canada Business Corporations Act, R.S.C., 1985, c. C-44.
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Excise Tax Act, R.S.C., 1985, c. E-15, s. 317(3), (4) [ad. 1990, c. 45, s. 12].
Income Tax Act, S.C. 1970-71-72, c. 63, ss. 153, 224(1) [rep. & sub. 1980-81-82-83, c. 140, s. 121], (1.2) [ad. 1987, c. 46, s. 66; am. 1990, c. 34, s. 1], (1.3) [ad. 1987, c. 46, s. 66].
Personal Property Security Act, S.A. 1988, c. P-4.05, ss. 62, 63.

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APPEALS from a judgment of the Alberta Court of Appeal (1994), 16 Alta. L.R. (3d) 1, 149 A.R. 34, 63 W.A.C. 34, [1994] 4 W.W.R. 685, 24 C.B.R. (3d) 257, 94 D.T.C. 6650, [1995] 1 C.T.C. 75, reversing decisions of Forsyth J. (1992), 5 Alta. L.R. (3d) 141, 134 A.R. 124, [1993] 1 W.W.R. 639, 15 C.B.R. (3d) 143, and MacLeod J. and affirming a decision of Hunt J. (1993), 9 Alta. L.R. (3d) 349, 139 A.R. 295, [1993] 5 W.W.R. 756, [1994] 1 C.T.C. 108, 5 P.P.S.A.C. (2d) 117, concerning priorities. Appeals allowed, Iacobucci and Major JJ. dissenting.

Edward R. Sojonky, Q.C., and Michael J. Lema, for the appellant. Written submissions only by J. Gary Greenan and Scott Watson, for the respondent Province of Alberta Treasury Branches. Jeffery D. Vallis and C. Bryce Code, for the respondent the Toronto-Dominion Bank.

Solicitor for the appellant: The Deputy Attorney General of Canada, Ottawa. Solicitors for the respondent Province of Alberta Treasury Branches: Bruni Greenan Klym, Calgary; Parlee McLaws, Calgary. Solicitors for the respondent the Toronto-Dominion Bank: Howard, Mackie, Calgary.

The judgment of La Forest, Cory and McLachlin JJ. was delivered by

CORY J.

1 At issue on these appeals is whether, on the facts of this case, lending institutions are secured creditors pursuant to the provisions of s. 224 of the Income Tax Act, S.C. 1970-71-72, c. 63 (ITA) and s. 317 of the Excise Tax Act, R.S.C., 1985, c. E-15 (ETA), which are practically identical in their provisions.

2 The facts giving rise to these appeals and the decisions of the court below have been ably set out in the reasons of Justice Major.

3 Both the ITA and the ETA provide for the collection of funds due to the federal government by way of income tax deductions from the wages of employees and for the remission of monies owing for the Goods and Services Tax (GST). The sections under review provide for the recovery of monies owing from those who are responsible for the collection and remission of income tax deductions and GST collections by way of garnishment. This system of collection and remission of income tax is exceedingly important. For example, in 1987 some 87 per cent of all personal income tax was collected through employer's deduction and remission.

4 In the cases under consideration, the company responsible for collection and remission of income tax and GST borrowed money from a lending institution. To secure their indebtedness the debtor companies made a general assignment of book debts (GABD) to the lending institution. If the submissions of the appellant prevail then the Government of Canada will recover the monies which ought to be paid to it by way of employees' income tax or GST. If the respondents are correct in their position, then the lending institutions will retain the funds which have come into their possession as a result of the GABD. Thus the decision in this case will have a very real significance for both the federal government and lending institutions.

5 In essence, s. 224(1.2) provides a form of garnishment enabling the federal government to intercept monies owed to tax debtors. It is not available for the collection of income tax generally, but is limited to the recovery of funds owing by a person or company which has withheld monies from another person, usually an employee, for income tax purposes pursuant to s. 153 ITA and has failed to remit the withheld amounts to the federal government. A similar garnishment remedy is provided by s. 317(3) ETA. It is applicable in circumstances where a company or an individual has failed to remit GST which was collected as required by the provisions of the ETA.

6 Major J. has concluded that the Alberta Court of Appeal was correct in finding that an assignee of a GABD is not a "secured creditor"within the meaning of s. 224(1.3) ITA or s. 317(3) ETA because the assignee does not hold a security interest "in the property of another person". Rather, the assignee is the owner of those book debts. With respect I cannot agree with that conclusion. However I am in complete agreement with these conclusions:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.
2. The wording of s. 224(1.2) ITA as amended in 1990 is sufficiently clear and non-equivocal to allow a transfer of property in the garnished funds to the Minister of National Revenue (MNR) and to grant him a priority in circumstances where the balance of the section applies.

The Provisions of the GABD Made in These Cases

7 It would be helpful first to consider the assignment of book debts made in these cases in order to ascertain the apparent intentions of the parties. The two assignments in which the Treasury Branch was the lender provide:

> THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches. . . . [Emphasis added.]

To a similar effect, the Toronto Dominion assignment reads in part:

> PROVIDED and it is hereby distinctly understood and agreed that these presents are and shall be a continuing collateral security to the Bank for the general balance due at any time by the Assignor to the Bank. . . .
>
> PROVIDED ALWAYS and it is hereby distinctly agreed that these presents are and shall be continuing and collateral security to the present and any future indebtedness of the Assignor to the Bank. . . . [Emphasis added.]

8 Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid the Bank or Treasury Branch would have no further interest in the assignment. The documents themselves refer to the assignment as being a continuing collateral security for the payment of the indebtedness. The clear intention of the parties is that the assignment is given as security for the payment of a debt and upon payment of the debt the GABD is to be of no force or effect. That is to say the lending institution could not, after payment of the debt, make use of the GABD to realise upon any of the book debts of the assignor. In my view since the assignment by its terms can be redeemed by payment of the debt it cannot or at least should not be construed as an absolute assignment.

9 Neither the lending institutions nor the debtor companies by their actions gave any indication that the respondents were the owners of the book debts. This is demonstrated by the fact that the lending institutions made no efforts whatsoever to realise upon the book debts or in any way to act as "owners" of them until the debtor companies were obviously in severe financial difficulty if not bankrupt. Only then did the lending institutions seek to realise upon their security. Both the wording of the documents and the actions of the parties indicate that they regarded the assignment to be given as collateral security for the indebtedness. In commercial affairs, it is well known that a GABD is indeed a means of granting collateral security for a debt. In my view, so long as the possibility of redemption exists, the GABD remains as collateral security.

10 In light of this customary commercial understanding of a GABD, it may be helpful to review the legislation to determine if, by its wording, it renders a GABD something other than collateral security for a debt and makes the assignee the owner of the book debts.

Pertinent Provisions of the ITA and the ETA and Their History

11 As Major J. pointed out, prior to 1987 the provisions of the garnishment remedy in the ITA (s. 224(1)) were almost unanimously interpreted by the courts in such a way that a demand made under the section was ineffective to attach any of the assigned debts. The courts held that by the assignment the tax debtor had transferred all its interest in the accounts to the assignee with the result that there was nothing left for the Minister of National Revenue (MNR) to attach by garnishment.

12 In an attempt to address these decisions, Parliament amended the ITA in 1987 by adding two new subsections. They provided that the MNR could garnish funds owed by a tax debtor to a "secured creditor" and defined the terms "secured creditor" and "security interest". As Major J. observed, there was a divergence of opinion in the provincial courts of appeal as to whether the 1987 amendments permitted the MNR to effectively garnish funds in the hands of an assignee of a GABD.

13 In order to further clarify the situation and resolve the differences of opinion in the appellate courts, Parliament again amended the ITA with the apparent aim of granting priority to the MNR. It may be helpful to set out s. 224(1.2) ITA as it now appears following the 1990 amendment:

> 224.. . .

(1.2) Notwithstanding any other provision of this Act, the Bankruptcy Act, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment

(a) to another person (in this subsection referred to as the "tax debtor") who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or

(b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,

the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole or in part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision, and on receipt of that letter by the particular person, the amount of those moneys that is required by that letter to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest. [Emphasis added.]

(1.3) In subsection (1.2),

"secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator or any other person performing a similar function;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

14 The question then is how should these sections be interpreted. At the outset it should be remembered that Parliament was responding to the division of opinion in the appellate courts and attempting to make it clear that the MNR could undertake garnishment procedure in those situations where a GABD has been made. The appropriate principles to be considered in interpreting taxation legislation were clearly set out in Friesen v. Canada, [1995] 3 S.C.R. 103, at pp. 112-14. There the principles were summarized in these words:

C. Principles of Interpretation

The central question on this appeal of whether the appellant is entitled to take advantage of the inventory valuation method in s. 10 of the Act involves a careful examination of the wording of the provisions of the Act and a consideration of the proper interpretation of these sections in the light of the basic structure of the Canadian taxation scheme which is established in the Income Tax Act.

In interpreting sections of the Income Tax Act, the correct approach, as set out by Estey J. in Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, is to apply the plain meaning rule. Estey J. at p. 578 relied on the following passage from E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The principle that the plain meaning of the relevant sections of the Income Tax Act is to prevail unless the transaction is a sham has recently been affirmed by this Court in Canada v. Antosko, [1994] 2 S.C.R. 312. Iacobucci J., writing for the Court, held at pp. 326-27 that:

> While it is true that the courts must view discrete sections of the Income Tax Act in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed: Mattabi Mines Ltd. v. Ontario (Minister of Revenue), [1988] 2 S.C.R. 175, at p. 194; see also Symes v. Canada, [1993] 4 S.C.R. 695.

I accept the following comments on the Antosko case in P. W. Hogg and J. E. Magee, Principles of Canadian Income Tax Law (1995), Section 22.3(c) "Strict and purposive interpretation", at pp. 453-54:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision. . . . (The Antosko case) is simply a recognition that "object and purpose" can play only a limited role in the interpretation of a statute that is as precise and detailed as the Income Tax Act. When a provision is couched in specific language that admits of no doubt or ambiguity in its application to the facts, then the provision must be applied regardless of its object and purpose. Only when the statutory language admits of some doubt or ambiguity in its application to the facts is it useful to resort to the object and purpose of the provision.

15 Thus, when there is neither any doubt as to the meaning of the legislation nor any ambiguity in its application to the facts then the statutory provision must be applied regardless of its object or purpose. I recognize that agile legal minds could probably find an ambiguity in as simple a request as "close the door please" and most certainly in even the shortest and clearest of the ten commandments. However, the very history of this case with the clear differences of opinion expressed as between the trial judges and the Court of Appeal of Alberta indicates that for able and experienced legal minds, neither the meaning of the legislation nor its application to the facts is clear. It would therefore seem to be appropriate to consider the object and purpose of the legislation. Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament". What then was Parliament's intention in enacting the 1990 legislation?

The Purpose of the Legislation

16 There can be no doubt of the importance of levying taxation. The ITA entrusts to employers the duty of deducting income tax from the wages of employees and remitting it on their behalf. Similarly the ETA imposes on those who provide goods and services to others the duty to collect and remit the GST which is payable. In essence, companies collect taxes which they hold in trust for the government.

17 The purpose of the 1987 legislation, which I think is even more appropriately applied to the 1990 legislation, was very clearly and forcefully set forth in Pembina on the Red Development Corp. v. Triman Industries Ltd., [1991] 6 W.W.R. 481 (Man. C.A.). There, at pp. 488-89, Scott C.J.M. observed:

> To determine the dominant characteristic of the legislation, it is important to know the governmental policy behind the section. The tax debtor's bank is in the best position to know its customer and to structure its business arrangements accordingly. Revenue Canada, on the other hand, does not have the same opportunity to become acquainted with the affairs of the tax debtor or its creditors. It must therefore rely solely on the provisions of the legislation to mandate the employer to remit the employee income tax deductions as required by the [Income Tax] Act, and to establish its collectability in the event of default.
>
> . . .
>
> The purpose of the Act is not only to levy tax, but to collect it. There is a strong public duty on employers to remit; indeed, this is central to the scheme of self-assessment under the Act.

Further, Lyon J.A., dissenting in the result, stated at pp. 506-7:

> One must always remember that the withholding tax or source deduction to which s. 224 applies is at the heart of the collection procedures for personal income taxation in Canada. Indeed, if one makes a calculation from the statistics reported in "Taxation Statistics, 1987," a publication of Revenue Canada Taxation, catalogue No. RV-1987, one finds that 87 per cent of all personal income taxes paid in Canada are collected by source deductions. It can thus be seen that Parliament in passing s. 224(1.2) made it as all-encompassing as it is in order to ensure its continued viability. No other system is so crucial to the overall collection procedure adopted by the Crown. Parliament clearly meant to protect this system. Using the employer as a tax collector requires such extra protection in cases such as the one at bar where the employer converts the withheld tax money to its own purposes. Understandably, that conversion cannot be countenanced if the integrity of that system is to be preserved. Parliament, therefore, acting within its constitutional authority, has taken this extraordinary remedy to protect a major collection source.
>
> . . .
>
> In my opinion it was intended by Parliament that anyone who, in the ordinary course of business, made credit arrangements with a tax debtor involving assignments of accounts receivable, did so subject to the overriding right of the Crown to satisfy the primary obligations of the tax debtor to collect and remit taxes withheld from its employees. The words of the statute can mean nothing less. The section is cast in the broadest of possible terms precisely because it was meant to interfere with and interrupt payments under such assignments and divert them to meet this statutory obligation. I do not know what other words Parliament could use to make its overriding intention and claim more clear.

18 These statements can be applied even more forcefully to the 1990 amendments. The Parliamentary intent was to confirm the overriding right of the MNR to collect by garnishment the taxes collected which ought to have been remitted by the debtor company to the MNR.

What is the Nature of a General Assignment of Book Debts?

19 Like Major J., I am of the view that a GABD is a form of security for a loan which is always subject to the right of the debtor to redeem. It will be remembered that s. 224(1.3) defines the "security interest" in these words:

> "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

This definition encompasses the general assignments of book debts which are at issue in these appeals. However, I cannot agree with Major J.'s conclusion that the creditors are not secured creditors. I find it difficult, indeed impossible, to conclude that the same document can be both a security interest and an absolute assignment. The same document cannot, simultaneously, embrace two such conflicting concepts.

20 Basically, security is something which is given to ensure the repayment of a loan. Black's Law Dictionary (6th ed. 1990), at p. 1357, gives a clear definition of a "security interest" in these terms:

> The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time, (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

21 This definition is consistent with that set out in the ITA. It is in sharp contrast to the definition of the word "absolute" set out in the same source at p. 9 in these terms:

> Complete; perfect; final, without any condition or incumbrance; as an absolute bond (simplex obligatio) in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

22 These definitions are, in my view, correct. If that is the case, then it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.

Cases Which Have Considered the Nature of a General Assignment of Book Debts

23 Major J. expressed the opinion that it is "well-established law" that a GABD, such as those in issue, has the effect of transferring all title and ownership in the property assigned so that they can no longer be considered to be the property of the assignor. Yet ordinarily, in the world of commerce, a GABD is considered to be a security interest. As a security interest, it simply cannot transfer all "right, title and ownership in and to the property assigned". This conclusion has found support in other cases.

24 In Thermo King Corp. v. Provincial Bank of Canada (1981), 34 O.R. (2d) 369 (C.A.), leave to appeal refused, [1982] 1 S.C.R. xi, Wilson J.A. (as she then was) held, for a unanimous court, that a GABD is a security document. In that case she was required to consider an instrument which was very similar if not identical to those presented in these appeals. At p. 381 she concluded:

> While these provisions appear on their face to constitute the assignor a trustee for the bank of any payments it receives from its customers and to permit the bank to appropriate them at will, whether or not any debt is then due to the bank by the assignor, this seems to be quite incompatible with the nature of the instrument as a collateral security. [Emphasis in original.]

Similarly, in Bonavista (Town) v. Atlantic Technologists Ltd. (1994), 117 Nfld. & P.E.I.R. 19, Osborn J. considered a GABD. He wrote (at p. 24):

> One may ask, if the assignment is absolute to the point of ownership, why does it specifically give to the Bank the power to collect or dispose of the debts. Are not such powers incidents of ownership? Similarly, if the assignment is absolute, what remaining rights reside in the customer that may be "extinguished" if the Bank buys the accounts at a sale?
>
> In my view, the assignment contemplates that it will operate as a security interest. It vests in the Bank title to the debts owed to Atlantic, but such vesting is for the purpose of security; it is not to transfer ownership, as that term is commonly understood . . . . The Bank is a "secured creditor". The nature of the interest held by the Bank, even if considered to be an absolute assignment, cannot be divorced from the circumstances in which it arose. The commercial reality is that the Bank held a security interest in the property of Atlantic. Atlantic transferred its receivable to the Bank to secure payment of money Atlantic owed to the Bank. Once Atlantic paid off the Bank, it was entitled, not to a reassignment of the debt, but, by the wording of the assignment, "to the cancellation hereof". The Bank was a secured creditor holding a security interest. [Emphasis added.]

25 I agree with the reasoning expressed in these cases. As well, I would note that the Newfoundland Court of Appeal in Bank of Montreal v. Baird (1979), 33 C.B.R. (N.S.) 256, leave to appeal refused, [1980] 1 S.C.R. v, dealt with a GABD as a security interest. Further, the New Brunswick Court of Appeal in R.V. Demmings & Co. v. Caldwell Construction Co. (1955), 4 D.L.R. (2d) 465, found that a bank holding a GABD was a secured creditor, subject to an equity of redemption in the assignor company.

26 I also find support for this conclusion from the reasoning in cases which considered a situation similar to that created by a GABD. These cases arise when a borrower grants to a lending institution a fixed charge or mortgage based upon the borrower's present and future stock-in-trade and inventory but reserves to the borrower the right to make sales of the stock-in-trade and inventory in the ordinary course of business.

27 In R. in Right of B.C. v. F.B.D.B. (1987), 17 B.C.L.R. (2d) 273, McLachlin J.A. (as she then was), on behalf of the majority of the Court of Appeal, considered the manner in which courts have dealt with such instruments and in so doing, reached the following conclusions at p. 303:

> Generally speaking, the authorities draw a clear distinction between fixed and floating charges, recognizing nothing between and taking the view that any charge which permits dealing in the ordinary course of business must be regarded as floating. . . .

28 She then went on, at pp. 303-4, to discuss the conceptual possibility of a fixed charge on stock-in-trade coupled with a licence to deal in those goods, a situation analogous to that which the lending institutions claim exists under a GABD. She noted at p. 305:

> The generally accepted view . . . is that such a charge should be regarded as floating rather than fixed because it involves no final and irrevocable appropriation of property to the creditor.

She also observed that the English courts have specifically rejected the possibility of an absolute assignment being coupled with a licence to deal (at pp. 305-6):

> . . . this theory was soon rejected by the English courts, as is seen from the comments of Lord Buckley in Evans v. Rival Granite Quarries Ltd., [1910] 2 K.B. 979 at 999 (C.A.):
>
> > A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security. [Emphasis added by McLachlin J.A.]

29 In determining whether a particular charge over book debts is fixed or floating, McLachlin J.A. referred (at p. 307) to R. A. Pearce in "Fixed Charges over Book Debts", [1987] J. Bus. L. 18, at p. 29:

> . . . the essential characteristic for deciding whether a charge of book debts is fixed or floating is whether the book debts can be disposed of free from the charge; if they can, the charge is a floating charge, otherwise it is a fixed charge.
>
> . . .
>
> Modern authorities have accepted the either-or approach to fixed and floating charges upon which the courts settled in the late 19th and early 20th centuries. For example, they accept the conclusion that a fixed

> charge on book debts is inconsistent with the assignor having the freedom to deal with proceeds in the course of his business: see Siebe Gorman & Co. v. Barclays Bank Ltd., [1979] 2 Lloyd's Rep. 143 (Ch. D.); Re Armagh Shoes Ltd., [1982] N.I. 59 (Ch. D.); Re Keenan Bros. Ltd. (1985), 5 I.L.R.M. 641 (S.C.). In Great Lakes Petroleum Co. v. Border Cities Oil Ltd., [1934] O.R. 244, [1934] 2 D.L.R. 743 (C.A.), an assignment of book accounts which permitted the debtor to continue to "collect, get in, and deal with said debts, accounts, claims, moneys, and choses in action in the ordinary course of the business" was held to be a floating charge. The same result obtained in R. v. Lega Fabricating Ltd. (1980), 22 B.C.L.R. 145 (S.C.).

She indicated that the sole exception to this rule appeared to be the case of Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd. (1958), 27 W.W.R. 38 (B.C.C.A.), cited by Major J. in his reasons. Significantly she went on to observe at p. 307:

> Why did the courts reject the concept of a fixed charge with a licence to deal? In doing so, they undeniably limited the freedom of debtor and creditor to contract as they might choose in an age when freedom of contract was paramount. The answer, it may be suggested, lies in the effects which recognition of such a concept would have upon the rights of third parties and general commercial activity, as well as the perceived injustice of allowing the debtor to trade freely while remaining immune from the normal incidents of legal process. As Fletcher-Moulton L.J. put it in Evans v. Rival Granite Quarries Ltd., supra (p. 995):
>
> > The results of such a contention are astonishing; it means that by giving such a debenture a company retains the full right of trading with untied hands and at the same time obtains immunity from the operation of all processes of law. I should be slow to come to the conclusion that such an anomaly was recognized by the law. Nor do I think that it is. A consideration of the effect of floating charges and of the fact that the freedom of the company to carry on its business is not based on special words creating that freedom, but on the nature of the charge itself, leads me to the conclusion that the right of the company to carry on its business as it wills pending the enforcement of the security must mean that it may carry it on in accordance with law, including a liability to the processes of the law if it does not pay its debts.

Finally, at p. 309, McLachlin J.A. concluded:

> In general, the courts have been unwilling to characterize charges which permit the debtor to deal with his property in the ordinary course of business as fixed charges with licenses to sell. Rather, the courts have characterized such charges as floating, with the result that they give the chargeholder no priority over third parties prior to crystallization. . . . In short, the answer to the question of whether the courts have recognized a fixed charge subject to a licence to sell in the ordinary course of business is no . . . .

The Significance of the Equity of Redemption

30 For the resolution of these appeals, it is essential that there be a clear recognition of the fundamental difference between an absolute and a conditional assignment of book debts. In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, Corporate Finance Law (2nd ed. 1992), at p. 100, in this manner:

> "Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger."

From this definition it is apparent that factoring arrangements involve:

(1) the purchase of the client's book debts;

(2) the taking over and administration of the client's sales ledger and credit control functions; and

(3) the provision to the client of finance which will be a specified percentage of the nominal value of the debts.

The author goes on (at p. 101) to consider the requirements for an assignment of book debts under English law and observes that to be effective the assignment must be absolute. The text defines "absolute", in these terms:

> The ordinary legal meaning of "absolute" is unconditional, so, for an assignment to be absolute, it must not be conditional in any way; specifically, it must not purport to be by way of charge only.

31 A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. In my view, s. 224 ITA does protect those engaged in the factoring business and those lending institutions that have succeeded in perfecting their security interest prior to any intervention by the MNR. However, I cannot accept the submission that Parliament, by this section, intended to create an interest which was both conditional as a security interest and at the same time unconditional as an absolute assignment. There cannot have been an intent to combine such incompatible concepts.

32 Clearly a GABD does not meet the standard required for a factoring arrangement which requires an absolute transfer of the proprietary interest of the assignor in the book debts. Pursuant to the instruments presented in this case the borrower retains the right to redeem the book debts once the debt is paid off. This right of redemption irrefutably demonstrates that the assignment is something less than absolute.

33 I agree with the MNR that what the actual equity of the borrower in the book debts may be from time to time is irrelevant for the purpose of determining the legal effect of the equity of redemption. It would be absurd if a company were to fluctuate between having title and not having title to their book debts based on their ratio of debt to assets. This is particularly true of a company engaged in a seasonal business. Yet if a GABD is treated as an absolute assignment, this can be the only result, as the bank is limited to recovering the amount of the loan. Since the bank could not recover any book debts if the company had a surplus in their account, the book debts would belong to the company. When there was a deficit, some or all of the book debts would belong to the bank. Such a fluctuating state of affairs is inconsistent with the certainty required in commercial matters. I believe that the correct view is that a GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This is supported both by the jurisprudence and by the wording of the section.

34 This Court, in Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061, interpreted "property of a bankrupt" in what is now s. 67 of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, as including property subject to a security interest, even when the legal title to the property is transferred to the security holder. This indicates that the concept of "property" is not so narrow as to encompass only legal title. It would be inconsistent to hold in this case that a transfer of legal title by means of a GABD is an absolute transfer when it has already been held in another that an equity of redemption is a property interest which remains with the borrower.

35 The recent case of Canada v. National Bank of Canada, [1993] 2 F.C. 206, applied Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail), supra, to provide an appropriate answer to the question as to whether or not a borrower under a GABD retains a property interest in the book debts. Rothstein J. held (at pp. 224-25):

> Based on the reasoning of Houlden J. in Re Broydon Printers, supra, as approved by Lamer J. in Federal Business Development Bank, supra, the right of redemption of the book debts, in my view, comes within the definition of "property" in the Bankruptcy Act. As such, the reasoning of Lamer J. in Federal Business Development Bank would apply and the book debts would constitute "property of the bankrupt" for purposes of subsection 107(1) of the Bankruptcy Act.

In summary, an assignment cannot be both absolute and yet leave an equity of redemption in the form of the right to redeem with the assignor. The retention of an equity of redemption is consistent with a security interest and not with an absolute assignment. A GABD simply cannot constitute an absolute transfer of property.

36 This conclusion is supported by s. 63 of the Alberta Personal Property Security Act, S.A. 1988, c. P-4.05, which stipulates the basis upon which the right of redemption in personal property, including book debts, will be terminated. There must be either a disposition of the collateral by the secured party or an irrevocable election made by the secured party creditor under s. 62 of the Act to take the collateral. In the absence of these events, the debtor has certain rights under the section to redeem the collateral. The facts presented on these appeals do not disclose whether the lending institutions prior to receiving notice from the MNR, sold or transferred the book debts, or met the requisite conditions in order to be deemed irrevocably to have taken the collateral. If they did not, it would appear that the debtor companies still retained a right of redemption under the statute.

37 I would further add that to conclude that a GABD results in a change of ownership as a result of its absolute nature rather than constituting collateral security for a debt will have serious implications. It could, for example, result in a change in the ordering of priorities provided by the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, and the Canada Business Corporations Act, R.S.C., 1985, c. C-44. Further, it could constitute the means by which an unscrupulous debtor company, knowingly or unknowingly abetted by a creditor company, could so order its affairs that many other bona fide creditors could be adversely affected.

Summary

38 In Friesen, supra, it was held that the words of the Income Tax Act should be given their plain and ordinary meaning in accordance with the structure and purpose of the Act. It is clear that in enacting the sections of the ITA and ETA under consideration Parliament was attempting to ensure the priority of the claim of the MNR over that of other creditors. The primary task of collecting and remitting taxes and contributions under both Acts rests with those who are employers and those who sell goods and services. These amounts so collected could be said to belong not to the collecting debtor entities but to the government. In a sense the funds collected but not remitted might be considered to be held in a form of trust since the entities that have collected these funds are not in any circumstances entitled to retain them. Rather, they must remit the funds. In those circumstances the priority granted to the MNR to recover such funds cannot possibly be said to be expropriation without compensation.

39 In an effort to ensure the recovery of these amounts collected for the MNR, Parliament has endeavoured to ensure the priority of the claims of the MNR to these funds over other creditors. The majority of the courts that have considered this issue since the 1990 amendment have concluded that Parliament has succeeded in achieving this aim: see: TransGas Ltd. v. Mid-Plains Contractors Ltd. (1993), 101 D.L.R. (4th) 238 (Sask. C.A.), aff'd [1994] 3 S.C.R. 753; Berg v. Parker Pacific Equipment Sales, [1991] 1 C.T.C. 442 (B.C.S.C.); Lundrigans Ltd. (Receivership) v. Bank of Montreal (1993), 110 Nfld. & P.E.I.R. 91 (Nfld. T.D.); Bonavista (Town) v. Atlantic Technologists Ltd., supra, as well as two of the trial decisions in this case on appeal.

40 I am in agreement with Major J. that a GABD is a security interest and as well that "secured creditor" excludes those individuals who own property absolutely. However I cannot agree that a GABD constitutes an absolute assignment so that the assignee becomes the owner of the book debts. The two concepts in the same instrument are incompatible and an impossible contradiction. Quite simply, a GABD cannot be an absolute assignment since by its very nature it is a security interest.

41 In drafting the language of the sections it must be assumed that Parliament sought carefully to achieve its purpose, and that it did not intend to create an absurdity or a redundancy. My position can be summarized in this manner:

(i) The definitions of a "security interest" and a "secured creditor" cannot be contradictory. Parliament cannot have intended to create definitions which overlap and contradict each other with the result that the same instrument can, at the same time, be both a "security interest" and not a "security interest". This is not to say that all assignments are "security interests". Rather it is simply that an instrument, once having been defined as a "security interest", cannot also be an absolute assignment. By definition, an absolute assignment cannot be a "security interest".

(ii) GABDs are "security interests" and not absolute assignments because they:

(a) meet the definition of "security interests" as set out in s. 224(1.3) ITA;

(b) are defined as collateral security on their face;

(c) are treated as security for a loan on the part of the parties involved;

(d) have been defined by this Court as including an equity of redemption, and thus provide a property interest for the borrower. As a result they cannot be absolute;

(e) cannot be simultaneously a security interest and an absolute assignment;

(f) to recognize GABDs as absolute assignments would frustrate the purpose of several other statutes.

(iii) "secured creditor" is meant to exclude absolute owners. By definition, one cannot be a secured creditor and at the same time an owner of the security. An absolute assignee would be an owner of the book debts as is, for example, a factor. Parliament by this section has excluded those financial institutions engaged in factoring from the operation of the section, together with those financial institutions who have perfected their security interest by assuming ownership. There is no intention manifested by the 1990 amendment to accord any priority to holders of GABDs.

Disposition

42 I would allow the appeals, set aside the order of the Court of Appeal and confirm the priority of the MNR, and direct that the MNR recover in all three cases in the manner directed by the trial judge in The Queen v. Toronto-Dominion Bank. The MNR should have his costs throughout.

The following are the reasons delivered by

IACOBUCCI J. (dissenting)

43 While I agree with the general principles of statutory interpretation outlined by my colleague Justice Cory, I agree with Justice Major that the general assignments of book debts in this case were tantamount to an absolute transfer of property. Accordingly, I would dispose of the appeals in the manner proposed by Major J.

The following are the reasons delivered by

MAJOR J. (dissenting)

I. Introduction

44 These are appeals from a decision of the Court of Appeal of Alberta involving three cases. In all cases Her Majesty in Right of Canada as represented by the Minister of National Revenue (the "MNR") is a party. Alberta

Treasury Branches is a party in two of the cases and the Toronto-Dominion Bank is the other party. Each appeal involves a priorities contest between the MNR's garnishee summons, and a general assignment of book debts ("GABD") to the lending institutions.

45 Section 224(1.2) of the Income Tax Act, S.C. 1970-71-72, c. 63, as amended in 1990, S.C. 1990, c. 34, s. 1, provides a form of garnishment which enables the MNR in certain circumstances to intercept monies owed to tax debtors. This form of garnishment is not available for the collection of income tax debts generally. It is limited to the collection of amounts owing by a person who has withheld, or should have withheld, monies from another under s. 153 of the Income Tax Act and who has failed to remit the withheld amounts. An identical garnishment remedy, provided by the Excise Tax Act, R.S.C. 1985, c. E-15, s. 317(3), applies where a person has failed to remit GST which was, or ought to have been, collected from other persons.

46 The issue in these appeals is whether the sections apply to give the MNR a priority over creditors who have received an absolute assignment of book debts from the tax debtor. The resolution of the appeals turns on the definition of "secured creditor", which requires the holding of a security interest in the "property of another person".

47 In my opinion, the sections do not grant the MNR a priority over a creditor who holds an assignment of book debts. As a matter of law, such a creditor owns the book debts in question and thus cannot be said to have a security interest in the property of another person.

48 This result is dictated by the common law as well as basic principles of the interpretation of the Income Tax Act. The wording of the sections is simply not sufficiently clear and unambiguous to authorize the expropriation, without compensation, of a proprietary interest from the innocent holder of the assignment of the book debts.

II. Facts

49 The first case arose in 1987 from a loan made by the respondent, Alberta Treasury Branches, to Country Inns Inc., an Alberta hotel operator. The borrowed money was secured in part by a general assignment of book debts. Country Inns Inc. was in arrears to the appellant MNR for $33,312.67 in unremitted GST, plus interest and penalties. Zurich Canada owed Country Inns Inc. $15,000 while Zurich Insurance Company was alleged to owe $95,000.

50 In June 1992, the MNR served requirements to pay under s. 317(3) of the Excise Tax Act on Zurich Canada and Zurich Insurance Company, and all other possible debtors. After Country Inns Inc. made an assignment under the Bankruptcy Act, R.S.C., 1985, c. B-3, the trustee estimated the realization of the assets of the estate would leave a shortfall to the respondent Alberta Treasury Branches, which was owed in excess of $6,000,000. Forsyth J. of the Court of Queen's Bench, in an application to determine priorities, held that the MNR had priority by virtue of the provisions of the Excise Tax Act: (1992), 5 Alta. L.R. (3d) 141.

51 In the second case, Pigott Project Management Ltd. contracted with Land-Rock Resources Ltd. for excavation work on the Old Man River Dam spillway. In 1989, Land-Rock borrowed monies from the respondent Alberta Treasury Branches and granted it a general assignment of book debts. After Land-Rock completed the contract work, Pigott held $161,821.77 in contract holdback funds. These funds were claimed by various creditors of Land-Rock, including the appellant MNR, to whom Land-Rock was indebted for unremitted employee source deductions, interests and penalties.

52 In 1991, the MNR served two requirements to pay on Pigott, under s. 224(1.2) of the Income Tax Act, for almost $600,000. On an application to determine priority to the monies in question, Master Waller of the Court of Queen's Bench decided the respondent Alberta Treasury Branches had priority through its general assignment of book debts. An appeal to Hunt J. was dismissed: (1993), 9 Alta. L.R. (3d) 349.

53 In the third case, Bodor Drilling Ltd. operated a drilling company which borrowed monies from the respondent

Toronto-Dominion Bank. The borrowed money was secured in part by a general assignment of book debts. Bodor owed the appellant MNR $83,325.19, in unremitted GST, interest and penalties.

54 In March 1992, the MNR served requirements to pay under s. 317(3) of the Excise Tax Act on the trade debtors of Bodor. Another of Bodor's creditors successfully filed a petition under the Bankruptcy Act to have Bodor declared a bankrupt. Bodor was indebted to the respondent Toronto-Dominion Bank in the amount of $266,331.12. In an application to determine priority, MacLeod J. of the Court of Queen's Bench held that the MNR had priority under the provisions of the Excise Tax Act.

55 All three cases were appealed to the Alberta Court of Appeal. It held that in each case the lending institution had priority over the MNR: (1994), 16 Alta. L.R. (3d) 1.

III. Analysis

56 Before 1987, the primary garnishment remedy in the Income Tax Act was provided by s. 224(1), which stated:

> 224. (1) Where the Minister has knowledge or suspects that a person is or will be, within 90 days, liable to make a payment to another person who is liable to make a payment under this Act (in this section referred to as the "tax debtor"), he may, by registered letter or by a letter served personally, require that person to pay forthwith ... the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.

57 Where a tax debtor had assigned its debts to another party as part of a security arrangement, courts were virtually unanimous in finding that a demand under s. 224(1) was ineffective to attach any of the assigned debts. The courts held that, by the assignment, the tax debtor had transferred its interest in its accounts to the assignee, leaving nothing for the MNR's garnishment to attach. See: Royal Bank of Canada v. R. (1984), 52 C.B.R. (N.S.) 198 (F.C.T.D.), at pp. 210-13, aff'd (1986), 60 C.B.R. (N.S.) 125 (F.C.A.).

58 Parliament amended the Income Tax Act in 1987 (S.C. 1987, c. 46, s. 66) and added two additional subsections (ss. 224(1.2) and (1.3)). Sections 317(3) and (4) were also added to the Excise Tax Act. For the purposes of the issue raised in these appeals the wording of the sections in the Excise Tax Act is identical to that of the Income Tax Act. For the sake of convenience I will refer to the sections of the Income Tax Act.

59 Section 224(1.2) provided that the MNR could garnish funds owed to a tax debtor or to a "secured creditor". Section 224(1.3) provided, inter alia, definitions of "secured creditor" and a "security interest":

> 224....
>
> (1.2) Notwithstanding any other provision of this Act, the Bankruptcy Act, any other enactment of Canada, any enactment of a province or any law, where the Minister has knowledge or suspects that a particular person is or will become, within 90 days, liable to make a payment
>
> (a) to another person who is liable to pay an amount assessed under subsection 227(10.1) or a similar provision, or to a legal representative of that other person (each of whom is in this subsection referred to as the "tax debtor"), or
>
> (b) to a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor,
>
> the Minister may, by registered letter or by a letter served personally, require the particular person to pay forthwith, where the moneys are immediately payable, and in any other case, as and when the moneys become payable, the moneys otherwise payable to the tax debtor or the secured creditor in whole in or in

part to the Receiver General on account of the tax debtor's liability under subsection 227(10.1) or a similar provision.

(1.3) In subsection (1.2),

"secured creditor" means a person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes a trustee appointed under a trust deed relating to a security interest, a receiver or receiver-manager appointed by a secured creditor or by a court on the application of a secured creditor, a sequestrator, or any other person performing a similar function;

"security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;

60 The operation of the 1987 version of s. 224(1.2) as against the holder of a GABD was considered by courts in Alberta, British Columbia, Saskatchewan, Manitoba and Nova Scotia.

61 In Alberta, in Lloyds Bank of Canada v. International Warranty Co. (1989), 64 Alta. L.R. (2d) 340 (Q.B.), rev'd (1989), 68 Alta. L.R. (2d) 356 (C.A.), McDonald J. held that the new definition of "security interest" was broad enough to include monies which were equitably assigned by a tax debtor to a bank (at pp. 352-53):

> ...the definition of "security interest" is so broad as to include moneys which have been equitably assigned by the tax debtor to, for example, a bank. The ownership by the bank of the funds that are the subject of the assignment constitutes an "interest in property". That interest in property is one which "secures payment" of the "obligation" of the tax debtor.... The provision of such security is the very purpose of the assignment of book debts. Moreover, the bank's interest is one "created by or arising out of [an] assignment...of any kind whatever, however or whenever arising..."

As a result, he held that the MNR obtained priority to the garnished funds over the claim of Lloyds Bank as the assignee of the book debts.

62 The Alberta Court of Appeal reversed the trial decision in Lloyds Bank but on other grounds. Relying on its decisions in Re Lamarre; University of Calgary v. Morrison, [1978] 2 W.W.R. 465, and Attorney General of Canada v. Royal Bank of Canada, [1979] 1 W.W.R. 479, the Court of Appeal held that the provisions of s. 224(1.2) provided at most for a form of extra-judicial attachment which could bring the funds into the custody of the MNR. The court held that the section fell short of effecting a transfer of property in the funds or establishing the priority of the MNR's claim. It concluded (at p. 362) that "[s]omething further is required to accomplish either purpose".

63 The decision of the Alberta Court of Appeal in Lloyds Bank was followed by the Manitoba Court of Appeal in Pembina on the Red Development Corp. v. Triman Industries Ltd., [1991] 6 W.W.R. 481, and the British Columbia Court of Appeal in Concorde International Travel Inc. v. T.I. Travel Services (B.C.) Inc. (1990), 72 D.L.R. (4th) 405. In the B.C. decision, Hinkson J.A. referred to the decision of the Alberta Court of Appeal in Lloyds Bank and stated at p. 409:

> In my opinion, s. 224 styled as it is "Garnishment" deals in s-ss. (1) and (1.2) with the mechanics of garnishment. The Minister in serving a demand pursuant to that section must be proceeding upon the basis that he asserts a tax debtor's liability to him. That justified garnishing the funds in the hands of a creditor of the tax debtor. But, I am unable to see in that section any provision that would have the effect of transferring the property in the funds to the Minister or establishing a priority of Revenue Canada's claim. That was the point dealt with by the Alberta Court of Appeal. [Emphasis added.]

64 To the opposite effect are decisions by courts in Saskatchewan and Nova Scotia: Royal Bank of Canada v.

Saskatchewan Power Corp., [1991] 1 W.W.R. 1 (Sask. C.A.), aff'g [1990] 2 W.W.R. 655 (Sask. Q.B.) and Touche Ross Ltd. v. M.N.R. (1990), 71 D.L.R. (4th) 648 (N.S.S.C.T.D.).

65 Apparently in order to deal with the competing lines of authority as to whether s. 224(1.2) was sufficient to grant a priority to the MNR, Parliament amended the section in 1990 by adding the following to the end of the section:

> ...and on receipt of that letter [i.e. the garnishment summons] by the particular person, the amount of those moneys that is required by that letter, to be paid to the Receiver General shall, notwithstanding any security interest in those moneys, become the property of Her Majesty and shall be paid to the Receiver General in priority to any such security interest.

66 This 1990 amendment was made to both the Income Tax Act and the relevant provisions of the Excise Tax Act. The three trial decisions in the cases at issue in these appeals are principally concerned with the issue of whether this amendment constituted the "something further" which Lloyds Bank had held was necessary to transfer the property interest in the funds to the MNR or to grant a priority to the MNR.

67 Two judges of the Court of Queen's bench held that the 1990 amendments did constitute the "something further" and that as a result the MNR gained priority over the book debts to the lending institutions in question. Forsyth J. based his decision expressly on the wording of the 1990 amendment and held that it was sufficiently explicit. In addition to the 1990 amendments, MacLeod J. placed reliance on the finding of McDonald J. in Lloyds Bank that a GABD falls within the definition of a security interest in s. 224(1.3).

68 In the third case, the Master in Chambers held that the 1990 amendments were still not sufficiently broadly worded to allow Revenue Canada to attach monies in which the tax debtor has no interest by virtue of an absolute assignment. Hunt J. on appeal agreed with his conclusion. She relied on a perceived ambiguity in the definition of security interest, stating at pp. 360-61:

> I am of the view, moreover, that it is not clear whether the modifying provisions at the end of the definition of "security interest" (the words "of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for") are meant to apply to each of the enumerated types of interests or instruments (debenture, mortgage, assignment, etc.) or whether these words are meant only to modify the term "encumbrance". McDonald, J. [in Lloyds Bank, supra] assumed the former to be the case, but in my view the meaning is not without doubt. There is a third way of reading the modifying words at the end, namely that the words "of any kind whatever" describe "encumbrance", with the balance of the words applying to each of the listed types of interests. The words "of any kind whatever" might also be taken to apply to assignments and encumbrances. Were this provision more clear, it would be easier to conclude that Parliament meant to include all types of assignments, including unconditional assignments, in the definition. This would make it plainer that, indeed, Parliament intended Revenue Canada's claim to take priority over the property of someone other than the tax debtor, such as an assignee of the tax debtor's book debts. [Emphasis in original.]

69 I agree with Forsyth J. that the 1990 amendments to the Income Tax Act and the Excise Tax Act were sufficient to provide the "something further" which the Alberta Court of Appeal thought to be necessary in Lloyds Bank. As Côté J.A. in the decision of the Court of Appeal in this case stated about the amendment to s. 224(1.2), at p. 6:

> ...the amendments to that subsection say that service transfers the debt to Her Majesty, and that it shall be paid to Her Majesty notwithstanding the security interest, and in priority to the security interest. Where those amendments apply, in my view they reverse our Lloyds Bank decision and give the M.N.R. priority over earlier mortgages and assignments. I cannot confine them to floating or conditional assignments and must disagree with one of the Justices appealed from.

70 I also agree with MacLeod J. that McDonald J. at trial in Lloyds Bank was correct to hold that a GABD falls

within the definition of security interest in s. 224(1.3). That section defines "security interest" as including:

> ... any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of ... [an] assignment ... of any kind whatever, however or whenever arising ....

71 With respect, I do not accept the conclusion of Hunt J. that the definition of "security interest" is ambiguous and that the phrase "of any kind whatever" should be read to modify only "encumbrance" which is the last type of security listed. When the definition is read in its plain and ordinary sense, it is clear that the broad phrase "of any kind whatever" is intended to cover all of the listed types of security including an assignment. The phrase "a[n] assignment ... of any kind whatever" is broad enough to encompass the absolute assignments of book debts which are at issue in these appeals.

72 The finding that a GABD is a security interest for the purposes of the Income Tax Act or the Excise Tax Act is also consistent with the manner in which the assignments are dealt with in the contracts which create the assignments. For instance, the instrument which creates the assignment of book debts from Land-Rock Resources Ltd. to Alberta Treasury Branches provides, inter alia:

> THE PRESENT assignment and transfer shall be a continuing collateral security to Treasury Branches for the payment of all and every present and future indebtedness and liability of the undersigned to Treasury Branches and any ultimate unpaid balance thereof with interest. [Emphasis added.]

73 My conclusions that the GABDs at issue in these appeals fall within the statutory definition of a security interest and that the 1990 amendment is effective, when it applies, to give the MNR a priority over earlier mortgages and assignments, do not, however, lead inevitably to the conclusion that the MNR has priority over the lending institutions to the debts at issue in these appeals.

74 A new argument was raised before the Alberta Court of Appeal and this Court to the effect that even if an unconditional GABD is a security interest, the lending institutions do not fall within the definition of "secured creditor" in s. 224(1.3) of the Income Tax Act. Côté J.A. held at pp. 7-8:

> The M.N.R. must believe or suspect that the intended recipient of the letter is liable, or will soon become liable to make a payment under para. (a) or para. (b) of the operative subs. (1.2). No one suggests that para. (a) applies here, given the general assignments of book debts and other assignments. So the effective precondition in these cases is para. (b). It says:
>
> > (b) to a secured creditor who has a right to receive the payment that, but for [a] security interest in favour of the secured creditor, would be payable to the tax debtor. (emphasis added)
>
> Subsection (1.3) defines "security interest", and that definition appears to be satisfied in the present cases. But subs. (1.3) also defines "secured creditor".... I will restate that definition slightly using square brackets:
>
> > ... a [certain] person who has a security interest in the property of another person or who acts for or on behalf of that person with respect to the security interest and includes... (emphasis added)
>
> In each of these three appeals, there was a general assignment of book debts which purported immediately to transfer title to the Bank or Treasury Branch. Doubtless it was done to secure a loan, but legal title was thereafter in the transferee, the Bank or Treasury Branch. Therefore, the Bank or Treasury Branch is not a "secured creditor" under this definition, because it does not have any interest "in the property of another person". The Bank or Treasury Branch itself is the owner. The tax debtor, both sides agree, would have to be the "other person". But he has no title. So one cannot say that the book debts (receivables) assigned are "the property of" the tax debtor.

75 I agree. The wording of s. 224(1.2) clearly requires not only that there is a security interest, but also that the payment be made either to the tax debtor or to a secured creditor. Here, because of the assignments, the payments

are made to the lending institutions and the question is whether these lending institutions meet the definition of "secured creditor" as defined in the statutes.

76 The definition of secured creditor is a "person who has a security interest in the property of another", that other being the tax debtor. The critical issue is whether, after an assignment, the lending institutions have a security interest in the property of the tax debtor. In my view, they do not. An assignment passes title and therefore property in the book debts is held by the lending institution and not by the tax debtor.

77 It is well-established law that a GABD, such as the ones at issue in these appeals, has the effect of transferring all right, title and ownership in and to the property assigned so that it can no longer be considered the property of the assignor. See: Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd. (1958), 27 W.W.R. 38 (B.C.C.A.), at p. 42; Lettner v. Pioneer Truck Equipment Ltd. (1964), 47 W.W.R. 343 (Man. C.A.), at pp. 348-49; Royal Bank of Canada v. Attorney General of Canada (1977), 25 C.B.R. (N.S.) 233 (Alta. S.C.T.D.), at pp. 236 and 241, aff'd [1979] 1 W.W.R. 479; Royal Bank of Canada v. R., supra, at pp. 206 and 212; Toronto-Dominion Bank v. Minister of National Revenue (1990), 39 F.T.R. 102, at p. 105.

78 In Evans Coleman and Evans Ltd. v. R.A. Nelson Construction Ltd., the plaintiff attempted to garnish funds owing to the defendant which were held by a bank. A second bank held a GABD executed by the defendant. The British Columbia Court of Appeal concluded that the GABD passed property in the book debts absolutely, and that the defendant no longer had an interest that could be garnisheed.

79 In Royal Bank of Canada v. R., Muldoon J. of the Federal Court Trial Division came to a similar conclusion which was unanimously confirmed by the Federal Court of Appeal. Under the terms of the assignment, the assignor Miles contracted to act as a trustee for the funds assigned by him to the Royal Bank under a GABD. The MNR argued that an assignee can have no greater claim on the garnished money than the assignor. Muldoon J. rejected this argument and held at p. 212:

> With respect, that contention misses the point. To equate the respective rights of the assignee and the assignor in and upon the book debts is to overlook the very nature and effect of the assignment, for the assignee owns the book debts and the assignor does not. To those who have not searched in the personal property security register, the assignor, of course, might still appear to be an ordinary trade creditor, but having assigned the book debts, the assignor, Miles, was in reality a trustee of them for the assignee, the plaintiff bank. Here, the Crown has received that which belonged to the bank.

80 In Lettner v. Pioneer Truck Equipment Ltd., Guy J.A. of the Manitoba Court of Appeal commented upon the nature and effect a GABD as follows at pp. 348-49:

> As between Pioneer Truck and the bank, Pioneer Truck knows that its accounts receivable or book debts belong to the bank. In equity it cannot be heard to say that it owns these book debts.
>
> . . .
>
> The fact that banking practice in Canada permits the extension of credit to going concerns, and permits the borrowers (by licence, as it were) to collect some accounts to pay wages and current creditors, does not destroy the absolute and specific quality of the legal assignment to the bank.

81 In Toronto-Dominion Bank v. Minister of National Revenue, Jerome A.C.J. of the Federal Court Trial Division conducted a thorough review of the authorities, including those discussed above, and concluded at p. 105:

> In light of the preceding authorities, and particularly in light of the Federal Court of Appeal's decision in Royal Bank of Canada v. The Queen, which is entirely binding on this Court, I must conclude that the general assignment of book debts granted April 26, 1983, by J.K. Campbell and Associates Limited to the

> Toronto-Dominion Bank constituted an absolute transfer of all property and interest previously held by J.K. Campbell in its accounts or other book debts, present or future. Accordingly, after April 26, 1983, the Toronto-Dominion Bank had full legal and equitable title in all accounts that were owing or that would become owing by debtors of J.K. Campbell unless such right was otherwise expropriated by competent and valid legislation.

82 In addition to establishing that an absolute assignment of book debts transfers property in the debts to the assignee, the cases discussed above also stand for the simple and obvious proposition that the true nature of an assignment can only be determined by examining the particular wording of the instrument which creates the assignment.

83 The assignments in each of the three cases which are involved in these appeals all contain language which makes it clear that they are immediate and absolute. Typical is the assignment from Land-Rock Resources to Alberta Treasury Branches, which provides:

> THE UNDERSIGNED Land-Rock Resources Ltd. for valuable consideration HEREBY ASSIGNS AND TRANSFERS to Province of Alberta Treasury Branches (herein called "Treasury Branches") all debts, demands and choses in action now due or hereafter to become due, together with all judgments and securities for the said debts, demands and choses in action, and all other rights and benefits in respect thereof which now are or may hereafter become vested in the undersigned.

84 It was noted in Royal Bank of Canada v. R., at p. 202, that there may be a distinction between an absolute assignment and one that provides that, in the event of default and the non-remedy of the default, the bank may without further notice deal with the book debts. Such wording appears to be less than an absolute assignment and creates for the lending institution a charge on the book debts which does not crystallize into property in the debts until there has been an unremedied default.

85 While it does not fall to be decided in this case, it seems likely that such an assignment does not transfer property to the lending institution and thus, at least prior to default on the part of the assignor, the lending institution would be a secured creditor under s. 224(1.3). This type of conditional wording is not present in any of the instruments at issue in these appeals, all of which are unconditional and absolute.

86 Moreover, at least one of the instruments provides that the assignor is a trustee for the book debts held by the lending institution. In Royal Bank of Canada v. R., Muldoon J. held that the fact that the assignor is in the position of a trustee is a further indication that the assignment passes property to the assignee. The assignment from Bodor to the Toronto-Dominion Bank provides:

> IT IS HEREBY DECLARED AND AGREED that all money received by the Assignor in payment of any debts, demands and choses in action...shall be received and held by the Assignor in trust for the Bank.

87 It should be noted that the fact that the GABD is referred to as "continuing collateral security" in two of the instruments does not make the GABD anything less than absolute. In both Evans Coleman and Lettner, the GABDs contained language that the general assignment of book debts would be continuing collateral security and in each case the courts held that such language did not affect the absoluteness of the assignment.

88 At the Alberta Court of Appeal, the MNR took the position that even if legal title was transferred to the assignee by the GABD, the assignor tax debtor retained an equitable interest in the nature of an equity of redemption which was sufficient for the book debts to remain the "property" of the tax debtor.

89 Côté J.A. responded to this argument by stating that while in theory the tax debtor held an equity of redemption, this equity could not be exercised in practice except by application to a court of equity. Such an application would only be granted by a court of equity where the value of the book debts exceeded the value of the loans which they

secured. He concluded that in cases like the three on appeal, where the value of the loans exceeded the value of the book debts, there is no real equity of redemption. He also held that the only property of the tax debtor was the equity of redemption and that the MNR did not claim that interest.

90 I agree with Côté J.A. that the tax debtor retains an equity of redemption upon an assignment of its book debts. Halsbury's Laws of England (4th ed. 1980), vol. 32, at para. 401, defines a mortgage as "a disposition of property as security for a debt" which "may be effected ... by an assignment of a chose in action" such as a book debt. At para. 407 Halsbury's also states that:

> Incident to every mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemption.... This right arises from the transaction being considered as a mere loan of money secured by a pledge of the estate.

Thus prima facie an assignor of book debts retains an equitable right to redeem his assignment of the book debts once the debt obligation which is secured by the book debts has been completely discharged by the assignor.

91 I also agree with Côté J.A. that in the context of these appeals the fact that the tax debtors in theory hold an equity of redemption in their book debts is of purely academic interest since, on the facts, the value of the loans secured by the book debts far exceeds the value of the debts themselves. Thus there is no value in the equity of redemption held by the tax debtors. While the equity of redemption theoretically exists, for practical purposes it is incapable of any realization.

92 The appellant MNR argues, however, that Côté J.A. erred by focusing his attention on whether the value of the loans exceeds the value of the book debts. The MNR points out that if the relative value of the loan and the security is the only relevant factor then a tax debtor who operates his business with the assistance of a revolving line of credit secured by an assignment of book debts (which is a common business arrangement) would fluctuate between being and not being a secured creditor on an almost daily basis depending on the relative value of the collectibles and the line of credit of the business.

93 I share the MNR's concern that the relative value of the loan and the book debts is not the sole determining factor as to whether the assignor's equity of redemption makes the book debts his "property".

94 As a matter of law, an absolute assignment of book debts makes those book debts the property of the assignee. Those book debts remain the property of the assignee until the assignor actually exercises his equitable right to redeem. It is a necessary precondition to the exercise of the equity of redemption that the loans secured by the assignment be paid off in full, along with any accrued interest and costs.

95 With respect, however, while it is a necessary precondition that the value of the security exceed the value of the loan in order to exercise the right of redemption, the fulfilment of this precondition is not sufficient to return the book debts to the property of the assignor. The assignor must also choose to exercise the right of redemption which will mean a termination of the loan arrangement with the lending institution.

96 At base, the equity of redemption is no more than a recognition that the assignment of debts to the creditor, while immediate and absolute, is for a limited purpose. In equity, the creditor cannot unjustly enrich itself by realizing on more security than the value of the loan which is secured. At any given time the value of the security may exceed the value of the loan, but upon termination of the lending relationship, the assignor of the security is entitled, in equity, to an accounting.

97 In determining whether the book debts, once assigned, are the "property" of the assignor or of the assignee, the Court must choose between two competing definitions of "property". One definition is the immediate legal title to what had been assigned and the other is a potential interest enforceable only in equity to reacquire property which has been assigned to another, contingent upon successfully fulfilling the terms of the loan agreement.

98 In Friesen v. Canada, [1995] 3 S.C.R. 103, it was held that the words of the Income Tax Act are to be read in their plain and ordinary sense. The plain and ordinary meaning of "property" is legal title and not a contingent future equitable right to reacquire property which one does not presently hold. The very term "equity of redemption" highlights the fact that property is not presently held by the assignor, but rather there is a limited right to reacquire property at a future date.

99 The central thrust of the MNR's submissions in this Court is contained in para. 45 of his factum, where he states that where title to property is transferred, the phrase "property of another person" must be read to mean "property that, absent the security interest, is the property of the person giving the security".

100 This proposition is contrary to the traditional Canadian jurisprudence that the words of a taxing statute are to read strictly for their plain and ordinary meaning and that only if there is a true ambiguity is the intention of Parliament to be considered.

101 In the circumstances of these appeals, a strict reading of the taxation statute is appropriate. As pointed out by Hunt J. at p. 361, these appeals raise not only the traditional tax interpretation principle of resolution of ambiguity in favour of the taxpayer: Johns-Manville Canada Inc. v. The Queen, [1985] 2 S.C.R. 46, at p. 72. They also raise the well-known principle that, in the absence of clear and unequivocal language, there is a presumption that proprietary rights are not to be taken away without provision being made for compensation.

102 In the context of these appeals, the interpretation of s. 224 urged by the MNR would have the effect of expropriating property to which the lender is legally entitled under its security agreement with the tax debtor. The taxes which would be garnished and withheld from the lending institution are not taxes owed by the lender but rather taxes owed by its debtor.

103 The lending institutions are innocent third parties whose proprietary rights would be expropriated by the provisions of s. 224 and accordingly those provisions must be read strictly to determine whether the expropriatory language is clear and unequivocal.

104 However, it is not necessary to resort to strict interpretation to resolve these appeals. In this case the plain and ordinary meaning of the phrase "property of another person" is property now held by another person. This interpretation makes sense of the words without reading anything into the statute and respects the well-established principle of interpretation that statutes are to be read as though presently speaking.

105 One of the cardinal principles of the plain and ordinary meaning approach is that nothing be read into a section unless no sense can be made of that section without the addition of the extra words. The plain and ordinary meaning of the statutory words simply does not bear the strained interpretation urged by the MNR of "property that, absent the security interest, is the property of the person giving the security".

106 In addition to offending the principle that extra words should not be read into a section unless absolutely necessary, this proposed reading attempts to read in wording which can be expressly found in another part of the same section. Section 224(1.2)(b) applies to "a secured creditor who has a right to receive the payment that, but for a security interest in favour of the secured creditor, would be payable to the tax debtor". The emphasized words in s. 224(1.2)(b) are identical in effect to the words which the MNR seeks to introduce into the definition of secured creditor.

107 The use of a particular phrase in other parts of the Income Tax Act militates against reading that same phrase into a section of the Act where it is not found. This is particularly so where the phrase is found in the very same section as the disputed wording, and the section in question has been the subject of amendments twice within the last decade.

108 If Parliament had intended that s. 224(1.2) should cover all persons who hold a security interest, it could have defined "secured creditor" as any person who holds a security interest without the deliberately limiting words "in the property of another person". Alternatively, it could have expressly provided "property that but for a security interest in favour of the secured creditor would be the property of another person", thus echoing the phrasing found in the rest of the section.

109 In spite of two recent amendments to this section, Parliament chose not to define secured creditor in the manner urged by the appellant MNR. To read into the section the words suggested by the MNR would be an unwarranted judicial usurpation of the legislative function. The only conclusion which can be drawn from the plain and ordinary meaning of the words which do appear in the Act is that Parliament did not intend to bring creditors who actually owned the title to the security interest within the purview of the section.

110 It is my conclusion that these appeals can be resolved without resort to any special principles of interpretation tailored to the expropriatory nature of this particular provision.

111 If I am mistaken in this conclusion, and there is an ambiguity in the meaning of the word "property" then I would hold that the specific effect of this section warrants a strict resolution of any ambiguity in favour of the respondents. Such an interpretation requires that "property" be read to mean present legal title in preference to a future contingent equitable right to reacquire property not currently held. It also requires that words expressly found in another part of the same section not be read without cause into the definition of secured creditor.

112 In summary, these appeals should be resolved as follows:

1. The definition of "security interest" is broad enough to include a general assignment of book debts even where that assignment is absolute.
2. The wording of s. 224(1.2), as amended in 1990, is sufficiently clear and unequivocal to allow a transfer of property in the garnished funds to the MNR and to grant him a priority in circumstances where the rest of that section applies.
3. An assignee of an absolute assignment of book debts is not a "secured creditor" within the meaning of s. 224(1.3) because he does not hold a security interest "in the property of another person".
4. Therefore, s. 224(1.2) of the Income Tax Act and s. 317(3) of the Excise Tax Act are not effective to grant the appellant MNR an interest in or priority over debts owed to the assignee of a GABD.

IV. Disposition

113 All three appeals should be dismissed with costs to the respondents.

TAB 3

Sharma v. 643454 Alberta Ltd., [2006] A.J. No. 149

Alberta Judgments

Alberta Court of Queen's Bench

Judicial District of Edmonton

Slatter J.

Heard: December 19, 2005.

Judgment: February 9, 2006.

Docket: 9503 15964

[2006] A.J. No. 149 | 2006 ABQB 119 | 55 Alta. L.R. (4th) 371 | 392 A.R. 353 | 30 C.P.C. (6th) 60 | 9 P.P.S.A.C. (3d) 263 | 148 A.C.W.S. (3d) 736 | 2006 CarswellAlta 170

Between Dev Sharma, plaintiff, and 643454 Alberta Ltd., Wayne Goebel, Herman Viases and Pubalagan Venkatraman, defendants

(43 paras.)

Case Summary

Creditors & debtors law — Security — Liens — Creation of — Application to determine the priorities of a solicitor's charging order, an unsecured creditor and a writ of execution — The applicant was the only party who pursued recovery of the debt — The limitation period had expired for a portion of the solicitor's accounts — However, the solicitor had a charging order for approximately $6,000 — The applicant's garnishee summons had some priority over the writs because it pursued to the claim — The garnishee summons had priority over the unsecured creditor.

Creditors & debtors law — Garnishment — Garnishee summons — Application to determine the priorities of a solicitor's charging order, an unsecured creditor and a writ of execution — The applicant was the only party who pursued recovery of the debt — The limitation period had expired for a portion of the solicitor's accounts — However, the solicitor had a charging order for approximately $6,000 — The applicant's garnishee summons had some priority over the writs because it pursued to the claim — The garnishee summons had priority over the unsecured creditor.

Application by Alberta Lawyers' Insurance Association (the Association) for a determination of the priorities of a solicitor's charging order, an unsecured creditor and a writ of execution -- The plaintiff, Sharma, obtained a judgment against Goebel in 1996 -- The judgment was assigned to the Association -- The amount owing on this judgment was $120,000 -- There were writ holders as well -- In 2002, Goebel was convicted of several offences for which he was fined -- He was unable to pay the fine and spent six days in prison prior to his friend, Semenchuk, providing funds to pay the fine -- Semenchuk advanced $42,026 to Holder Law Office, who was representing Goebel -- Goebel signed an irrevocable assignment of capital health board fine refund from Court of Queen's Bench Appeal in favour of Semenchuk -- He was also to pay Semenchuk $600 per month to pay back the loan -- On appeal, the fines were reduced and the overpayment was forwarded to Holder -- Semenchuk and Holder signed a further irrevocable assignment of proceeds in 2003, which permitted Holder to retain $10,000 out of the fine refund and the balance was to be paid to Semenchuk -- The Association garnished the Holder Law Office twice in 2003 -- The garnishee summonses were renewed in 2004 -- In 2005, Holder asserted a solicitor's lien for the first time -- Semenchuk claimed an entitlement to the funds and sought a form or tracing order --

Holder claimed $10,000 based on the irrevocable assignment and also claimed a charging order -- The Association claimed priority due to the garnishee summonses -- HELD: Semenchuk was an unsecured creditor since her claim was a loan -- The assignments created a security interest -- However, the assignments were subordinate to the writs -- Holder was only entitled to a charging order for the fees incurred between when the funds were advanced and when the appeal was decided -- There was no reason a secured creditor should be allowed to benefit from the labours of the lawyer, without seeing that the lawyer was paid a fair amount -- However, the two-year limitation period for the first two accounts had expired -- For the third account, the limitation period did not begin to run under the final account was rendered -- Holder was entitled to a charging order for approximately $6000 -- The Association had some priority over the other writ holders because it pursued a claim.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 625, Rule 625(3), Rule 651(2)

Civil Enforcement Act, R.S.A. 2000, c. C-15, s. 35, s. 99(3) (c), s. 103(1)

Limitations Act, R.S.A. 2000, c. L-13, s. 1(i), s. 1(i), s. 2(1)(a), s. 3(1), s. 3(1)

Personal Property Security Act, s. 4, s. 32

Public Health Act, R.S.A. 2000, c. P-37

Counsel

E.M. Lafuente and K.D. Watamaniuk for the Applicant A.L.I.A.

Jodie K. Holder for the Holder Law Office

Cheryl Semenchuk in person

Angela Alphonse (watching brief) for the Savannah Animal Care Corporation

REASONS FOR JUDGMENT

SLATTER J.

1 This Interpleader application raises the issue of the priority between a Solicitor's Charging Order, an unsecured creditor, and a Writ of Execution. It also raises the issue of when a limitation period runs against a lawyer seeking to enforce his account.

Facts

2 The matter started on March 28, 1996, when the Plaintiff obtained a judgment against the Defendants 643454 Alberta Ltd., Wayne Goebel, and Herman Viases. The judgment was subsequently assigned to the Applicant The Alberta Lawyers' Insurance Association ("A.L.I.A."). Nothing has ever been paid on this judgment, and the amount owing exceeds $120,000.00. There are other judgment creditors, including the Savannah Animal Care Corporation, who have writs against the Defendant Goebel totalling another $225,000.00.

3 In July of 2002, Goebel was convicted in Provincial Court of several offences under the Public Health Act, R.S.A. 2000, c. P-37, and he received a substantial fine. Goebel launched an appeal to the Court of Queen's Bench, but in the interim he was unable to pay the fines in accordance with the terms imposed, and he was arrested in January of 2003. He served six days in jail before he was able to raise the money to pay the balance of the fines.

4 The source of the funds used to pay the fines was the claimant Cheryl Semenchuk, a long-time friend of Goebel. She was able to raise money from her lines of credit and credit cards, and on January 20, 2003 she advanced the sum of $42,026.00 to the claimant the Holder Law Office, which was used to secure the release of Goebel.

5 On January 23, 2003, Goebel signed an "Irrevocable Assignment of Capital Health Board Fine Refund from Court of Queen's Bench Appeal" in favour of Semenchuk. This document acknowledged the advance of funds, and indicated that if Goebel's pending appeal of his sentence was successful, any refund of the fines would be returned to Semenchuk. The claimant Holder Law Office signed an acknowledgment of the Irrevocable Assignment, stating "I agree to be bound by this irrevocable assignment".

6 On January 24, 2003, the Holder Law Office refunded surplus funds of $1,841.78 to Semenchuk. These surplus funds resulted because Goebel had served six days in custody, and was therefore entitled to credit against the fines. The Holder Law Office originally intended to apply the surplus fines against the outstanding legal accounts, but Semenchuk objected and the surplus was paid to her.

7 On May 9, 2003, Goebel's appeal against conviction and sentence was allowed in part, and the matter was referred back to Provincial Court for sentencing: R. v. Goebel, 2003 ABQB 422, 17 Alta. L.R. (4th) 153, [2003] 9 W.W.R. 279. The Holder Law Office represented Goebel on the appeal. Because the appeal was allowed in part, Goebel was entitled to a refund of some of the fines he had paid. He was given the option of leaving the money with the Provincial Treasurer until the outcome of the re-sentencing was known, but he elected to have the funds refunded to him forthwith. On May 12, 2003, an Order was given directing the Clerk of the Provincial Court to pay out the fines to the Holder Law Office.

8 By this time the Applicant A.L.I.A. was aware of the proceedings. On July 11, 2003, A.L.I.A. garnisheed the Holder Law Office. On July 28, 2003, the Holder Law Office filed a Reply to the garnishee, stating that no money was owed to Goebel, or alternatively that any money belonged to an unidentified third party, presumably Semenchuk.

9 There was some confusion regarding the payment out of the funds due to conflicting Orders granted by the Court of Queen's Bench, and a further Order was made on October 21, 2003, confirming that the funds should be paid out to the Holder Law Office. On October 27, 2003, A.L.I.A. issued a second garnishee summons against the Holder Law Office. No Reply was ever filed to this garnishee.

10 On October 29, 2003, Semenchuk and Holder signed a further "Irrevocable Assignment of Proceeds". This document indicated that the Holder Law Office was entitled to retain $10,000.00 out of the fine refund, in recognition of the efforts of the Holder Law Office in recovering these funds on the appeal. The balance of the refund was to be paid to Semenchuk.

11 The Holder Law Office rendered invoices to Wayne Goebel as follows:

a)	June 7, 2002	-	$17,163.08
b)	Feb. 11, 2003	-	$11,298.39
c)	July 10, 2003	-	$ 6,491.58
d)	Dec. 3, 2003	-	$ 4,700.68

No significant payment has been made on these accounts since March 14, 2003, and the present balance claimed is $21,832.00.

12 On December 16, 2003, the Provincial Court paid out $9,936.00 to the Holder Law Office. On March 9, 2004, the Provincial Court paid out a further $14,904.00 to the Holder Law Office, making a total of $24,840.00.

13 On July 9, 2004 and October 22, 2004, A.L.I.A. renewed its garnishee summonses.

14 To this point the Holder Law Office had indicated that it had no claim to the funds, and the expectation was that the Holder Law Office would interplead the funds between the writ holders and Ms. Semenchuk. On August 26, 2005, another appearance was made before the Court of Queen's Bench. This appearance arose as a result of the Holder Law Office's failure to interplead the funds, despite repeated assurances it would do so. On August 26, 2005, the Holder Law Office asserted for the first time a claim under the assignment of October 29, 2003, and it also asserted a solicitor's lien, despite the several prior representations that the Holder Law Office had no claim to the funds. The solicitor's lien was in fact an application for a Charging Order under Rule 625, which reads as follows:

> 625(1) The court may, on the application of a barrister and solicitor, declare the barrister and solicitor to be entitled to a charge upon the property recovered or reserved through his instrumentality in any proceedings prosecuted or defended by him for his proper fees and disbursements in reference to the proceeding, and may make such order or orders as may be just for the raising of payment of the fees and disbursements out of that property.
>
> (2) No act or thing defeats any such charge unless the property has been disposed of to a bona fide purchaser for value without notice.
>
> (3) No order shall be made under this Rule where the right of the barrister and solicitor to recover payment of his fees and disbursements is barred by any statute of limitations.

The disputed funds were eventually paid into court.

15 There are accordingly competing claims to the funds in court. Ms. Semenchuk claims an entitlement to the funds, as she was the one who originally advanced them to Mr. Goebel. She claims a form of tracing order. The Holder Law Office claims $10,000.00 by virtue of the Irrevocable Assignment of October 29, 2003, and also claims a Rule 625 Charging Order. The writ holders claim under the various garnishees, and A.L.I.A. claims a priority under s. 99(3)(c) of the Civil Enforcement Act, R.S.A. 2000, c. C-15 because it has taken the initiative in pursuing the funds.

Nature of the Semenchuk Advance

16 A threshold issue is the nature of Ms. Semenchuk's claim. In my view her claim is clearly a loan, and she is a creditor. The true nature of the arrangement is that she lent the funds to Mr. Goebel on the condition that they were to be used for a specific purpose: the payment of his fine. Mr. Goebel agreed to pay her back at the sum of $600.00 per month, and has apparently agreed to pay the interest that accrues on the credit card debt that was the source of the funds. He had paid back $19,800.00 as of October, 2005. Ms. Semenchuk herself refers to the transaction as a loan, specifically in the letter she wrote to the Holder Law Office (Examination of Jodie Holder, Undertaking #1), and in her answers to undertakings dated October 16, 2005. There was no trust and no proprietary interest in the funds,

which is sufficient to distinguish the case of Grant v. Ste. Marie (Estate of), [2005] A.J. No. 48, 2005 ABQB 35. Ms. Semenchuk is not entitled to a tracing or proprietary remedy, but is left with her remedies in debt.

Status of the Assignments

17 Both Ms. Semenchuk and the Holder Law Office assert claims under the assignments. As such, they might achieve the status of secured creditors. Unfortunately, neither assignment was the subject of a registration at the Personal Property Registry. Section 35 of the Civil Enforcement Act provides that a security interest is subordinate in priority to any writ that is registered prior to the registration of the security interest.

18 I am satisfied that the two assignments are security interests, as their primary purpose was to secure payment or performance of an obligation. Specifically, they were not absolute assignments: Alberta (Treasury Branches) v. Minister of National Revenue, [1996] 1 S.C.R. 963. Once the fines were paid, there was no identifiable fund. The assignments covered a chose in action which was conditional upon the appeal being successful. In the mean time Goebel was paying down the loan at $600.00 a month. If he had paid down the loan to any degree, and all of the fines had been refunded, Semenchuk would only have been entitled to the unpaid portion of the loan. Goebel would have been entitled to keep any surplus created by the monthly payments he had been making. This reveals that the assignments were not absolute, but were only to provide security for payment, and accordingly they are security interests.

19 As a result, the two assignments are ineffective against the writ holders. Ms. Semenchuk is merely an unsecured creditor. The Holder Law Office is also an unsecured creditor, subject to any claim for a Charging Order.

The Charging Order

20 In Royal Bank of Canada v. Laughlin, 2001 ABCA 78, 277 A.R. 201 at para. 34, the Court set out four requirements for a charging order under Rule 625:

(a) The lawyer must have conducted litigation on behalf of the client;

(b) The lawyer's efforts in the litigation must have recovered or preserved for the client the net property sought to be charged;

(c) The charge is limited to fees and disbursements incurred in the same litigation which recovered or preserved the property;

(d) Even if the foregoing conditions are met, the Court may refuse to grant the charge if to do so would be unfair.

In order to succeed in its application, the Holder Law Office must satisfy each of these requirements.

21 It is clear that the first condition is met, because the Holder Law Office prosecuted the successful appeal on behalf of Goebel. It has also been established that it was the successful prosecution of the appeal that resulted in the fund being created, when the fines were refunded.

The Fees Incurred

22 The third condition is somewhat more complex. The charge can only be granted to the extent of the fees actually incurred in recovering the fund. The Holder Law Office has four accounts outstanding, but they do not all relate to the successful prosecution of the appeal. The first account is dated June 5, 2002, which precedes the Provincial Court trial decision in July 2002. This account obviously does not relate to any efforts to recover the fines that had been paid, as the fines were only paid after conviction.

23 Semenchuk actually advanced the funds on January 20, 2003. The second account was rendered on January

31, 2003, 11 days later. Prima facie it would appear that no efforts could be taken to preserve the fine money until after the money had actually been advanced. The appeal had of course been launched within 30 days of the original conviction, and in one sense any efforts made to advance the appeal would have eventually assisted in recovering the fines. However, despite an ample opportunity to do so, the Holder Law Office has failed to demonstrate that any work that was done prior to January 20, 2003 did materially contribute to the eventual recovery of the fines. There is no evidence as to when work on perfecting the appeal actually commenced.

24 The decision allowing the appeal in part was rendered on May 9, 2003. By that point all of the work that resulted in the recovery of the fines should have been completed, apart from some relatively minor paperwork involved in obtaining a refund of the fines. The third account was rendered about two months later, on July 10, 2003. The work that was done between the third account and the fourth account apparently related primarily to the re-sentencing that was required as a result of the appeal, and for dealings with the present Applicant and Semenchuk regarding the competing claims to the funds. Those fees did not relate to preserving the fund itself.

25 In the result, the only fees of the Holder Law Office that are eligible for a charging order would be those incurred between January 20, 2003 (when the funds were advanced) and May 9, 2003 (when the appeal was decided). Within that time period the Holder Law Office could seek a charging order for work directly related to the prosecution of the appeal. The exact amount would have to be determined by the taxing officer, but it would appear to be in the area of $6,000.00.

Equitable Considerations

26 The final consideration before a charging order is granted is that the granting of the charge would not be unfair. The Applicant argues that in these circumstances it would be unfair to grant a charging order.

27 First of all the Applicant notes that Mr. Holder represented to the Court on several occasions that he did not have any claim to the funds, and that the only claimants were Semenchuk and the Applicant. It was not until August 2005, over two years after the issue first arose, that the Holder Law Office asserted any claim to the funds. The Applicant argues that it has pursued this matter in good faith on the assumption that Ms. Semenchuk had the only competing claim, and that it would now be unfair to allow the Holder claim to intervene. It is true that up until August 2005 the Applicant had pursued the fund on the assumption that they need only show a priority over Ms. Semenchuk in order to succeed. However, if any costs have been thrown away as a result of the delay of the Holder Law Office in advancing its claim, that could be dealt with by way of costs. In my view the lateness of the claim does not necessarily result in unfairness, where the unfairness can be remedied by costs or interest.

28 It is also argued that a charging order would operate unfairly as against Ms. Semenchuk, because the Holder Law Office had previously acknowledged her assignment. It is suggested that it would now be unfair for the Holder Law office to seek to obtain indirectly through a charging order, which it could not obtain directly because of the acknowledgement of the assignment. There is merit to this argument. However, I note that in the second assignment Ms. Semenchuk acknowledged that the Holder Law Office should be entitled to retain $10,000.00 out of the fine recovery in recognition of the work done by the Holder Law Office. That subsequent acknowledgement by Ms. Semenchuk negates any unfairness that might otherwise occur. In any event it would appear that Ms. Semenchuk will not be entitled to any of the funds, and accordingly any unfairness to her is somewhat abstract.

29 At the end of the day, it was the efforts of the Holder Law Office that resulted in the recovery of the fines. The whole purpose of the charging order is to ensure that third parties do not benefit from the work of solicitors, unless the solicitors are paid first. Apart from any overall concerns about fairness, there would obviously be no incentive on the part of solicitors to advance claims of this sort if they did not know they were going to be paid. If solicitors had no incentive to advance claims of this sort, there would be no recovery for anybody. In the circumstances, there would be no unfairness in a charging order.

Priorities

30 The Applicant argued that it would be unfair to permit a charging order if the effect of it would be to adversely affect the rights of third parties. That proposition is too generally stated, because if charging orders did not affect the priorities of third parties, there would be no point to them. The Applicant cited Re Gillilland [1933] O.J. No. 204, (1933), 14 C.B.R. 492, and White Resource Management Ltd. v. Durish, [1998] 3 W.W.R. 204 as authority. Those cases however concerned the right of set-off between the client of the lawyer, and the person who was paying the disputed funds. Those cases would only apply if there was some set-off between the Provincial Court and Mr. Goebel, resulting in a reduction of the fines that were refundable.

31 The Applicant also cited cases such Gauthier Estate v. Capital City Savings and Credit Union Ltd. (1992), 129 A.R. 12 for the proposition that a charging order should not be allowed to defeat a secured creditor. This argument however overlooks the fact that the Applicant is a mere writ holder, and not a secured creditor at all. Further, ss. 4 and 32 of the Personal Property Security Act provide that common-law liens are not subject to registration under the Act. The charging order therefore can be effective even if not registered. Whether a charging order should be allowed to defeat the claim of a secured party would depend on all the circumstances. If the efforts of the lawyer resulted in a large recovery that accrued to the benefit of the secured creditor, there may well be reasons to grant a charging order. There is no reason why the secured creditor should be allowed to benefit from the labours of the lawyer, without seeing that the lawyer is paid a fair amount.

Limitation Periods

32 Rule 625(3) provides that a charging order cannot be granted if the limitation period for enforcement of the account has expired. The two-year limitation period on the first three accounts rendered by the Holder Law Office has prima facie expired.

33 The fourth account was rendered on December 3, 2003. On November 30, 2005 the Holder Law Office took out a Notice of Appointment for Taxation (Action No. 0503 19753). This Notice of Appointment would stop the two-year limitation period from running if it constituted "seeking a remedial order" under the Limitations Act, R.S.A. 2000, c. L-13, s. 3(1).

34 The Limitations Act does not define "seeking a remedial order". The term "remedial order" is defined in s. 1(i):

> (i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes . . .

The Act avoids the use of traditional legal terminology like "issue a Statement of Claim", and is generically worded: see Report No. 55 of the Alberta Law Reform Institute, Limitations, pg. 46. Section 1(i) only requires a "civil proceeding", and a "claim" is defined as "a matter giving rise to a civil proceeding". Section 2(1)(a) speaks of a remedial order being sought "in a proceeding", which is also very broad wording. Section 3(1) requires that the claimant "seek" a remedial order. "Seeking" is not a traditional legal term. This drafting indicates that a functional and pragmatic approach should be taken to deciding what amounts to "seeking" a remedial order.

35 There are two ways that a lawyer can enforce an account in Alberta. The first way is simply to issue a Statement of Claim or Small Claims Summons against the client. The second way is to take out a Notice of Appointment for Taxation. Once the account is taxed, an application can be brought under Rule 651(2) for judgment. These applications are routinely brought within the same Court file as the original Appointment for Taxation. The application is similar to a summary judgment application: Peter Knaak Professional Corp. v. Scherer, [2002] A.J. No. 244, 2002 ABCA 53. Judgment is then granted and enforced. In this context an Appointment for Taxation is an application for a remedial order, because the very purpose of it is to obtain an enforceable judgment against the client. The intermediate step of having the taxing officer assess the account is a summary method of reviewing the quantum of the account.

36 The purpose of a statute of limitations is to prevent the prosecution of stale claims. The principle is that persons with claims should not sleep on them, and if they do sleep on them then the claims will be barred. Potential defendants are entitled to know that, after a certain period of time, dated claims will not be pursued against them, and they can conduct their affairs accordingly: James H. Meek, Jr. Trust v. San Juan Resources Inc., [2005] A.J. No. 1754, 2005 ABCA 448 at para. 37. Once a client is served with an Appointment for Taxation, the client knows that the lawyer is seeking payment. The Appointment starts a chain of events leading to a remedial order. Taxation is a "civil procedure". As long as the Appointment is issued within two years of the original debt, then the claim is not seen as being stale by the law of limitations. The mere fact that the enforcement proceedings are started by an Appointment for Taxation, as opposed to a Statement of Claim, should not make any difference. The lawyer has commenced enforcement of the claim within the period provided for by the limitations statute, and the client is aware within that period that the claim is being advanced. The purposes of the Limitations Act are met. There is nothing in the wording of the Act to require a proceeding commenced by a more formal or traditional process.

37 In McLeod Dixon v. Fazal, 2004 ABQB 523, 30 Alta. L.R. (4th) 202, it was held that a Certificate of Taxation is not an application for a remedial order. That may be so, but in my view an Appointment for Taxation is an application for a remedial order; there is in fact no other point to an appointment for taxation taken out by a lawyer other than to enforce the account against a client. I therefore distinguish Fazal, and conclude that the Appointment for Taxation issued by the Holder Law Office did stop the limitation from running.

38 As noted, the Appointment for Taxation was only issued within two years of the fourth account. The question is therefore whether the Appointment was effective to prevent the limitation from running against the previous three accounts, particularly the third account that supports the granting of a charging order (see supra, para. 25).

39 It is common practice for a lawyer to issue a series of interim accounts on a file, followed by a final account when the retainer is complete. The law has often treated the interim accounts as being provisional only, and not "final" until the final account is rendered: see Raithby v. Fraser & Beatty (2000), 47 O.R. (3d) 245 at para. 16; Enterprise Rent-A-Car Co. v. Shapiro Cohen & Co. (1998), 38 O.R. (3d) 257 (C.A.); Siegel v. Cameron & Cameron, [1996] A.J. No. 757; Nathanson, Schachter & Thompson v. Levitt, [2004] B.C.J. No. 2243, 2004 BCSC 1402 (Dist. Reg.); Poundmakers Lodge v. Scott Co., [2002] A.J. No. 1011, 2002 ABQB 745, at para. 19. Whether an interim account is final, or merely an advance billing must be decided in each case: Morin, Grant v. Olsson (1994), 37 C.P.C. (3d) 130 (B.C.S.C.) at para. 130. So a client can often tax all the interim accounts, even if they have been paid, within six months of the final account. Lawyers' accounts should be treated the same way for all purposes, and so the limitation should run from the final account when the interim accounts are provisional only. It is neither sensible nor fair to have the interim accounts be provisional for purposes of taxation, but final for purposes of limitations: Lappoehn v. Kambeitz, 2003 ABQB 497, 37 C.P.C. (5th) 386 (M.). Thus, unless there is a clear break in the retainer, or clearly two retainers, or some particular agreement between the lawyer and the client that the "interim" account is "final", the limitation should run from the final account.

40 Although Mr. Holder drafted a retainer agreement, Mr. Goebel did not sign it. The first three accounts are marked "Interim", while the last one is marked "Final". The first account was on file 336, the second two on file 440, and the fourth account has no file number. The reminder statements from the Holder Law Office included all the statements together without reference to file number. There is nothing on this record to show any break between the retainer resulting in the third account and the fourth account. They both concerned the same chain of events. The third account includes work to July 10, 2003, and the fourth account starts on July 11, 2003. I conclude that the third account was provisional only, and that the limitation period for its taxation and enforcement did not start to run until the final account was rendered. The application for a charging order is therefore not barred by Rule 625(3).

Preferential Costs

41 The A.L.I.A. claims preferential costs under s. 99(3)(c) of the Civil Enforcement Act, which reads:

> 99(3) Where the total amount of the eligible claims exceeds the amount of a distributable fund, the distributing authority must apply the distributable fund toward the claims in the following order of priority: . . .
>
> (c) second, to other costs that may be claimed against the enforcement debtor that were incurred by the instructing creditor in connection with the enforcement measures that have produced the fund and any other costs that the Court has directed to be paid out of the fund;
>
> (d) third, to claims referred to in section 103(1). (emphasis added)

Alternatively, a claim is made for costs of the interpleader under s. 103(1). It is clear that the A.L.I.A. is the only writ holder that has pursued the garnisheed funds, and that but for its efforts nothing would have been recovered for any creditor. It is entitled to preferential costs, and submissions may be made on quantum. Not all of the steps taken by A.L.I.A. were taken efficiently or in a timely way, and that must be considered.

Conclusion

42 In conclusion

(a) Ms. Semenchuk is an ordinary creditor with no secured or proprietary claim.

(b) The two Assignments are unenforceable against the writ holders for non-registration.

(c) The Holder Law Office is entitled (subject to taxation) to a charging order estimated at $6,000.00.

(d) The A.L.I.A. is entitled to some priority over the other writ holders for its efforts in pursuing this matter. It may speak to quantum.

(e) The balance of the funds should be distributed among the writ holders in accordance with the Civil Enforcement Act.

43 The parties may, within 30 days of these reasons, make an appointment to speak to costs, and other outstanding issues.

SLATTER J.

TAB 4

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2

Supreme Court Reports

Supreme Court of Canada

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

1983: September 26 / 1985: January 31.

File No.: 17479.

[1985] 1 S.C.R. 2 | *[1985] 1 R.C.S. 2* | *[1985] S.C.J. No. 1* | *[1985] A.C.S. no 1* | *1985 CanLII 55* | *J.E. 85-192*

Aetna Financial Services Limited, (defendant) appellant; and Joel Jerome Feigelman, Ruth Feigelman, Mary Goldberg, R.L.L. Holdings Ltd. and Pre-Vue Company (Canada) Ltd., (plaintiffs) respondents; and Allan Lax and Jeffrey Burke, defendants.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

* Ritchie J. did not participate in the judgment.

Case Summary

Injunction — Mareva injunction — Interlocutory order restraining transfer of assets to another province pending trial — Order made against federally incorporated company with exigible assets in other provinces — Whether or not Mareva injunction available — Whether or not Mareva injunction appropriate in federal system given the circumstances.

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 assets 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 [page3] 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 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 [page4] 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.

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Western Railway Co. v. Birmingham & Oxford Junction Railway Co. (1848), 2 Ph. 597, 41 E.R. 1074; Rosen v. Pullen *(1981), 126 D.L.R. (3d) 62*; Campbell v. Campbell *(1881), 29 Gr. 252*; Toronto (City of) v. McIntosh *(1977), 16 O.R. (2d) 257*; Mills and Mills v. Petrovic *(1980), 30 O.R. (2d) 238*; Aslatt v. Southampton (Corporation of) (1880), 16 Ch.D. 143; Hawes v. Szewezyk, *[1979] 2 A.C.W.S. 274*; De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945); Robinson v. Pickering (1881), 16 Ch.D. 660; Bradley Bros. (Oshawa) Ltd. v. A to Z Rental Canada Ltd. *(1970), 14 D.L.R. (3d) 171*; Z Ltd v. A, [1982] 1 All E.R. 556; Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L. DA. *(1982), 141 D.L.R. (3d) 498*; Liberty National Bank & Trust Co. v. Atkin *(1981), 31 O.R. (2d) 715*, *121 D.L.R. (3d) 160*; Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268; A J Bekhor & Co. v. Bilton, [1981] 2 All E.R. 565; Z Ltd. v. A-Z and AA-LL, [1982] 2 W.L.R. 288; Cretanor Maritime Co. v. Irish Marine Management Ltd., [1978] 1 W.L.R. 966; Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A., [1980] 2 W.L.R. 488; Canadian Pacific Airlines Ltd. v. Hind *(1981), 122 D.L.R. (3d) 498*; Quinn v. Marsta Cession Services Ltd. *(1981), 34 O.R. (2d) 659*; Chitel v. Rothbart *(1982), 39 O.R. (2d) 513*; Humphreys v. Buragalia *(1982), 135 D.L.R. (3d) 535*; Sekisui House Kabushiki Kaisha (Sekisui House Co.) v. Nagashima *(1982), 42 B.C.L.R. 1*, 33 C.P.C. 42; B.P. Exploration Co. (Libya) v. Hunt *(1980), 114 D.L.R. (3d) 35*, referred to.

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APPEAL from a judgment of the Manitoba Court of Appeal *(1982), 143 D.L.R. (3d) 715*, *19 Man. R. (2d) 295*, *[1983] 2 W.W.R. 97*, dismissing an appeal from a judgment of Wilson J. dismissing an application to set aside an ex parte interlocutory injunction granted by Wilson J. Appeal allowed.

[page7]

D'Arcy C.H. McCaffrey, Q.C., for the appellant. W.P. Riley, Q.C. and Peter Sim, for the respondents.

Solicitor for the appellant: D'Arcy C.H. McCaffrey, Winnipeg. Solicitors for the respondents: William P. Ripley, Winnipeg.

[Quicklaw note: Errata were published at [1985] 1 S.C.R., page iv, and [1990] 3 S.C.R., page iv. The changes indicated therein have been made to the text below and the texts of the errata as published in S.C.R. are appended to the judgment.]

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. 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 Sekine. This realization was in the approximate sum of $270,000 which Aetna was about to transfer to its offices outside Manitoba, either Toronto or Montreal, when these proceedings were commenced.

3 When the respondent Pre-Vue Company (Canada) Ltd. (for convenience hereinafter called "Pre-Vue") went into default under the debentures [page8] 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 March 30, 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 [page9] 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".

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:

> 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 and Ohio Railway Co. v. Ball, *[1953] O.R. 843*, where McRuer C.J.H.C. stated, at pp. 854-55:

> 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 [page10] 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 the 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 American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396. 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 Society of Upper Canada v. MacNaughton, [1942] O.W.N. 551, 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, [1886-90] All E.R. 797, at p. 799, as follows:

> I know of no case where, because it is highly probable if the action were brought the plaintiff could establish [page11] 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 was referred to in Burdett v. Fader *(1903), 6 O.L.R. 532*, affirmed *(1904), 7 O.L.R. 72*, at p. 533, by Boyd C.:

> The plaintiff may or may not get judgment in the 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] 3 All E.R. 190, where Megarry V.C. stated, at p. 193:

> In broad terms, this establishes the general proposition that the court will not grant an injunction to restrain the 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 Industries Ltd. v. Marc-Jay Investments Inc. *(1978), 88 D.L.R. (3d) 446*, 7 [page12] C.P.C. 57 (Ont. H.C.);

Pivovaroff v. Chernabaeff (1977), 16 S.A.S.R. 329; Bedell v. Gefaell (No. 2), *[1938] O.R. 726* (C.A.); Hepburn v. Patton *(1879), 26 Gr. 597*; Pacific Investment Co. v. Swan (1898), 3 Terr. L.R. 125; Ferguson v. Ferguson (1916), 26 Man. Rep. 269.

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 Queen's Bench Rules (Man.) 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, Rule 470(1);

Nova Scotia, Civil Procedure Rules, R. 43.02;

Saskatchewan, The Queen's Bench Rules, R. 389;

Alberta, The Supreme Court Rules, R. 468.

That the courts had jurisdiction to make an order for the preservation of property pending litigation was, however, recognised even prior to passage of the Rules. In Great Western Railway Co. v. Birmingham & Oxford Junction Railway Co. (1848), 2 Ph. 597, 41 E.R. 1074, 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 [page13] 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), 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, 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 Railway case, supra, was decided before Lister v. Stubbs, supra, 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), 126 D.L.R. (3d) 62* at pp. 74-75:

> 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;

[page14]

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

In Campbell v. Campbell *(1981), 29 Gr. 252*, both the general rule and the exception to it on the basis of fraud, were succinctly stated by Boyd C. at p. 254-55, as follows:

> Where no fraud has been committed the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property. But where a fraudulent disposal has actually been made of the defendant's property, (as is admitted by the demurrer in this case,) then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity, and a recovery of judgment for the amount claimed.

More recent cases in which the fraud exception have been applied include Toronto (City of) v. McIntosh *(1977), 16 O.R. (2d) 257* (Ont. H.C.J.); and Mills and Mills v. Petrovic *(1980), 30 O.R. (2d) 238* (Ont. H.C.J.).

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 Vic., 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 [page15] as s. 45. Lister, supra and many other authorities, notably Aslatt v. the Southampton (Corporation of), (1880), 16 Ch.D. 193, 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". Nor in the words of the authors of Halsbury's Laws of England (4th ed.), Vol. 24, p. 518, paragraph 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 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 (N.B.), 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, supra.

12 The Quebec Code of Civil Procedure, R.S.Q., c. C-25, provides for interlocutory injunctions in art. 752 "where the applicant appears to be entitled to it". These words, given their plain meaning, clothe the court with at least as much authority and latitude as the jurisdiction to enjoin where it is found "to be just and convenient". The article goes [page16] 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. Szewezyk, 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, (infra) 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 wasn't until a series of Maritime disputes arose that the courts consciously began to build up a special code of rules or sub-rules 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 [page17] 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] 3 All E.R. 282;
- Mareva Compania Naviera SA v. International Bulkcarriers SA, [1980] 1 All E.R. 213.

- Rasu Maritima SA v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [1977] 3 All E.R. 324;
- Third Chandris Shipping Corp. v. Unimarine SA, [1979] 2 All E.R. 972.

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, supra, 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 [page18] entitled", although no one made such an admission, as the defendant at no stage of the process appeared.

18 Mareva, supra, 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 Judicature (Consolidation) Act, 1925 mentioned above in the Nippon case and upon a commentary on the resultant powers of the court in Halsbury's. Lord Denning 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...." 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 [page19] 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 U.K. 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 U.K. 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 [page20] 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 Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945), at pp. 222-23. 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 harmonisation 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 the 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 a defendant" and reference is made with approval to this condition by the Master of the Rolls. In Rasu, the turning point in the line of reasoning seems to be reached [page21] 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 as in Rasu except that (at p. 985) the Master of the Rolls placed more emphasis on the requirement that the plaintiff demonstrate 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 [page22] 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, Chief Justice Bray, 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, per James LJ. 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 Canada Ltd. (1970), 14 D.L.R. [page23] (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, supra, 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, paragraph 729; [Halsbury's Laws of England (4th ed.), vol. 24, p. 518, paragraph 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, supra, thought that:

> 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(1) 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 sprung 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 [page24] general rule of long standing. The plaintiff in the United Kingdom must demonstrate that he has a good arguable case. At least once (Rasu, supra, 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, 1981 (U.K.), c. 54, which reads in part:

> 37. ...
>
> (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 in Z Ltd. v. A [1982] 1 All E.R. 556 at p. 561 opines that this was the position prior to the enactment. The claim no longer need 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 [page25] 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*; see also Liberty National Bank & Trust Co. v. Atkin *(1981), 31 O.R. (2d) 715*, *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 Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha, [1980] 1 W.L.R. 1268, at p. 1273; see also A.J. Bekhor & Co. v. Bilton, [1981] 2 All E.R. 565, and Z Ltd. v. A-Z and AA-LL [1982] 2 W.L.R. 288.

27 The harshness of the Mareva 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 Management Ltd., [page26] [1978] 1 W.L.R. 966 at 974-75), 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 Ministry of Defence v. Arcepey Shipping Co. S.A., [1980] 2 W.L.R. 488 at p. 494. 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 Industries Ltd. v. Marc-Jay Investments 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 National Bank & Trust Co. v. Atkin, supra; Canadian Pacific Airlines Ltd. v. Hind *(1981), 122 D.L.R. (3d) 498*, 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*, 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*, 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 (per MacKinnon A.C.J.O., at pp. 522-23) is somewhat narrower than that [page27] generally applied by the courts in the United Kingdom:

> 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, supra.) 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..."

31 In other provinces the courts have reached approximately the same result. The New Brunswick Court of Appeal in Humphreys v. Buragalia *(1982), 135 D.L.R. (3d) 535*, 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. Szewezyk, 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.

[page28]

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. F-160; The Garnishment Act, C.C.S.M. c. G-20; the Court of Queen's Bench Rules, Chapter XXIV (Attachment), Rule 582; and Chapter XIX (Examination of Judgment Debtors, Attachment of Debts), Rule 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; Rule 372 of the present Rules of Practice 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, supra. See Halsbury's Laws of England (4th ed.), vol. 18, p. 166, paragraph 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 [page29] similar view has been expressed by Tallis J., now of the Saskatchewan Court of Appeal, in BP Exploration Co. (Libya) v. Hunt *(1980), 114 D.L.R. (3d) 35*, at p. 58. 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 than 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.), 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 a Mareva injunction". 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 Pretrial 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 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. [page30] 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 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. J-20, 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 [page31] 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 require 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 Corporations Act of Manitoba, 1976 (Man.) c. 40, *C.C.S.M., c. C225*, such corporations are required to register and to nominate an agent for service, all as noted by justice Huband 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 [page32] appeared in the original action, except in any case involving the decision of a right affecting immoveables 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, centered 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 [page33] 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 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, supra, 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)(d)). 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, [page34] supra, 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 "the 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 [page35] 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, supra. 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 from 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 provinces. 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 [page36] 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 the respondent 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 [page37] 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 sub-rule 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 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., [page38] 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 with costs.

* * * * *

Erratum, published at [1990] 3 S.C.R., page iv

[1985] 1 S.C.R. p. 35, line b-1 of the English version, Read "the depredations of shady mariners" instead of "depradations of shady mariners".

Errata, published at [1990] 3 S.C.R., page iv

[1985] 1 S.C.R. p. 35, line b-1 of the English version. Read "the depredations of shady mariners" instead of "depradations of shady mariners".

Errata, published at [1985] 1 S.C.R., page iv

[1985] 1 S.C.R. p. 38, line f-4 of the English version. Read "Riley" instead of "Ripley".

[1985 1 S.C.R. p. 22, line c-1 of the English version. Read "Pivovaroff v. Chernabaeff" instead of "Pivovaroff v. Chernbaeff".

TAB 5

2003 CarswellOnt 35
Ontario Superior Court of Justice

Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology

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

Canadian Imperial Bank of Commerce, Plaintiff (Responding Party) and Credit Valley Institute of Business and Technology, Lawrence Mpamugo, Kathleen Mpamugo, Steven Mpamugo, Ernest Mpamugo, Pauline Mpamugo, Justine Mpamugo, Marygold Technologies Incorporated and Black Crown International Limited, Defendants (Moving Parties)

Molloy J.

Heard: December 3, 2002
Judgment: January 7, 2003
Docket: 99-CV-179494

Counsel: *Lincoln Caylor*, *Bianca Lanene*, for Plaintiff/Responding Party
Brian Shiller, *Alan Gold*, for Defendants/Moving Parties

***Molloy J.*:**

A. Nature of the Motion

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

B. Factual Background

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

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

4 Upon commencing this action, CIBC applied *ex parte* and obtained interim injunctive relief freezing accounts of the defendants at the CIBC, Canada Trust, Royal Bank of Canada, The Bank of Nova Scotia and TD Waterhouse and restraining the defendants from dealing with real property located at Queens Avenue, Scarlett Road and Wallenberg Crescent: Order of Lissaman J. dated November 3, 1999.

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

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

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

- $27,000 for expenses incurred on the Scarlett Road property (primarily property tax arrears and utility bills)
- $11,000.00 estimated as the cost of repairs and renovations needed at the Scarlett Road property
- $29,000.00 for tax arrears and unpaid utility bills at the Queens Avenue property
- $24,000.00 estimated for the cost of various repairs at the Queens Avenue property
- $43,000.00 estimated as the cost of removing and replacing all asphalt at the Queens Avenue property
- $15,000.00 for outstanding management fees for Queens Avenue
- $2000.00 estimated for legal fees to evict tenants in one apartment who have not paid rent since January 2001
- $8000.00 for tax arrears on the Wallenberg Crescent property (the family home)
- $94,000.00 for legal fees to Edward Greenspan in respect of the preliminary inquiry
- $50,000.00 by way of a retainer to Alan Gold for the continued defence of the criminal charges
- $75,000.00 by way of retainer to legal counsel in this civil action
- $5220.00 per month for living expenses for the family

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

9 In a supplementary affidavit sworn in November 21, 2002, Mr. Mpamugo swears that the family is unable to survive on $3500.00 per month. He now seeks an allowance of $6,855.00 per month plus a one-time emergency payment of $2320.00 to cover the cost of winter clothing for the four family members. In addition, he seeks the release of funds to pay university expenses for Steven and Pauline, including about $9500.00 for tuition, $141.00 per month each for

transportation to and from school (they live in Mississauga and attend the University of Toronto), the cost of two laptop computers and approximately $2600.00 for books.

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

C. Assets Frozen by the Injunction

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

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

- $2 million in an account at CIBC in the name of Credit Valley
- $500,000 in an account at Canada Trust in the name of Pauline Mpamugo
- $500,000 in an account at Canada Trust in the name of Steven Mpamugo
- $530,000, the amount for which the Queens Avenue property was purchased in 1999
- $445,000, the amount for which the Scarlett Road property was purchased in 1999
- $140,000, approximate value of Mr. Mpamugo's Canadian and US accounts at TD Waterhouse

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

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

D. Case Law

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

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

16 A *Mareva* injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in *Lister & Co. v. Stubbs* (1890), 45 Ch. D. 1 (Eng. C.A.) that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a *Mareva* injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong *prima facie* case: *Chitel v. Rothbart* (1982), 39 O.R. (2d) 513 (Ont. C.A.), at 522 and 532 . In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: *Chitel v. Rothbart* at p. 532-533.

17 The purpose of the *Mareva* injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The nature of the *Mareva* is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business or living. As was noted by the English Queen's Bench in *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* (1979), [1980] 1 All E.R. 480 (Eng. Q.B.), at 485-486:

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

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

19 The English cases apply a preliminary test before granting relief from a *Mareva* injunction. Under those authorities, before an Order will be made permitting payment of expenses out of funds frozen by a *Mareva* injunction, the defendant must satisfy the court that he has no other assets from which to make the payments: *Halifax plc v. Chandler* , at para

17; *Ostrich Farming Corp. v. Ketchell*[(December 10, 1997), Doc. CHANI 97/0948/B (Eng. C.A.)] , per Roch and Millett LJJ. Although I could find no Canadian authority explicitly adopting that test, I believe it is implicit in many of the decisions. It is really only logical that this should be the case. Suppose, for example, that a defendant has one accounts in the jurisdiction containing $100,000.00 and it is properly frozen by a *Mareva* injunction at the behest of a plaintiff who has a claim exceeding that amount and who has shown that the defendant is trying to put the funds beyond the reach of the court. If that was the defendant's only source of funds, one can easily see the rationale of permitting his ordinary living expenses to be paid out of the account. If, however, the defendant has millions of dollars in other accounts not covered by the *Mareva* injunction, it is not reasonable to first deplete the assets that are covered by the injunction before having recourse to the other funds. Accordingly, I find it is appropriate to apply that preliminary test in this case.

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

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

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

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

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

And further, at page 6:

> The plaintiff has put forward a strongly arguable case for saying that the money belongs beneficially to the plaintiff. The defendants ought not to have access to those moneys for the purpose of their legal costs unless they establish, first, that they have no other funds out of which to pay those costs, and secondly, that they have an arguable case for denying that the money belongs to the plaintiff company. For that purpose they must put in evidence and

condescend to particulars. If they do so, and only then, will the court enter into the difficult balancing exercise which other judges have described, in which the court must weigh up the relative strength of the two cases, consider the nature of the defence which has been put forward and all the other circumstances of the case.

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

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

24 It would appear that earlier case authority in England supports the test applied by Roch LJ, rather than the more stringent requirements described by Millett LJ: e.g. *Xylas v. Khanna*, [1992] E.W.J. No. 1486 (Eng. C.A.) ; *Fitzgerald v. Williams* (1995), [1996] Q.B. 657, [1996] 2 All E.R. 171, [1996] 2 W.L.R. 447 (Eng. C.A.) ; and *Sundt Wrigley & Co. v. Wrigley*, [1993] E.W.J. No. 4430 (Eng. C.A.) . In *Sundt Wrigley & Co. v. Wrigley* , a deputy judge of the Queen's Bench had permitted a defendant to pay his legal expenses out of funds to which the plaintiff had asserted a proprietary claim. The plaintiff appealed. The Court of Appeal held that the judge below had not erred in the exercise of his discretion and dismissed the appeal. One of the arguments advanced by the plaintiff was that the judge in the first instance had failed to give appropriate weight to the merits of the case. In dealing with that argument, the Master of the Rolls (Sir Thomas Bingham, who also wrote the main judgment in *Fitzgerald v. Williams*) noted the difficulty and undesirability of a detailed examination of the merits based on affidavit evidence at an interlocutory stage. He then held at paragraph 32:

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

25 I was not directed to, and am not aware of, any Canadian authority directly on point. However, in my view, the balancing of interests test applied by the English courts in this situation is consistent with the respective purposes underlying the proprietary and *Mareva* injunctions as identified by Canadian courts and is therefore an appropriate test to apply here. With respect to the consideration of the merits of the defendants' case, I am inclined to the view expressed by Roch LJ. and by the Master of the Rolls in *Sundt Wrigley & Co. v. Wrigley* that the relative merits of the plaintiff's case and the defence advanced by the defendant is a relevant consideration when balancing the competing interests of the parties. However, I would not go so far as to make it a pre-requisite for the defendant to demonstrate an arguable case on the merits before the Court should engage in the balancing of interests process. This is subject, however, to one caveat. Where the plaintiff has frozen assets and advanced an arguable case that those assets are subject to a proprietary

claim by the plaintiff, there is an onus on the defendant to put forward credible evidence as to the source of the subject assets if the defendant seeks to use the funds for his own purposes. It is only where the defendant can demonstrate that the assets are from a source other than the plaintiff that the usual rules for variation of a *Mareva* will apply. Otherwise, his right to use the funds will be subject to the balancing of interests in the exercise of the court's discretion.

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

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

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

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

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

E. Analysis

(i) Available Assets Not Frozen by Any Injunction

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

28 Mr. Mpamugo filed an affidavit in May 2002 in which he listed certain assets and swore that those were the only assets he owned. On cross-examination in August, he stated that he was not aware of any other bank accounts but undertook to review "the disclosure" (referring to the Crown's disclosure material in the criminal proceedings) to be sure. In November 2002, Mr. Mpamugo filed a supplementary affidavit in which he disclosed for the first time two other bank accounts in the name of Credit Valley, one at the Scotia Bank and the other at the Royal Bank. The total funds in the two accounts exceed $1 million. He also disclosed for the first time a GIC in his name with a value of approximately $161,000.00. The existence of these assets was known to the Crown and referred to in the disclosure material. It is difficult to accept that Mr. Mpamugo had simply forgotten about more than $1 million and tempting to conclude that he only disclosed it because he knew the police were aware of it and it was therefore inevitable that the plaintiff would find out about it eventually. Further, it was frozen by the injunctions in any event and frozen assets not readily traceable to the plaintiff's funds would be more likely to be released by the court for use in funding his defence and other expenses. The timing of Mr. Mpamugo's disclosure of these assets is therefore suspiciously convenient for him. That said, the existence of these additional assets is now known and I have no other evidence to rebut the defendant's sworn evidence that he has now disclosed all of his assets and that everything he has is frozen by the injunction. It is always difficult for a party to prove a negative, and particularly difficult to prove the non-existence of something. It is not unusual for the evidence on this kind of point to consist entirely of a sworn statement that there are no such assets. While the credibility of the defendant's evidence in this regard is suspect, I am not prepared on a motion of this nature to simply dismiss his evidence

entirely without *some* evidence that there are assets elsewhere. For purposes of this motion, therefore, I hold that the defendant has established the first part of the test and that, apart from assets frozen by the injunction, he has no means to pay his ordinary living expenses and legal fees.

(ii) Assets Subject to the Proprietary Injunction

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

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

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

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

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

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

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

such supporting evidence is forthcoming, I will treat the funds in the Scotia Bank account as subject to the proprietary injunction.

36 In respect of the Royal Bank account, Mr. Mpamugo produced the bank statement for the month from June 7, 1999 to July 7, 1999. There is an opening balance of $568,235.02 and a closing balance of $655,522.95. The total of all deposits during the month is approximately $150,000.00. Mr. Mpamugo testified on cross-examination that the account was opened in January 1999 and that 50% of the funds in the account are from earnings by Marygold, with the remaining 50% being tuition received directly from students and student loan advances by the Royal Bank for tuition. However, Mr. Mpamugo conceded on cross-examination that all of the deposits for the month shown on the statement are preceded by the entry "RB STUDENT TUIT" and that those amounts were student loan advances from the Royal Bank. There were no other deposits during the month. Therefore, at least $150,000.00 (plus interest earned on that amount since July 1999) is from a source other than CIBC and is not subject to the proprietary injunction. With respect to the balance of the funds, Mr. Mpamugo produced no documentation of any kind and again his evidence was vague and devoid of particularity. As is the case with the Scotia Bank account, Mr. Mpamugo has failed to satisfy me on credible evidence that any of the funds in the account represent business earnings by Marygold or actual tuition paid by legitimate students directly to Credit Valley. Therefore, apart from the $150,000.00 from Royal Bank funds, for purposes of this motion I will treat the funds in this account as subject to the proprietary injunction.

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

(a) The available funds

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

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

Account. The defendant Lawrence Mpamugo shall keep accurate accounts of all deposits and expenditures in respect of the Expense Account, which accounts are subject to review by the Master if requested by the plaintiff.

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

(b) Living Expenses

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

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

(c) Legal Expenses

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

43 Mr. Caylor, for the plaintiff, argues that Mr. Mpamugo should not be entitled to retain counsel of the highest calibre, but rather should be restricted to counsel with a more modest hourly rate than Mr. Gold. I disagree. First of all, the right to counsel of choice should not be lightly interfered with, particularly where serious criminal charges are involved. Secondly, a higher hourly rate for lead counsel does not necessarily translate into a higher overall fee for the trial. Mr. Gold's expertise will likely enable him to accomplish more in less time than would be the case for less experienced counsel. Thirdly, there will be a process involved to ensure that the fees are reasonable, as dealt with in more

detail below. Finally, insofar as funds subject only to the *Mareva* injunction are concerned, there should be no fetter on how expensive a defence Mr. Mpamugo chooses to mount. To the extent the amount of the legal costs is an issue at all, it is only because the non-proprietary claim assets are limited and insufficient to cover everything requested by the defendant. Since those funds are limited, however, only reasonable legal costs will be permitted. Mr. Mpamugo is entitled to retain Mr. Gold. it is understood that the full cost of the defence on the criminal charges will far exceed the amount of the retainer. Mr. Gold shall render accounts from time to time. Any account should be sent first to Mr. Mpamugo. If he approves the amount of the account, it should then be sent to counsel for the plaintiff. If the plaintiff consents, through its counsel, Mr. Gold's account can be paid out of Expense Account. Counsel for the plaintiff may request back-up documentation from Mr. Gold, and such shall be provided as long it can be done without compromising the defence or breaching solicitor and client privilege. If counsel are unable to agree on any issue in respect of the payment of the account, that issue shall be referred to the Master for determination. In deciding whether the amounts charged by Mr. Gold are recoverable, the Master shall apply the usual tests for assessment of an account by a solicitor to his own client.

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

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

(d) University Expenses

46 On December 3, 2002 I ordered the release of sufficient funds to pay the university tuition and books for Steven and Pauline, as well as transit passes for January. I hereby authorize a further payment out of the Expense Account to cover transit passes for February 2003. I approved the university expenses for this academic year because both Steven and Pauline are already into the school year and would lose their year if the payment could not be made. However, In the absence of evidence that the family's previous disposable income was over $50,000.00 per year, I am not prepared to continue payment of the university expenses in future years. Also, there is no reason that Steven and Pauline should not contribute to their own support through part-time work. I have provided for transit passes to the end of February, which should give them time to raise the funds themselves for transportation costs thereafter. The cost of two laptop computers is a luxury that cannot be justified on the basis of the material before me. The anticipated costs of both civil and criminal counsel shall have priority over payment of future university expenses for Steven and Pauline. However, if the Expense Account balance reaches a point where it would appear that the legal costs can be covered with enough money left over to pay for university for one or both children, a further motion may be brought for a variation of my Order. I am not seized. The motion may be brought in the ordinary course before any judge of this Court.

(e) Wallenberg Crescent Tax Arrears

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

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

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

48 The apartment buildings at Scarlett Road and Queen Avenue were purchased with cash received from the CIBC and are subject to the proprietary injunction. In an affidavit sworn in November 1999, the defendant Kathleen Mpamugo swore that the total monthly income from the two properties was approximately $8000.00 and that the total monthly expenses to maintain them were $4500.00. The defendants were authorized under the December 1999 Order of Cameron J. to open a separate account for these properties and to deposit all rental income and pay all expenses out of that

account. Although the account was opened, it was not operated on a consistent basis. Some of the rental cheques were cashed through other accounts or at Money Mart. Some payments were allegedly made in cash. It would appear no records were kept, or at least none were produced. It is unclear what, if any, expenses were paid. There are no mortgages on the property. The tax arrears have grown to sizeable proportions, to an extent that suggests no property taxes were paid at all. There are also utility arrears and Mr. Mpamugo stated in his affidavit that both properties are in a poor state of repair. By the time of Mr. Mpamugo's affidavit in support of this motion in May 2002, there would have been $240,000.00 of income from these properties. It is largely unaccounted for. Although Mr. Mpamugo now swears that the apartment buildings have been operating at a loss, I am hard pressed to understand how that can be the case since there is substantial revenue and virtually no expenses have been paid. At the very least, the properties would appear to have been mismanaged. Alternatively, revenue from the properties may have been used by the defendants for other purposes.

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

(b) Payment of Expenses out of Proprietary Assets

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

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

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

money. It is virtually certain that such amounts would ever be recovered from Mr. Mpamugo if the plaintiff is ultimately successful at trial.

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

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

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

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

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

F. Summary of Rulings and Costs

58 To summarize:

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

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

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

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

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

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

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

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

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

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

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

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

(xiii) Upon filing further affidavit evidence with supporting documentation showing a disposable family income (after tax) in excess of $50,000.00 for the period prior to the advance of any student loan funds by the CIBC, the defendants may re-apply to this Court to increase the living allowance and/or to vary my order to provide for payment of some or all of the university expenses for Steven and Pauline Mpamugo for future academic years out of the Expense Account. Also, if the Expense Account is increased to an amount that permits the payment of all legal fees with money left over, a motion may be brought to vary this order to provide for the payment of university costs.

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

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

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

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

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

59 Costs are left to the trial judge.

Motion granted in part.

TAB 6

2014 BCSC 1123
British Columbia Supreme Court

Hans v. Volvo Trucks North America Inc.

2014 CarswellBC 1778, 2014 BCSC 1123, [2014] B.C.W.L.D. 5572, 241 A.C.W.S. (3d) 439

Amandeep Hans and Pavandeep Hans, Plaintiffs and Volvo Trucks North America Inc., National Truck Centre Inc. dba Pacific Coast Heavy Truck Group, VFS Canada Inc. dba Volvo Financial Services and N. Yanke Transfer Ltd., Defendants

Fitzpatrick J.

Heard: June 4, 2014; June 5, 2014; June 6, 2014
Judgment: June 19, 2014
Docket: Vancouver S099074

Counsel: Robert S. Fleming, for Plaintiffs
Wendy A. Baker, Q.C., Aimee N. Schalles, for Defendant, N. Yanke Transfer Ltd.
Jonathan B. Ross, for Interested Party Celadon Canada Inc.

Related Abridgment Classifications

Remedies
II Injunctions
II.3 Mareva injunctions
II.3.b Threshold test
II.3.b.i Strong prima facie case

Headnote

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

Plaintiffs sought damages for economic losses relating to truck they owned and operated — Plaintiffs learned that defendant Y was in process of selling all its operating assets to C — Plaintiffs obtained Mareva injunction against Y — Y applied to dissolve Mareva injunction — Application allowed — Y had complied with court order requiring disclosure and court was at liberty to consider overall circumstances in terms of whether balance of convenience justified continuing Mareva injunction — Sale to C was not part of any attempt to avoid consequences of judgment that might be granted to plaintiffs — Evidence established that circumstances leading to sale of Y's assets began before plaintiffs' claim was filed and was driven by forces that were not related to plaintiffs' claim — Sale of assets to C did not result in immediate cessation of business activity — Based on evidence, nothing untoward and no improper or dishonest intention was evidenced in respect of why transaction took place, terms of sale and distribution of proceeds to date when Mareva injunction was granted — Mareva injunction was not intended to prevent defendant from paying debts as they became due in ordinary course of its business — With this Mareva injunction plaintiffs were tying up assets to detriment of other creditors — Balance of convenience did not favour continuation of Mareva injunction — Y was distributing proceeds of sale in ordinary course of business and there was no dissipation of assets by Y — Mareva injunction was causing hardship to third party creditors — Case did not rise beyond usual case where it was necessary to provide security to plaintiffs based on special circumstances.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

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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.) — considered

Blue Horizon Energy Inc. v. Ko Yo Development Co. (2012), 2012 BCSC 58, 2012 CarswellBC 211, 18 C.L.R. (4th) 302, 27 C.P.C. (7th) 369 (B.C. S.C.) — considered

Canadian Cash Express Corp. v. Connect Cash Service Inc. (2011), 2011 BCSC 219, 2011 CarswellBC 581 (B.C. S.C. [In Chambers]) — referred to

Deane v. LDS Corp. (1970) Ltd. (1983), 1983 CarswellBC 116, 44 B.C.L.R. 373 (B.C. S.C.) — referred to

Derby & Co. v. Weldon (Nos. 3 & 4) (1988), [1989] 2 W.L.R. 412, [1990] Ch. 65, 139 N.L.J. 11, [1989] E.C.C. 322, 133 S.J. 83, [1989] 1 All E.R. 1002 (Eng. C.A.) — referred to

Eli Lilly Canada Inc. v. Novopharm Ltd. (2010), 2010 CarswellNat 508, 2010 FC 241, 364 F.T.R. 265 (Eng.), 82 C.P.R. (4th) 401 (F.C.) — considered

First Majestic Silver Corp. v. Davila (2009), 266 B.C.A.C. 219, 449 W.A.C. 219, 66 C.P.C. (6th) 108, 2009 BCCA 71, 2009 CarswellBC 410 (B.C. C.A.) — considered

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Hans v. Volvo Trucks North America Inc. (May 9, 2014), Doc. Vancouver S099074 (B.C. S.C.) — referred to

Hans v. Volvo Trucks North America Inc. (2014), 2014 BCSC 897, 2014 CarswellBC 1382 (B.C. S.C.) — referred to

Insurance Corp. of British Columbia v. Patko (2008), 290 D.L.R. (4th) 687, 77 B.C.L.R. (4th) 254, 420 W.A.C. 259, 251 B.C.A.C. 259, 57 M.V.R. (5th) 70, 2008 BCCA 65, 2008 CarswellBC 253, 51 C.P.C. (6th) 53 (B.C. C.A.) — followed

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Ma v. Nutriview Systems Inc. (2011), 2011 CarswellBC 2610, 2011 BCCA 389, 310 B.C.A.C. 313, 526 W.A.C. 313 (B.C. C.A. [In Chambers]) — followed

Mooney v. Orr (1994), 33 C.P.C. (3d) 13, 98 B.C.L.R. (2d) 318, [1995] 1 W.W.R. 517, 1994 CarswellBC 488 (B.C. S.C. [In Chambers]) — referred to

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Patterson v. Puri (2008), 2008 CarswellBC 576, 2008 BCSC 351 (B.C. S.C.) — considered

Reynolds v. Harmanis (1995), 1995 CarswellBC 649, 39 C.P.C. (3d) 364 (B.C. S.C.) — referred to

SCF Finance Co. v. Masri (1985), [1985] 2 All E.R. 747, [1985] 1 W.L.R. 876 (Eng. C.A.) — considered

Sekisui House Kabushiki Kaisha v. Nagashima (1982), 33 C.P.C. 42, 1982 CarswellBC 360, 42 B.C.L.R. 1 (B.C. C.A.) — referred to

Silver Standard Resources Inc. v. Joint Stock Co. Geolog (1998), 1998 CarswellBC 2725, 115 B.C.A.C. 262, 189 W.A.C. 262, 59 B.C.L.R. (3d) 196, 168 D.L.R. (4th) 309, [1999] 7 W.W.R. 289 (B.C. C.A.) — considered

Sutherland v. Reeves (2014), 2014 BCCA 222, 2014 CarswellBC 1661 (B.C. C.A.) — considered

Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd. (2007), 2007 BCCA 481, 2007 CarswellBC 2392, 246 B.C.A.C. 296, 406 W.A.C. 296, 48 C.P.C. (6th) 157, 285 D.L.R. (4th) 413 (B.C. C.A.) — followed

Statutes considered:

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

Generally — referred to

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 39(1) — considered

***Fitzpatrick J.*:**

Introduction

1 The plaintiffs Amandeep and Pavandeep Hans seek damages against the defendants for certain economic losses relating to a truck that they owned and operated. Damages for physical injury and wrongful dismissal are also claimed. The matter is scheduled for trial in November 2014.

2 In late 2013, the Hanses learned that the defendant N. Yanke Transfer Ltd. ("Yanke") was in the process of selling all of its operating assets. The sale in fact closed in November 2013 and since that time, Yanke has had limited operations. The operations that Yanke has had have been principally related to the recovery of outstanding receivables and the payment of trade and other creditors. Despite making requests or demands, the Hanses were not able to obtain any information from Yanke to satisfy them that the asset sale and wind down of its operations would not adversely affect their ability to recover any damages that might be proven at trial.

3 In April 2014, the Hanses sought and obtained a short term Mareva injunction against Yanke. In early May 2014, both the Hanses and Yanke appeared on further court applications and the Hanses were successful in extending the injunction. In addition, at that time, the court ordered extensive disclosure from Yanke in support of the injunction.

4 As contemplated by the May 2014 court order, Yanke now seeks to dissolve the Mareva injunction which has been in place for some six weeks. Arguments are principally advanced in light of the further disclosure which has been made by Yanke. The Hanses oppose the application.

5 At the conclusion of the hearing, I concluded that the balance of convenience did not favour the continuation of the Mareva injunction. In addition, I concluded that certain funds in Yanke's bank account were the property of another party, Celadon Canada Inc. ("Celadon"), and should be released to it. In the result, I ordered that the Mareva injunction would be dissolved immediately, with reasons to follow. These are the reasons.

Background Facts

6 This action was commenced in December 2009 and the genesis of the claims arises from an electrical failure in a Volvo truck and the ensuing accident and repair of the truck. The Hanses owned and operated the truck under a certain hauling contract with Yanke. In addition to claims against the remaining defendants (the "Volvo Defendants"), the Hanses' claims against Yanke include breach of fiduciary duty in respect of the aftermath of that accident which includes allegations that Yanke improperly withheld a certain report as to the cause of the electrical failure and the repair to the vehicle. Mr. Hans also claims damages for wrongful dismissal from Yanke.

7 The Hanses have made several attempts in the past to have the matter determined summarily. These dates are somewhat relevant in terms of their timing in relation to the sale of Yanke's assets.

8 On September 16, 2013, the Hanses sought summary judgment on liability only, with damages to be assessed. At that time, they referenced damages relating to the value of the truck and certain lost earnings. They also referenced a psychiatric injury on the part of Mr. Hans and a claim for lost income and future cost of care, although no amount was specified. That court application was dismissed since severance of the liability and damage issues was not justified.

9 In November 2013, Yanke made a public announcement that it had sold its business to Celadon. When the Hanses heard this news, they wrote to Yanke and put them on notice that any sale proceeds should not be distributed without reserving sufficient monies for any potential award in their favour. The sale did close and Yanke paid no heed to such "notice".

10 In January 2014, the Hanses renewed their summary trial application on both liability and damages. I am advised by Yanke's counsel that only at this time was the magnitude of the claims, including Mr. Hans' personal injury claim, crystallized. The claims relating to the truck included the previously pled consequential economic loss (said to total $647,000) and the personal injury claims just then pegged at $3.7 million, for total claims of $4.4 million. The Volvo

Defendants, no doubt supported by Yanke, attempted to pre-empt the hearing of the summary trial and succeeded in convincing the court on January 27, 2014, that the matter was unsuited for a summary trial.

11 On February 28, 2014, the Hanses' counsel again wrote to Yanke. He asked for confirmation that Yanke was still operating or that sale proceeds of at least $4.8 million were being held and that Yanke would not distribute these funds until the plaintiffs' claims had been determined. Counsel indicated that the Hanses would seek a Mareva injunction if these demands were not met. Yanke did not provide any substantive response to these demands. The Hanses made good on their threat to seek an injunction and succeeded in obtaining such interlocutory relief.

Approach to the Application

12 On April 17, 2014, the Hanses applied for an *ex parte* Mareva injunction before Mr. Justice Voith. That order was granted on April 22, 2014: *Hans v. Volvo Trucks North America Inc.*, 2014 BCSC 897 (B.C. S.C.) (the "Voith Reasons"). Voith J. found that a strong *prima facie* case existed. The court also found that, even without any evidence of a real risk of dissipation of assets, the balance of convenience favoured an injunction, pending a likely "meaningful response" from Yanke as to its "activities and circumstances": see paras. 27-33. The injunction was only granted for a short two week period, ending May 7, 2014.

13 The Voith Reasons clearly indicate that the court anticipated that Yanke would respond with evidence which might satisfy the Hanses and the court that nothing untoward was happening with Yanke's operations.

14 When Yanke learned that the Mareva injunction was granted, it immediately moved to set it aside. Both that application and the Hanses' application to extend the injunction came before Madam Justice Sharma on May 6-8, 2014. By that time, Yanke had responded by way of two affidavits of its President, Russel Marcoux.

15 Sharma J. dismissed Yanke's application and extended the Mareva injunction, while ordering extensive disclosure by Yanke: *Hans v. Volvo Trucks North America Inc.* (May 9, 2014), Doc. Vancouver S099074 (B.C. S.C.) (the "Sharma Reasons"). It is evident that the quality of Mr. Marcoux's evidence at that time was not sufficient to satisfy the court as to the "current financial status of Yanke", that the Celadon transaction was *bona fide* and that the further operations of Yanke were being made in the ordinary course: Sharma Reasons, paras. 37-53. The court found that Mr. Marcoux's evidence was lacking in many respects in terms of inconsistencies, vagueness and incompleteness.

16 Sharma J.'s Order at paragraph 2 specifically listed further matters that were to be addressed by Yanke and also set out further documentation that Yanke had to produce. The Sharma Order specifically provided that after the required disclosure, Yanke would have the opportunity to apply to dissolve the injunction.

17 It is not exactly clear why Mr. Marcoux's evidence at the earlier hearing was not as fulsome as it is now; however, I suspect that the urgency in dealing with the situation led to this state of affairs.

18 Mr. Marcoux has now filed four further affidavits, which include his affidavit #3 sworn May 23, 2014 which Yanke contends meets the specific requirements of the Sharma Order and also includes his affidavits #4, #5 and #6, which are said to specifically respond to questions asked of Yanke by the Hanses' counsel in light of the earlier disclosure.

19 When this matter came on for hearing during the week of June 2, Yanke wished to press ahead on the basis of urgency. The Hanses sought an adjournment, principally on the basis that the matter should be heard by Sharma J. Ideally, simply as a matter of using judicial resources efficiently, the matter would have been heard by her. Unfortunately, she was not available. In these circumstances, I dismissed the adjournment application and proceeded to hear Yanke's application.

20 The parties are not in agreement on the correct approach that I may take to this application. The Hanses argue that since Yanke's application to dissolve the Mareva injunction was dismissed, the matter is *res judicata*. Yet, the Sharma

Order clearly allowed Yanke to apply to dissolve the application once disclosure had been made in accordance with the Sharma Order.

21 Yanke asserts that in these circumstances, I may approach the application on a *de novo* basis, citing *Mooney v. Orr*, [1994] B.C.J. No. 2652 (B.C. S.C.) at para. 7 ("*Mooney #2*") and *Ma v. Nutriview Systems Inc.*, 2011 BCCA 389 (B.C. C.A. [In Chambers]) at paras. 13-15.

22 I am not convinced that *Ma* and *Mooney* #2 are applicable authorities in these circumstances. Both cases address situations where the Mareva injunction is granted on an *ex parte* basis and confirm that the approach of the court on the later application to set aside or dissolve the injunction after notice, is on a *de novo* basis: see *Mooney* #2 at paras. 7, 30. However, in this case, that further hearing has already taken place before Sharma J.

23 I consider that an alternate approach is best suited to this application. The Mareva injunction is an interlocutory order. As such, the court has a wide discretion to vary that order where there has been a change in circumstances, particularly when a party has specifically been given "liberty to apply" in the court order: *Canadian Cash Express Corp. v. Connect Cash Service Inc.*, 2011 BCSC 219 (B.C. S.C. [In Chambers]) at para. 36.

24 The further substantial evidence of Mr. Marcoux does represent such a change of circumstances in this case, just as was anticipated by the Sharma Order. As such, I am in a position to reconsider the matter in that light and come to my own conclusions in the present circumstances, having due regard, of course, for the concerns raised by Sharma J. on the earlier application.

25 As a preliminary matter, the Hanses take the position that Yanke has not fully complied with paragraph 2(a)-(h) of the Sharma Order and that this application should be dismissed for that reason alone. This argument is largely premised on the somewhat unusual argument that in addition to the strict provisions of the Sharma Order, Yanke should have produced further documentation arising from the Sharma Reasons and even from the "spirit" of the discussion between the court and counsel as evidenced from the transcript of the hearing before Sharma J.

26 I reject such a proposition. The Sharma Order was meant to encapsulate the requirements that Yanke must meet in order to apply to dissolve the injunction and resulted from an extensive discussion between the court and counsel at the conclusion of the hearing. The draft prepared by the Hanses' counsel was revised and to some extent abbreviated given the court's view that some disclosure sought was overly broad. While the Sharma Reasons are relevant in terms of the interpretation of the Sharma Order, I do not consider that it is either necessary or desirable to resort to the transcript as the Hanses' counsel seeks to do. To require Yanke, or any party for that matter, to interpret orders and reasons for judgment by reference to discussions between the court and counsel is completely untenable in terms of determining whether there is compliance with that order. The decision of the court is reflected in the order, not the reasons.

27 Further, the Court of Appeal has recently described the approach to the interpretation of court orders. In *Sutherland v. Reeves*, 2014 BCCA 222 (B.C. C.A.), Bauman C.J.B.C. stated:

> [31] First, court orders are not interpreted in a vacuum. This Court has recently described the correct approach to the interpretation of court orders (*Yu v. Jordan*, 2012 BCCA 367 at para. 53, Smith J.A.):
>
> > [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, *the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.*
> >
> > [Emphasis in *Sutherland*.]

28 The Hanses' counsel says that the Sharma Order was finalized in a rush and that he did not take particular care in settling on the disclosure provisions. If that is the case, then the Hanses have only themselves to blame. Counsel further says that he only realized shortly after the Order was entered that there was a discrepancy between the Sharma Order and what he considered had been truly ordered to be produced. Even so, he did not apply as soon as possible before Sharma J. to amend the order because he was "too busy". I see no basis upon which such failures can be laid at the feet of Yanke such that it should bear the consequences of such non-action. A court order was granted and Yanke set out to respond to that Order as quickly as possible so as to bring this application.

29 In particular, Mr. Marcoux's further affidavits provide extensive disclosure in terms of companies within the "Yanke Group", which include or formerly included Yanke, Yanke Multimodal Services Ltd. ("Multimodal"), Yanke Global Logistics Services Ltd. ("Global") and Yanke Supply Chain Services Ltd. ("Supply"). The disclosure also referenced Yanke's detailed bank statements, both past and present, of various bank accounts indicating the balances and dispersal of the monies received from Celadon and from other deposits. In terms of the compliance issue, the evidence included references to both current and former assets. For example, certain payroll accounts and another account were closed in April 2014 and Mr. Marcoux indicated that Global and Supply had ceased operations in October 2012 and Multimodal had been merged into Yanke in October 2013.

30 The Hanses also take exception with the quality of Mr. Marcoux's evidence in respect of the circumstances leading to the sale of Yanke's assets, the terms of the Celadon transaction and what happened with the sale proceeds. The Hanses' counsel made substantial submissions that, based on his interpretation of the Sharma Order, the Sharma Reasons and the transcript of that hearing, Mr. Marcoux had simply failed to provide a very broad range of documents.

31 I reject the submissions that Yanke has not given adequate disclosure. As is readily apparent in relation to a company of this size, the nature of its assets and liabilities and the complexity of the Celadon transaction, there are no doubt thousands of documents which one might review to discern the course of Yanke's business since even 2013. My interpretation of the Hanses' submissions is that essentially, they want a forensic audit of Yanke's former and current operations and they want Mr. Marcoux to perform that audit for them.

32 In my view, no such remedy was intended by the Sharma Order. The disclosure provisions in the Sharma Order were, in the usual fashion, meant to "breathe some life" into the Mareva injunction so as to permit enforcement of the order: *Sekisui House Kabushiki Kaisha v. Nagashima*, [1982] B.C.J. No. 1491 (B.C. C.A.) at para. 10; *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2007 BCCA 481 (B.C. C.A.) at para. 74; *First Majestic Silver Corp. v. Davila*, 2013 BCSC 1209 (B.C. S.C.) at para. 42. The disclosure provisions were not meant to allow a plaintiff to undertake a forensic audit of the defendant's operations, let alone require the defendant to do so. The overreaching aspect of the disclosure sought by the Hanses is manifest. Many of their requests in the draft order were rejected by the court or found to be "too broad". For example, the request for "any similar documents relating to the insolvency of Yanke as alleged in Russel Marcoux's affidavit #1, sworn April 25, 2014" could conceivably encompass every document in Yanke's possession.

33 It bears repeating that at this stage, the plaintiff is not even a judgment creditor who might have some remedies in terms of investigating the affairs of a judgment debtor in their execution efforts.

34 In that sense, the "veil of secrecy" which was intended to be lifted per the Voith Reasons (see *Mooney* #2 at para. 76), and which was ordered by Sharma J. to be lifted, has now, in my view, been lifted.

35 I conclude that Yanke has substantially complied with the Sharma Order and in many respects, Yanke has provided further information beyond what was strictly required by the Sharma Order.

36 The Hanses also argue that Mr. Marcoux has no credibility given the substantial discrepancies in his various affidavits. As I have stated, Mr. Marcoux did Yanke no favours given the inconsistencies and errors in his original affidavits before Sharma J. However, in my view, he has largely rehabilitated himself with his further evidence in terms of addressing these errors and inconsistencies and supplementing areas where there was concern. As matters now stand, I

accept Mr. Marcoux's evidence. In addition, while he was not personally involved in Yanke's day to day operations in the past, he has now informed himself and provided the court with his understanding and belief as to what occurred in some specific transactions, which would not be an unusual state of affairs for a President of a multi-million dollar company.

37 Further, I see no basis upon which the Hanses can argue as to the admissibility of the documents presented by Yanke. Mr. Marcoux, as President, has indicated that he has personal knowledge of various matters and he has produced various business records of Yanke which would have been created or collected in the ordinary course of its business. It cannot be expected that Mr. Marcoux would have personal knowledge of every document produced. It is apparent that given the wind down of Yanke's operations since November 2013, Yanke's former staff members, including those in the accounting department, have largely departed and Mr. Marcoux himself is now the key person involved in Yanke's day to day activities.

38 Following from the *res judicata* point above, the Hanses take the position that the court has already found that the proposed payments by Yanke to its creditors has been found to be "dissipation", citing Sharma J.:

> [35] As made clear from its position about the bank account, Yanke intends to pay the money to a creditor, which proves beyond a reasonable doubt that this asset will be dissipated. This weighs very heavily in favour of granting the injunction.

39 In my view, this comment is taken out of context of the Sharma Reasons. For example, Sharma J. also states:

> [37] It is an interesting question whether the winding up of a company is a circumstance that fits within the description of normal or ordinary business practices or operation. I do not have to resolve that issue because I have insufficient evidence before me about the current financial status of Yanke; ...

40 When read as a whole, the court's underlying concern was the quality of Mr. Marcoux's evidence in terms of a fulsome explanation as to the Celadon transaction and its current financial status. That was intended to be addressed in the materials ordered by the court to be produced by Yanke, which are now before me. At the end of the day, there is really no mystery here as to what has occurred and is occurring with Yanke. In these circumstances, and whether one calls it "dissipation" or simply payment of the remaining funds to other creditors, I consider that I am at liberty to consider the overall circumstances in terms of whether the balance of convenience justifies the continuation of the Mareva injunction.

The Celadon Transaction

41 Yanke formerly operated a substantial trucking business with operations across North America.

42 On November 15, 2013, Yanke entered into an Asset Purchase Agreement with Celadon, a wholly owned subsidiary of Celadon Trucking Services, Inc. (the "APA"). The assets purchased from Yanke included a substantial fleet of trucking assets, related parts and inventory, the right to use the name "Yanke" and, despite some confusion in the evidence, the goodwill associated with the "Purchased Assets" (Section 1.1 of the APA). The purchased assets did not include Yanke's cash on hand or accounts receivable to the time of the closing of the transaction. The purchase price was approximately $17.8 million; approximately $17.3 million of which was to be paid on closing and $500,000 which was held back for a 90 day holdback period.

43 Given the substantial assets to be transferred to Celadon as part of the transaction and the rightly anticipated confusion with the customers of the business, the parties also entered into a Transition Services Agreement (the "TSA"). The TSA required that Yanke provide assistance to Celadon in transitioning the business (including managing accounts receivables) during the 90 day period after closing, which ended on or about February 15, 2014. In addition, pursuant to Section 5.4(b) of the APA, Yanke agreed, for a fee, to provide reasonable assistance to Celadon in the collection of Celadon's accounts receivable arising from Celadon's business operations after the closing and to remit all payments received by Yanke from customers in respect of accruals after the closing which were due to Celadon.

44 Since the closing of the transaction, and pursuant to these arrangements, Yanke did collect substantial amounts owing to Celadon by the customers and Yanke remitted some of these amounts to Celadon. As of this time, Yanke calculates that the net amount which remains owing to Celadon is approximately $659,419.

The Celadon Receivable Issue

45 As I have indicated above, after closing, Yanke did collect, from time to time, various accounts receivable owed to Celadon in accordance with the APA and the TSA. In particular, the APA provided that after the closing, Yanke and Celadon would:

> 8.4 ... hold and will promptly transfer and deliver to the other, from time to time as and when received by them, any cash, checks with appropriate endorsements (using commercially reasonable efforts not to convert such checks into cash), or other property that they may receive on or after the Effective Date that properly belongs to the other party ... and will account to the other for all such receipts.

46 After the expiry of the TSA, Celadon continued to invoice United Parcel Service ("UPS") (a former Yanke customer) for services provided to it. Between February 26 and March 4, 2014, Celadon forwarded invoices to UPS totaling $426,854.45. All invoices specifically indicated that payment was to be remitted to Celadon at its Toronto address.

47 By April 2, 2014, Celadon had still not received payment from UPS. Accordingly, on that date, a person in the Celadon accounting department wrote to UPS asking for an update on payment. Given the confusion arising from the transition from Yanke to Celadon, this person specifically asked UPS to check the remittance address to ensure that the payment came to Celadon and not Yanke. Unfortunately, just one day earlier on April 1, UPS had paid this amount directly into the bank account of Yanke, just as it had on previous occasions when it had done business with Yanke. UPS confirmed that it had done so before it had noted the change to Celadon's name and account number.

48 Recognizing UPS' error, Yanke wrote a cheque to Celadon on April 17, 2014 referenced as "U.P.S. repayment". As a result of the Mareva injunction granted on April 22, 2014, Celadon was unable to process this cheque.

49 Since the UPS monies were deposited into Yanke's operating account, no withdrawals have been made by Yanke but some deposits have been made, presumably from collection of accounts receivables. As such, the identity of these monies remains intact after the deposit by UPS.

50 The above circumstances and related documentation concerning this particular money which was erroneously paid to Yanke by UPS is confirmed by the evidence of Dennis Elschide, an attorney with Celadon Trucking Services, Inc.

51 It is Yanke's position, supported by Celadon, that these funds constitute the property of Celadon such that they should be released to Celadon immediately.

52 The Hanses say that these monies are simply part of the ongoing relationship between Yanke and Celadon and are simply "owed" to Celadon such that Celadon is an unsecured creditor of Yanke. Further, the Hanses say that there are substantial issues arising from the transactions between Yanke and Celadon such that these monies should remain in the account until they are sorted out in the fullness of time.

53 I consider it to be beyond dispute that the Mareva injunction was never meant to capture the property of others. The intent is to preserve the assets of the defendant or potential judgment debtor. In some instances, it may be the case that assets which are caught by a Mareva injunction will be claimed by another party. In that case, the court must be vigilant to ensure that the claims by a third party to this property are *bona fide* and not simply a ploy, with the assistance of an unscrupulous debtor, to secure access to the property and avoid the consequences of the injunction.

54 In addition, fairness to any *bona fide* third party also requires that the court review such claims and make a determination on the merits of the claim to property to the extent that it is able.

55 In *SCF Finance Co. v. Masri*, [1985] 1 W.L.R. 876 (Eng. C.A.), the English Court of Appeal addressed just such a case where a third party claimed ownership of certain assets, holding that while the court was not blithely obliged to accept such claims, nor was it required to maintain the injunction in the face of the plaintiff's contentions (at 880-81). At 884, the court summarized the approach in that the court may, but is not required to take, to assess the validity of such claims. The court must assess the matter in terms of what is just and convenient between the plaintiff, the defendant *and* the third party:

> ... For convenience I would summarise the position as follows: (i) Where a plaintiff invites the court to include within the scope of a *Mareva* injunction assets which appear on their face to belong to a third party, e.g. a bank account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene. (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient. ...

56 In my view, the circumstances of the payment in error by UPS into Yanke's bank account admit of no other conclusion but that the funds represent Celadon's assets. The amounts were invoiced to UPS by Celadon and those invoices clearly required payment to Celadon, not Yanke. This was not a payment that the parties contemplated might be collected by Yanke and then repaid to Celadon under the TSA, where arguments might arise as to whether it was then "owed" by Yanke to Celadon simply as a creditor. Indeed, Yanke did not collect the amount. The clear conclusion that arises from the circumstances of the payment is that UPS' accounting department made a mistake in terms of where to send the payment. This is understandable given the confusion arising from the sale of Yanke's assets and the transition period between the parties.

57 I would also note that Celadon takes no position at this time with respect to the other net amount said to be owed to it arising from the reconciliation of amounts collected by Yanke, other amounts said to be owed to Yanke from Celadon and finally, other cross claims. That reconciliation and the legal result of these various claims or cross claims is a far more complicated matter, particularly given that Yanke was, with the consent of Celadon, collecting and/or depositing these amounts into its bank account and thereafter, depositing other non-Celadon monies and also paying out monies from time to time.

58 However, this particular deposit stands in a different position from those other amounts in that these monies are clearly traceable and identifiable in Yanke's bank account. Nor can it be said that any further transactions in the bank account have resulted in a drawdown of those monies such that those monies could arguably have lost their separate character.

59 This is a substantial amount of money. While I have no evidence at this time as to what might result from non-payment to Celadon, I must also consider whether the undertaking as to damages of the Hanses would be "effective" per *Masri*. It appears to be readily conceded that the Hanses are of limited means. This is but one factor which I have considered; however, it is of much lesser importance in light of my conclusions as to Celadon's clear claim to these monies.

60 Accordingly, I find that Yanke and Celadon have established that Celadon is entitled to the sum of $426,854.45 from Yanke's bank account and this amount is to be paid to Celadon immediately.

Is there a Strong Prima Facie Case?

61 The issue as to whether the Hanses had established a strong *prima facie* case, as a precondition to the granting of the Mareva injunction, was addressed by Voith J. He found that such a *prima facie* case had been established, principally from the arguments and evidence referenced in the summary judgment applications: Voith Reasons at paras. 2-14, 23-25.

62 When the matter came before Sharma J. in early May, Yanke's counsel conceded that the Hanses had established a strong *prima facie* case: see Sharma Reasons at paras. 16, 33.

63 I am not convinced that any different conclusion is justified here. Simply as a matter of judicial economy, the court must be hesitant to rehear issues that have been earlier addressed and decided even on the basis of a counsel's concession unless there are compelling reasons to do so. No further evidence has been put forward by Yanke on this issue beyond what was before Sharma J.; rather, Yanke has new counsel on this application and she wishes to resile from the previous position. This circumstance does not justify revisiting the issue.

64 In any event, having heard substantial submissions from both parties on the point, I am satisfied that this threshold has been met by the Hanses. Yanke argues in particular that the psychiatric injury alleged by Mr. Hans was caused by the accident and that it bore no responsibility in that regard. Nevertheless, as I understand the argument, Mr. Hans alleges an aggravation of his psychiatric injury arising from Yanke's actions in withholding the report from him and Mrs. Hans. There is also substantial conflicting evidence between the parties concerning their contractual arrangements in terms of insurance for the truck and who was responsible to advance insurance claims.

65 The bar to establishing a strong *prima facie* case is not a necessarily high one. In *Mooney* #2, it was expressed as "either side 'might well win'" (paras. 25, 55) and in *Tracy*, it was said to be more than an arguable case, but not reaching the "bound to succeed" threshold (para. 54).

66 I conclude that the Hanses have established a more than arguable or strong *prima facie* case sufficient to meet the threshold requirement for a Mareva injunction. In that event, it is a neutral factor in terms of considering the balance of convenience.

67 I do not wish to leave this issue without commenting on a procedural point. The Hanses filed the Writ of Summons on December 9, 2009. While the claim references that the Hanses were traumatized by the accident and that Mr. Hans suffered PTSD as a result of the accident, the prayer for relief references "general damages" and a more specific listing (*albeit* nonexclusive) referencing the loss of the truck and consequential economic loss. There is no reference to a claim to damages for personal injury.

68 While the Hanses' counsel attempted to argue that this was a sufficient plea in respect of the later revealed personal injury claim, it was also readily acknowledged that an amendment was required but that he had simply not had the time to do so. Despite this lack of pleading, the summary judgment applications referenced the personal injury claims and various medical reports had been delivered in support of the person injury claim. I acknowledge that Voith J. described this state of affairs and no doubt, given the stated urgency at that time, proceeded on the basis of the existing pleading (see Voith Reasons at para. 13). Further, by the time of the application before Sharma J., Yanke's counsel's concession as to a strong *prima facie* case no doubt alleviated any such concerns about the state of the pleadings.

69 However, by the time of this application, some six weeks after the application before Sharma J., Yanke was clearly raising this issue again and counsel should have recognized the need to amend the pleadings in order to consider this issue. In light of my decision to not revisit the findings of Sharma J., I need not address this further. However, I wish to emphasize that it is critical that the pleadings be in order so that the court may consider the strong *prima facie* threshold issue in that light. It is of little assistance to the court in making a determination on this issue for a plaintiff to refer to future pleadings or state that "the other side knows what the allegations are". If the pleadings are not in order, the party seeking the injunction runs the risk that the court may not be in a position to determine this issue, in which case the application will fail.

What is the balance of convenience?

70 The general proposition is that a litigant is not entitled to a remedy or execution against a defendant's assets before having established any liability on the part of that defendant. In this context, the granting of a Mareva injunction is an extraordinary remedy: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.), at 10.

71 Therefore, the starting point is that until liability is established by a plaintiff, a defendant has a *prima facie* right to deal with his assets: *First Majestic Silver Corp. v. Davila*, 2009 BCCA 71 (B.C. C.A.) [hereinafter Santos] at para. 23.

72 Following from the statutory authority found in the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39(1), the fundamental question is whether the granting (or in this case, the continuation) of the injunction is just and equitable in all the circumstances: *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309 (B.C. C.A.), at para. 20.

73 In *Tracy*, the court outlined the exceptions where such an injunction may be granted:

> [34] ... Exceptions to this referred to in ***Aetna Financial*** at pp. 12-14 are:
>
> > 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...;
> >
> > 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...;
> >
> > 4. *quia timet* injunctions ... generally permitted under extreme circumstances which included a real or impending threat to remove contested assets from the jurisdiction.

74 It is also now well established that in British Columbia, following the seminal decision in *Mooney* #2 (which involved the second exception) which prescribes a flexible approach, there are no "hard and fast" rules governing when Mareva injunctions can be granted. In particular, the Hanses relied on authorities of this court supporting the proposition that it is not absolutely necessary that there be any evidence of active dissipation of assets or that there be a dishonest intent on the part of the defendant in the dissipation or disposal of assets, citing *Blue Horizon Energy Inc. v. Ko Yo Development Co.*, 2012 BCSC 58 (B.C. S.C.) at paras. 17, 24 and *Leaton Leather & Trading Co. v. Ngai*, [1997] B.C.J. No. 645 (B.C. S.C. [In Chambers]) at paras. 4-10. Further, in some cases, it may be appropriate to order "security" for the plaintiff's claim: *Mooney* #2 at para. 52.

75 However, after declining to depart from the flexible approach adopted in *Mooney* #2 , the court in *Tracy* provided a certain "clarification and a reminder" particularly as regards to the second exception:

> [44] I do not consider that the general approach to *Mareva* injunctions in British Columbia requires modification. It may, however, require clarification and a reminder that it is a species of interlocutory injunction with special requirements. Those requirements relate to the general rule against pre-judgment execution and may vary depending on the nature of the exception into which the injunction fits (with reference to the four categories of exception given as examples in ***Aetna Financial***). While the term "*Mareva* injunction" is used to denote any order impounding assets or freezing assets before judgment (outside of statutory remedies such as builders liens or garnishing orders), they are not all alike. Awareness of the root issue is helpful in sorting out the exercise of discretion.
>
> [45] Unlike a *quia timet* injunction, in which the issue is removal of assets from the jurisdiction, an injunction to protect the processes of the court may not involve extra-territorial considerations but may engage issues of dissipation. But at its root, the issue is the risk of harm through either dissipation of assets or removal of them to a place beyond the court's reach.

[46] In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in ***Grenzservice Speditions Ges.m.b.H. et al. v. Jans et al.*** (1995), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:

> [*Mareva* and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

[Underlining emphasis added, bold in original.]

76 For the purposes of this application, only the second and fourth *Aetna* exceptions are engaged.

77 In their Notice of Application for the *ex parte* Mareva injunction, the Hanses relied on the second exception asserting that "the court must take steps to prevent its process from abuse, and must not permit a defendant to 'disavow' in advance any judgment the plaintiffs could obtain". As I have stated, Voith J. accepted that the injunction was justified, not based on any evidence of dissipation or risk of dissipation of assets (Voith Reasons at para. 30), but so as to cause some meaningful disclosure as to Yanke's current financial situation (Voith Reasons at para. 31).

78 When the matter came before Sharma J., the focus of the application became not a lack of response from Yanke, but the adequacy of the response from Yanke with the suggestion that "dissipation" of assets had occurred.

Was there a dissipation of assets arising from the Celadon sale?

79 A plaintiff can never be assured that a defendant will stay in business until judgment may be granted. Further, I am not aware of any authority by which a plaintiff is entitled to require that a defendant provide assurances that its claim has been "secured" in some fashion pending trial, such as was demanded by the Hanses in this case.

80 Nor does any defendant bear the onus of proving that its assets would not be dissipated before any judgment might be granted: *Insurance Corp. of British Columbia v. Patko*, 2008 BCCA 65 (B.C. C.A.) at para. 30.

81 Nevertheless, as in this case, the sale or proposed sale of assets by a defendant might, in certain circumstances, raise concerns about the *bona fides* of any transaction or proposed transaction which the court may address through an injunction. These concerns will no doubt be heightened in the event of a sale of assets *after* the claim has been advanced where there may possibly be an ulterior motive to dispose of assets to defeat the plaintiff's claim.

82 The British Columbia courts have grappled with such fact scenarios in the context of Mareva injunctions, even where dispositions have been made or are being made in the ordinary course of business and payments to creditors are being made, all of which might very well have the result of lessening or negating any recovery for a successful plaintiff at the end of the day.

83 Perhaps most cited in this context are the comments of the Court of Appeal in *Silver Standard* (quoted in *Tracy* at para. 41 and *Santos* at para. 20):

> [20] I agree with this approach, which in my view is true to the historical roots of injunctions generally and *Mareva* injunctions in particular. Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendants urged upon us, that a *Mareva* injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party. (In the latter regard, Mr. Moshonas referred us to *Galaxia Maritime S.A. v. Mineralimportexport (Eleftherios)*, [1982] 1 All E.R. 796 (C.A.) at 800, *Northern Sales Co. Ltd. v. Government Trading Corp. of Iran*, *supra*, at 75-6. But this factor cannot be taken too far, for almost every *Mareva* injunction is likely to inconvenience another party in some way.) The overarching consideration in each

case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.

[21] Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

[22] What makes the case at bar difficult is that the factors in the plaintiff's favour are very strong: Silver Standard appears to have a good claim for repayment of its loans and advances while Geolog's counter-claim is very difficult to assess; and as earlier noted, if the injunction is released, there is almost no doubt that Silver Standard will not recover any award it obtains. Even if Geolog had assets elsewhere, there is no reciprocal legislation for the enforcement of judgments between Russia and British Columbia or other means by which a judgment against Geolog could realistically be enforced.

[23] The Chambers judge had before him all the relevant facts and law. He was also reluctant to set down a hard and fast rule. In his words:

> I am not prepared to go so far as to hold that a *Mareva* injunction should never be issued where funds or assets are being removed from the province in the ordinary course of business and there is no evidence of any scheme to avoid judgment creditors. There might be special circumstances where such an order is warranted, although at present, I cannot imagine what those circumstances might be. I am, however, of the opinion that such an order should not generally be made. [para. 57].

As an appellate court, we are in a position to interfere with the Chambers judge's exercise of his discretion only if he acted on a wrong principle or was otherwise clearly wrong in his conclusion. I cannot say that that occurred, and indeed I believe he properly applied the law to the facts before him. It may be that the cautious approach to Mareva injunctions favoured in *Aetna* now requires some refinement almost 15 years later in light of the globalization of business transactions and the speed with which assets may now be moved across borders. As *Mooney v. Orr* indicates, the law is moving incrementally in that direction. At present, however, the balance of convenience and justice is generally seen to weigh against the granting of an injunction that will prevent a defendant from paying a debt incurred in the ordinary course of business, simply in order to provide pre-judgment security to a plaintiff. That factor, and the consideration of Dukat's position, led the Chambers judge to conclude that the *Mareva* injunction should be set aside in this case. No basis for our interference has been shown.

[Emphasis added.]

84 Further, in *Silver Standard*, the court discussed that payment to creditors will not likely be held to be a scheme to avoid a potential judgment creditor simply because one usually expects that one will pay ones creditors in the ordinary course of a business:

> [16] The most difficult hurdle faced by Silver Standard was the Chambers judge's ruling that (to paraphrase his reasons at para. 57) a *Mareva* injunction should almost never be issued in the absence of a "scheme to avoid judgment creditors" or where the assets in question are being removed from the jurisdiction in the ordinary course of business. (To my mind, these are two sides of the same coin — i.e., where payments are seen to be made in the ordinary course of business — e.g., to persons who have supplied goods or services normally required for the operation of the enterprise — such payments are obviously unlikely to be part of a scheme to make the enterprise judgment-proof.) Counsel for Geolog referred us to numerous cases from both England and Canada to the effect that before a *Mareva* injunction will be granted, it must be shown the defendant is likely to place his assets outside the jurisdiction *for the purpose of defeating* a possible judgment creditor — in other words, that the defendant intends to abuse the

jurisdictional rules. Reference was made, for example, to *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 488 (Q.B.), where Goff J. (as he then was) varied a *Mareva* injunction to permit a foreign defendant to apply certain of its assets to the repayment of a loan outside the jurisdiction. He observed:

> A reputable businessman who has received a loan from another person is likely to regard it as dishonourable, if not dishonest, not to repay that loan even if the enforcement of the loan is technically illegal by virtue of the Moneylenders Acts. All the intervenors are asking is that the defendants should be free to repay such a loan if they think fit to do so, not that the loan transaction should be enforced. *For a defendant to be free to repay a loan in such circumstances is not inconsistent with the policy underlying the Mareva jurisdiction. He is not in such circumstances seeking to avoid his responsibilities to the plaintiff if the latter should ultimately obtain a judgment; on the contrary, he is seeking in good faith to make payments which he considers he should make in the ordinary course of business*. I cannot see that the *Mareva* jurisdiction should be allowed to prevent such a payment. To allow it to do so would be to stretch it beyond its original purpose so that instead of preventing abuse it would rather prevent businessmen conducting their businesses as they are entitled to do. [At 495]

. . .

[17] More recently, in *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769 (C.A.), the Court lifted a *Mareva* injunction that had prevented the Central Bank of Northern Cyprus from moving its foreign currency reserves from London in the face of a large claim by the plaintiff for misapplication of funds. This was done even though the defendant was likely to remove all its assets immediately from the United Kingdom, thus making any judgment obtained by the plaintiff ultimately worthless. Part of the Court's reluctance to continue the injunction was obviously due to the fact that the defendant was a central bank; however, the remarks of Lord Donaldson M.R. were framed in broader terms:

> I therefore turn to the principles underlying the [*Mareva*] jurisdiction. (1) So far as lies in their power the courts will not permit the course of justice to be frustrated by a defendant taking action, *the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain.* (2) *It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him*. Whilst a defendant who is a natural person can and should be enjoined from indulging in a spending spree undertaken with the intention of dissipating or reducing his assets before the day of judgment, he cannot be required to reduce his ordinary standard of living with the view to putting by sums to satisfy a judgment which may or may not be given in the future. Equally no defendant, whether a natural or a juridical person, can be enjoined in terms which will prevent him from carrying on his business in the ordinary way or for meeting his debts or other obligations as they become due prior to the judgment being given in the action... (4) *It is not the purpose of a Mareva injunction to render the plaintiff a secured creditor* ... [at 785-6]
>
> [Underlining emphasis added, italics in *Silver Standard*.]

85 In *Tracy*, the defendant's business was sold just prior to the commencement of the action. The Court of Appeal deferred to the discretion of the chambers judge in granting the injunction even where there was weak evidence of any risk of asset dissipation but where there was some history of asset protection (paras. 63-64). The Court of Appeal did, however, set aside the requirement that the sale proceeds be impounded, finding that the plaintiff would have a remedy if there was subsequently found to be dissipation: para. 75.

86 In *Patko*, the Court of Appeal reaffirmed the cautious approach per *Silver Standard* in terms of any case, such as was found in *Mooney* #2 , that may justify the "security" afforded by such an injunction:

> [26] The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: ***Tracy*** at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty

collecting on its judgment if the injunction is not granted": ***Silver Standard*** at para. 21. Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

[Bold emphasis in original.]

87 In *Santos*, the court found that the balance of convenience did not favour an injunction tying up proceeds of a share sale held by a foreign businessman even in the face of his stated but not improper intention to repatriate the sale proceeds to Mexico. The court noted the defendant's *prima facie* right to control his assets (paras. 23-24). In *Davila*, later litigation involving the same parties, the court granted an injunction in respect of a potential sale of a mine; however, of critical importance was that judgment had been obtained by then and there were insufficient assets within the jurisdiction to satisfy that judgment (paras. 52-53).

88 In *Blue Horizon Energy Inc.*, the court found such exceptional circumstances to exist and granted an injunction where the defendant was taking its major asset offshore and would have no further assets left in the jurisdiction. It will be obvious that there are materially different facts in this case, in that Yanke is not a foreign company transferring its assets out of the jurisdiction; rather, it is a Canadian company which has liquidated substantially all of its assets and is paying its Canadian creditors.

89 Yanke also refers to *Patterson v. Puri*, 2008 BCSC 351 (B.C. S.C.). In that case, the defendant had sold its assets prior to the discovery of a fraud (which was the subject of the claim), but sought to continue to use the sale proceeds even after that discovery to pay dividends, deferred income and legal expenses. The court found that the defendant was simply dealing with its assets as it normally would and not for the purpose of defeating the plaintiff's claims: para. 21.

90 The question then is whether this is an exceptional case, or as described by the chambers judge in *Silver Standard*, "special case"? Do these circumstances take this case beyond "most cases" per *Patko*?

91 In this case, the Hanses raise a considerable number of concerns regarding the Celadon transaction. Despite the concerns raised that there has not been any "meaningful disclosure", I am satisfied, based on Mr. Marcoux's evidence, that the sale to Celadon was not a part of any attempt to avoid the consequences of a judgment that might be granted to the Hanses in this case.

92 The evidence firmly establishes that the circumstances leading to the sale of the Yanke Group's assets began before the Hanses' claim was filed and were driven by forces unrelated to the Hanses' claim.

93 Mr. Marcoux indicated that the Yanke companies had been in business for a period of over thirty years but had encountered financial difficulty for some time.

94 In November 2009, HSBC Bank Canada (the "Bank") was the Yanke Group's operating lender. However, at that time, the Bank issued a letter indicating that Yanke was in breach of its minimum net worth financial covenant but that the Bank would forbear until March 2010. It is important to note that this forbearance agreement predated the filing of the Hanses' claim. This and other breaches and the Bank's continued forbearance in respect of Yanke and Global would continue for some years, being documented from time to time in various facility letters issued by the Bank, with the last deadline for remedy of the breaches set at March 2013.

95 Yanke's financial statements support a rather dramatic decrease in revenue from $134 million in the 2009 fiscal year to $77.5 million in the 2012 fiscal year, with losses in each of those years save for 2010 and a loss in 2012 of $1.1 million. The financial statements for the 2012 fiscal year indicate assets of $28 million and liabilities of $29.2 million, including $12.2 million said to be a secured shareholders loan to B&R Enterprises Ltd., a company controlled by Mr. Marcoux and his wife.

96 By March 2013, Yanke liabilities were in excess of $25.5 million, with over $10.3 million being owed to the Bank.

97 In September 2013, Yanke received notice that the Bank was transferring administration of its accounts to its Special Loans division. By any borrower's standards, this would not have been welcome news. The word "special" is somewhat of a misnomer; in that it only indicates that the Bank has recognized that these loan facilities are seriously offside and require active management to either rehabilitate them, or more typically, manage the file to the point of getting the Bank repaid by the debtor, whether voluntarily or involuntarily. What is also typical in these circumstances and what happened in this case in October 2013 is that Yanke was required by the Bank to hire an outside consultant, PricewaterhouseCoopers Inc., to consider Yanke's viability and possible resolutions to its financial problems and report to Yanke and the Bank after its assessment (colloquially, called a "look/see"). These are the actions of a lender concerned about the viability of its customer and even more concerned about getting repaid its loans.

98 In the midst of this continuing pressure from the Bank, Yanke also hired its own insolvency counsel and its own restructuring and M&A professionals to assist. As a result of all this input, Yanke determined, not surprisingly, that if it was to avert the appointment of a receiver by the Bank, and a forced liquidation of its assets to the detriment of the stakeholders, it would have to take urgent measures to sell the business as a going concern. A further forbearance agreement was negotiated with the Bank to allow a sale to occur but it was never signed because the APA was concluded quickly in mid-November 2013.

99 As I have indicated above, the sale to Celadon did close in mid-November 2013. Mr. Marcoux has provided a detailed Statement of Adjustments setting out the distribution of the funds. Approximately $10.5 million was paid to the Bank in respect of its various secured loans. In addition, various other substantial amounts, totaling approximately $4.9 million were paid to equipment financiers and other secured creditors. After payment of certain professional fees, the net amount received by Yanke was $1,772,804, which was deposited into the Yanke operating account on November 20, 2013.

100 While the Hanses question the timing of the sale in relation to their efforts to obtain summary judgment in the fall of 2013, the evidence establishes that their claim did not precipitate the sale to Celadon. In addition, as of the date of the sale, Yanke, while aware of the Hanses' claims, had not been advised of the magnitude of the claims and would not be so advised until months later. The Hanses also argue that Yanke has been dragging its feet in terms of having the summary judgment applications heard, but I note that the Volvo Defendants were equally opposed to the summary judgment applications and the position of all the defendants was ultimately upheld by the court not once, but twice.

101 The Hanses also take exception with the fact that certain schedules to the APA were not attached. These include certain non-compete and non-solicitation agreements of Mr. Marcoux and his wife (which I presume were signed) and also various driver lists and customer contracts. Mr. Marcoux refused to provide these on the basis on confidentiality and privacy concerns. In my view, the redaction of these schedules does not materially add to any understanding of the Celadon transaction, nor of course would it have affected the consideration paid by Celadon for the assets as is clearly referenced in the APA. As such, the privacy concerns of Mr. Marcoux and the other persons referenced should be respected: *Reynolds v. Harmanis*, [1995] B.C.J. No. 1129 (B.C. S.C.) at para. 23.

102 The Hanses also complain about a certain share transaction which occurred just before the Celadon sale whereby Yanke issued certain shares to Yanke Holdings Ltd. However, given the insolvency of Yanke, there would not appear to be any value in these shareholdings in any event. The Hanses also complain about the amalgamation of Multimodal with Yanke just prior to the sale. Mr. Marcoux does confirm that Multimodal had significant debts with CP Rail and that these were transferred into Yanke, just as Multimodal's assets would have been. Both companies used the HSBC operating account so there was clearly some interconnectedness between the various companies in respect of the debt. Despite the Hanses' objections, there could have been any number of legitimate reasons for this amalgamation (including for example, to preserve tax losses). In any event, the Sharma Order did not require any explanation of the amalgamation and in fact, only required disclosure of "Assets" as of the date of the Sharma Order, which was done.

103 Finally, the Hanses also take exception with certain payments totaling over $711,000 made to related companies in which Mr. Marcoux and his wife are involved. These matters are addressed in Mr. Marcoux's affidavit #5 and reveal that:

a) Marcoux Bros. Trucking was Yanke's landlord and had also loaned monies to Yanke from time to time, with a balance owing of $2 million as of October 2013. Further advances from Marcoux Bros. Trucking to Yanke and repayments from Yanke took place from November 2013 to March 2014;

b) Mr. and Mrs. Marcoux took out loans from HSBC which were outstanding in the amount of $670,000 as of June 2011. Mr. Marcoux's evidence is that these were injected into Yanke. A payment was made by Yanke in December 2013 and on April 17, 2014 a final payment of $260,000 by Yanke retired these loans to HSBC;

c) Mr. and Mrs. Marcoux also took out loans from Korchinski Holdings Ltd. and Marcoux Developments Inc., again for the purpose of injecting this money into Yanke. They also made interest payments on these loans themselves when Yanke did not have sufficient funds to pay it. The amount of $140,000 was paid by Yanke and was directed to these loans on April 17, 2014; and

d) Mr. Marcoux indicated that B&R Enterprises Ltd. normally took a $25,000 draw per month from Yanke. The bank statement shows payments in December 2013 and January and February 2014. The amount in February was $50,000 and Mr. Marcoux indicated that it included the last draw he took from Yanke, and a further amount toward repayment of the loans he and his wife took to inject into Yanke.

104 Counsel for the Hanses calls this evidence "absurd". Nevertheless, the clear evidence from Mr. Marcoux was that these payments were made by Yanke in respect of valid loans owing by Yanke to these various entities. Mr. Marcoux makes no secret as to the fact that these payments were made and when they were made. The Hanses suggest that this supports that there has been self-dealing and that the court should be concerned about this as evidence of dissipation of assets.

105 In *Eli Lilly Canada Inc. v. Novopharm Ltd.*, 2010 FC 241 (F.C.), the court rejected concerns about the payment of monies to the defendant's U.S. parent, which were said to be in the ordinary and usual course of business (para. 36).

106 Despite the Hanses' dramatic characterization of these payments, I question the inference that is said to arise. Again, Mr. Marcoux's evidence is that he has remained at the helm of this ship for the purpose of doing what he can to see that the creditors get paid. If he and his wife were truly trying to strip Yanke of funds to repay themselves, then I wonder why they would not already have done so and simply abandon ship. Why would Mr. Marcoux have remained invested in the process of seeing the final collection of accounts receivable and of continuing to deal with and pay the trade creditors, while all the while not taking any further draws? Mr. Marcoux's evidence and his reaction to this injunction would suggest that while he certainly saw fit to ensure some funds flowed to him and related parties, his intention at this time is to see other creditors paid from the remaining funds.

107 Further, the sale of the assets to Celadon did not result in an immediate cessation of business activity. The Bank continued to allow the operation of Yanke's operating account and the payroll accounts in which substantial transactions took place during the ensuing wind down period. The holdback amount owing under the APA was deposited into the operating account on January 21, 2014 and in doing so, brought that bank account into a positive balance for the first time such that amounts were no longer owed to the Bank in respect of its secured position. The balance in the account at that time was $396,116.

108 I would also note that in any later insolvency proceeding, such payments to related parties may possibly be challenged under either provincial or federal legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

109 I am satisfied on the basis of the evidence presented by Yanke that nothing untoward and no improper or dishonest intention is evidenced in respect of why the Celadon transaction took place, the terms of the sale and the distribution of

the proceeds to the date upon which the Mareva injunction was granted. In other words, I am satisfied that following the sale, Yanke saw fit to gather in the remaining assets (i.e. accounts receivables) owing to it and to then pay the funds on hand, along with the proceeds of the sale, to creditors who were owed monies by Yanke. Those loans and other obligations (such as from services provided) were incurred in the normal course of Yanke's operations and payment to those creditors, while taking place in somewhat unusual circumstances arising from the sale, can only be said to have been in accordance with Yanke's obligations to repay those amounts.

110 In my view, these circumstances fit squarely within the usual case where the court will be loath to tie up a defendant's assets when sale proceeds and other assets have been used to satisfy debt obligations in the ordinary course of its business, per *Silver Standard*.

Is there ongoing dissipation of Yanke's assets?

111 Mr. Marcoux's evidence is that from January to April 2014, Yanke was proceeding to collect its receivables and pay its creditors. This is supported by the detailed bank statements of the operating bank account. In fact, Mr. Marcoux estimates that from October 2013 to March 2014, Yanke paid over $4 million to trade creditors, all of which amounts were outstanding from October 2013.

112 The difficulty that Yanke faced at the time of the granting of the Mareva injunction was that Yanke's remaining debts were considerably in excess of its remaining assets, even assuming full collection of its remaining accounts receivable, all of which were in excess of 150 days, and without considering the ongoing costs of winding down Yanke's business. Those assets included the balance in the bank account (approximately $130,000 net of the Celadon/UPS amount), minimal personal property ($20,000) and accounts receivable of $187,300, for a total of $337,300.

113 That asset figure is balanced against the admitted debts to trade creditors of at least $143,000, the remaining amount said to be owed to Celadon in the reconciliation ($200,000), another $112,000 said to be owed to various trade creditors, less ongoing costs of operating to this limited extent. In this rough analysis, I have not even included secured shareholder loans which are likely still due to the shareholder, B&R Enterprises Ltd. ($12.2 million as of March 2012) and of course any contingent liability that may be owed to the Hanses.

114 By any measure, Yanke is insolvent but Mr. Marcoux intends to press forward to collect what he can and pay such debts as he can.

115 When the Mareva injunction was served at the Bank, this prevented negotiation of not only the cheque payable to Celadon for the UPS amount, but also cheques written to other creditors in the amount of approximately $143,000. Other transactions totaling $15,465 were reversed as a result. Mr. Marcoux indicated that all such payments were supported by invoices and that he had attempted to pay creditors that were pressing. Alternatively, he attempted to negotiate payments over time or to make a one-time payment based on a reduced amount and in that regard, the inability to pay these amounts is affecting Yanke's ability to perform on these negotiated settlements. Mr. Marcoux also now refers to further liability of $79,273 owing to third party creditors since that time.

116 At the time of the granting of the Mareva injunction in April 2014, Yanke had two bank accounts: the HSBC operating account with a balance of $557,651.60 and a US dollar bank account with a balance of $2,444.50 US. Both of these accounts have been frozen since that time.

117 It is Yanke/Mr. Marcoux's stated intention to proceed to collect what can be collected and to pay Yanke's creditors to the extent that it is able. Yanke claims hardship by reason of being prevented from doing so by the Mareva injunction:

> The Mareva Injunction in place is directly impacting Yanke Transfer's ability to make payments to third party creditors with existing undisputed claims. This is causing significant hardship for Yanke Transfer as many of these creditors have been waiting for months to be paid, and ought to be paid on the orderly wind up of Yanke Transfer. I

have been fielding calls from these creditors who want to know when they will be paid on their outstanding accounts. Unless the Mareva Injunction is lifted, Yanke Transfer will not be in a position to pay these third party creditors.

118 It is a fundamental point that a Mareva injunction was never intended to prevent a defendant from paying its debts as they become due in the ordinary course of its business, even where there is insolvency. In *Aetna*, Estey J. noted that the Manitoba Court of Appeal had ruled out insolvency as a factor for consideration (see *Aetna Financial Services Ltd. v. Feigelman*, [1982] M.J. No. 137 (Man. C.A.) at paras. 36-37). At page 26, Estey J. stated:

> ... 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 Ministry of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 488, at p. 494. 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.

119 In addition to the many authorities cited above, the cases are replete with references to the principle that Mareva injunctions are not intended to prevent a defendant from using its assets to either defend itself in the action or continue in the ordinary course of its business, including making payments to legitimate creditors: see *Derby & Co. v. Weldon (Nos. 3 & 4)* (1988), [1989] 1 All E.R. 1002 (Eng. C.A.) cited in *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (B.C. S.C. [In Chambers]), at 324 -25; *Grenzservice Speditions GmbH v. Jans* (1995), 129 D.L.R. (4th) 733 (B.C. S.C.) at para. 28; *Davila* at para. 53; *Tracy* at para. 23.

120 In these circumstances, the "harshness" of the granting of a Mareva injunction invites a consideration of the comments of Estey J. in *Aetna*, reinforced by the court in *Tracy* at para. 37, where such actions are more akin to "litigious blackmail", where assets are tied up without any dissipation of assets or any actions by a defendant which do not put such assets beyond the reach of the plaintiffs but rather are used to satisfy legitimate creditors' claims.

121 As Sharma J. notes, she did not resolve the "interesting question" whether the winding up of a company fits within "normal or ordinary business practices or operation": Sharma Reasons at para. 37. I also note that the substantial case authorities cited above were not argued before Sharma J. on this "interesting question", as they have now been argued before me.

122 I acknowledge that these are somewhat unusual circumstances; however, it must be emphasized that having conducted a sale of substantially all of its assets in the ordinary course, Yanke had been in such "wind down" operations for some five months even before the Mareva injunction was granted. To that extent, Yanke's operations at that time were "normal" in terms of collecting its pre-closing accounts receivable and also paying outstanding creditor claims owing by it.

123 A further matter addressed by Sharma J. requires some comment. At para. 37, the court states that "there is insufficient evidence from Yanke to establish it would suffer any prejudice if the injunction is granted". Further, the court states:

> [52] ...Yanke has failed to demonstrate it would suffer any prejudice from the injunction being granted. It has not been able to show it would be unfair or inequitable to grant the injunction. ...

124 I do not understand the authorities as establishing any onus on a defendant to establish that an injunction should *not* be granted. In fact, the onus has always been on the party seeking an injunction to establish that it is just and convenient. This is particularly so in the face of the well-known principle that a defendant is *prima face* entitled to carry on its business in the ordinary course.

125 The Hanses argue that Yanke has still not established any prejudice to itself, given that any prejudice will be suffered by Yanke's creditors. In the face of the obvious consequences to Yanke's creditors, the Hanses say "so what?" With respect, such a contention cannot be accepted. It has always been the case that one of the factors to be considered

is the effect on third parties. As Mr. Marcoux states, much if not most of the indebtedness has been outstanding for a long period of time. These are admitted debts which are due, unlike the contingent claim of the Hanses.

126 In *Mooney* #2 , one of the factors cited by Huddart J. was the "potential effects on third parties": para. 48. The effect of the Mareva injunction upon innocent third parties was also a key factor in refusing such an injunction in *Silver Standard* at para. 8.

127 In addition, in my view, the Hanses' position takes an unduly narrow view of prejudice to Yanke in these circumstances. Yanke is an existing business and as I have said repeatedly, even in the face of this litigation, it is entitled to carry on its business in the ordinary course. While certainly its present circumstances are not "normal" in relation to its pre-November 2013 circumstances; it is still operating, *albeit* in a limited way. It is entitled to pay its valid claims as and when they become due. If Yanke does not pay some of its debts, negotiated settlements will be breached. Further, Yanke will no doubt face creditor action, such as litigation to obtain judgment and once judgment is granted, execution on its assets. Execution would no doubt include garnishment of accounts receivables and bank accounts. In that respect, Yanke will be prejudiced by not being able to manage the ongoing collection of accounts receivables and payment of its debts. All of this will also no doubt increase the debt by reason of the non-payment and the legal actions of the creditors and there can be no doubt that Yanke will be required to expend legal fees to address this creditor chaos.

128 In *Patterson*, the court was not convinced that there would be no inconvenience to the defendant in making payments in the ordinary course even if it was no longer conducting its business and had no creditors (paras. 17-21).

129 What is essentially proposed by the Hanses is that by obtaining the Mareva injunction, they have put Yanke into receivership or bankruptcy. Counsel says that this is "like" a bankruptcy in that all of the other creditors, once they take steps to collect their debts, will be stopped from taking action against the assets frozen by the Mareva injunction. What is missing from this characterization is that both receivership and bankruptcy are court driven processes which set out clear rights and remedies for all creditors, both proven and contingent alike. Both processes provide for a stay of proceedings (including the Hanses' claim) and a process for the orderly realization of assets and the distribution of funds. In that respect, all creditors are treated fairly and equally. It is also important to recognize that both processes involve costs of professionals to advance the proceedings, all of which must be paid before any distribution to the creditors.

130 In the scenario of this Mareva injunction, it is simply the Hanses who have tied up the assets and all other creditors are meant to wait on the sidelines while the Hanses' claim is sorted out. All the while, these assets may be wasting (such as, for example, by the further aging of accounts receivable) while the defendant is unable to continue to operate.

131 That leads me to the specific relief granted under the Mareva injunction here. It is usually the case that the granting of a Mareva injunction poses particular challenges in terms of allowing ordinary course of business operations, while still preserving assets that might be dissipated. Nevertheless, it is a necessary exercise in light of the clear authorities above to the effect that generally speaking, such an injunction is not intended to prevent such activities. I note that the draft model order issued by the Law Society of British Columbia in the summer of 2012 simply references a provision to the effect that:

> This Order does not prohibit the defendant from dealing with or disposing of any of [its] assets in the ordinary and proper course of business.] (FN3)
>
> . . .
>
> FN3 — ... If the defendant is a company which conducts a business consideration and allowance should be made for the distribution of assets as an integral part of that business.

132 In this case, the Sharma Order did not address how Yanke was to continue to operate even in its "wind down" mode. At paragraph 10 of the Sharma Order, Yanke was simply allowed to spend up to $20,000 in complying with the Order and attempting to dissolve the injunction and also, to spend $50,000 in defending the proceedings generally.

133 The evidence before the court in May 2014 included a reference to ongoing wind up costs including insurance costs to CAFO, a phone lease, an IBM lease and maintenance costs, totaling $88,574. Since that time, Mr. Marcoux has further clarified Yanke's urgent ongoing obligations in his later affidavits.

134 Crawford Insurance Adjusters investigates claims and works with Yanke's insurance lawyers in respect of the management of outstanding claims under Yanke's fleet insurance. Crawford represents Yanke's interests in this regard and performs services in relation to such claims. While payment problems arose in the past, Yanke made regular payments to Crawford up to mid-April 2014. As a result of the granting of the Mareva injunction, a cheque in the amount of $12,409.08 was not honoured and Yanke has not been able to pay for five invoices received since April 22, 2014 totaling approximately $6,600. As a result, Crawford is threatening to withdraw its services, including from active claims that Yanke is in the process of trying to resolve. All of this is to say that without Crawford's assistance, the overall creditor exposure of Yanke may be increased.

135 In mid-May 2013, Crawford also advised Yanke that the amount of $32,571 was now owed to Crawford in respect of the settlement of a claim within Yanke's insurance deductible, although it is not clear what consequences arise from non-payment.

136 Obligations to Recap Leasing were identified in May 2014 but not addressed. Mr. Marcoux now says that $2,110 is owed to Recap in respect of the lease of Yanke's telephone system. Since the Mareva injunction was granted, the automatic debit has stopped. Mr. Marcoux has been notified that the telephone leases will be terminated if payment is not made.

137 The stridency of the Hanses' position is magnified by their staunch opposition to any payments being made for operational costs, beyond the legal and other costs identified in the Sharma Order, accompanied by no consideration as to how Yanke can continue in that light. It is truly a "bankruptcy" but in name but without the protections noted above.

138 One of the Hanses' major complaints is that they do not know who is paying Yanke's legal fees. The Sharma Order allowed payment of legal fees, as set out above, but also required that before spending such amounts, Yanke was required to advise the Hanses' counsel of the "intended source of the funds to be expended". No such advice has been given and Yanke asserts that it has not expended any funds on legal fees. Indeed, the bank account remains intact.

139 The Hanses argue that Yanke's position that it is insolvent is inconsistent with its stated intention to continue to defend the claim. Despite this mystery, I fail to see how this amounts to an abuse of process, similar to what Huddart J. faced in *Mooney* #2 . I would note that in *Mooney* #2 , Mr. Mooney was a plaintiff and the abuse arose in part because he chose to commence litigation in this province while purposely shielding his assets from the outcome of that litigation by keeping them outside of the jurisdiction. Here, Yanke is only a defendant with the right to defend the claim.

140 Even if a company is insolvent, it is allowed to continue to operate, just as Yanke has done, on a limited basis. More importantly, I am not aware of any case where a Mareva injunction did not allow a defendant access to its funds for the purpose of defending the claim, just as the Sharma Order did. To do otherwise would allow plaintiffs to avoid facing any defence by the simple mechanism of shutting off funds for legal fees by way of a Mareva injunction. The fact that Yanke has somehow found a "white knight" to pay for its legal fees should be of no concern to the Hanses. It has not detracted from the present funds on hand which is the concern in any Mareva injunction situation.

Conclusion

141 As I indicated at the conclusion of the hearing, I have found that the balance of convenience does not favour the continuation of the Mareva injunction, particularly as regards to the rightful claim of Celadon to the UPS monies, as discussed above.

142 I can discern no untoward behavior of Yanke in entering into the Celadon transaction and dealing with the proceeds of sale as it has done since November 2013. While certainly Yanke is disbursing those proceeds of sale and proposes to continue to do so, that process is in the context of paying legitimate creditors who are owed money by Yanke and as such, it is in the ordinary course of its current business. In that respect, I do not consider that there was any "dissipation" of assets within the normal meaning of that word, which connotes some wrongdoing or improper intent. Nor do I consider that any payments in the future to legitimate creditors constitute "dissipation" in that sense.

143 The Mareva injunction is also causing hardship to third party creditors. It also poses risks to Yanke in the event that it is prevented from paying its legitimate debts or even based on the Sharma Order, from continuing to pay urgent obligations.

144 Simply put, in my view, this case does not rise beyond the usual case where it is necessary to provide security to the Hanses in light of what could be called special circumstances (*Silver Standard* at paras. 21-23). Nor is it within the "outer limits" of such a remedy as discussed in *Tracy* at para. 63.

145 I appreciate, as did the court in *Silver Standard* at paras. 17 and 22, that the dissolution of the Mareva injunction will likely mean that the Hanses will face little, if not zero recovery, should they succeed at trial. However, that is a risk that any plaintiff faces as there is no assurance that a judgment debtor will be solvent and able to satisfy any judgment at the end of the day. Frankly, that is the situation the Hanses faced even at the time of the Mareva injunction, given the amounts on hand at the time. In any event, the Hanses may very well have remedies under the insolvency legislation referred to above in the event that they wish to further investigate Yanke's operations and perhaps challenge any payments made.

146 Yanke will have its costs of this application as against the Hanses: *Deane v. LDS Corp. (1970) Ltd.*, [1983] B.C.J. No. 1712 (B.C. S.C.). Celadon does not seek any costs award. I decline to make any costs award in respect of the hearing before Sharma J. as requested by Yanke.

Application allowed.

TAB 7

2017 ONSC 1857
Ontario Superior Court of Justice

Trade Capital Finance Corp. v. Cook

2017 CarswellOnt 6794, 2017 ONSC 1857, 137 O.R. (3d) 685, 279 A.C.W.S. (3d) 161, 48 C.B.R. (6th) 14

TRADE CAPITAL FINANCE CORP. (Plaintiff) and PETER COOK also known as PETER WILLIAM COOK, MARC D'AOUST also known as JEAN MARC D'AOUST, THOMAS BARKER also known as THOMAS RICHARD BARKER (personally and carrying on business as LC EXCHANGE, GLOBAL MEDICAL and GREENLINK CANADA GROUP), ROCKY RACCA, BRUNO DIDIOMEDE also known as BRUNO DIAIOMEDE, ALAN KEERY also known as ALAN JOHN KEERY, CHRIS BENNETT JR. also known as CHRIS BENNETT also known as CHRISTOPHER BENNETT (personally and carrying on business as CJR CONSULTING), TODD CADENHEAD, DAYAWANSA WICKRAMASINGHE, BONNY LOKUGE also known as DON BONNY LOKUGE, VIRTUCALL INC., VIRTUCALL INTERNATIONAL LLC, DEBT RESOLVE-MORTGAGE FUNDING SOLUTIONS INC. carrying on business as DEBTRESOLVE INC., THE CASH HOUSE INC., 1160376 ONTARIO LIMITED operating as THE CASH HOUSE, 2242116 ONTARIO INC. carrying on business as SUPERIOR MEDICAL SERVICES INC. and SUPERIOR MEDICAL SERVICES, CARLO MR. DE MARIA also known as CARLO VINCE DE MARIA also known as CARLO VINCENT MR. DE MARIA also known as CARLO VINCENZO MR. DE MARIA, MATTEO PENNACCHIO, FRANK ZITO also known as FRANCESCO ZITO, SIMONE SLADKOWSKI, JOBEC TRADE FINANCE INC., 1461350 ONTARIO INC., 2299430 ONTARIO INC., WF CANADA LTD., JOBEC INVESTMENTS RT LTD., GREEN LINK CANADA INC., 2339989 ONTARIO INC., 2252364 ONTARIO INC., 2224754 ONTARIO LTD., 6980023 CANADA INC. operating as LIVING BENEFITS and MILLWALK ENTERPRISES INC., OAK HILLS WATER DURHAM INC., JOSHUA COOK, ELIZABETH COOK, REBECCA COOK, MARK PINTUCCI, MARCO SANTONATO also known as MARC SANTONATO and NEW ERA RESOLUTIONS & CONSULTING INC. (Defendants)

Emery J.

Heard: January 25, 2017
Judgment: May 8, 2017
Docket: CV-15-2110-00

Counsel: Peter W.G. Carey, Christopher R. Lee, for Plaintiff
Laura Robinson, for Defendant, Cash House Inc.
Martin Sclisizzi, for Non-Party, Maple Trust Company

***Emery J.*:**

1 Maple Trust Company raises a unique question on this motion: whether a *Mareva* injunction over the assets of a named defendant prevents the seizure of those assets by another creditor under Writs of Seizure and Sale.

2 Maple Trust is not a party to this action. Maple Trust obtained Writs of Seizure and Sale to collect costs awarded under court orders it was awarded against The Cash House Inc. ("TCHI") in an unrelated proceeding.

3 Trade Capital has brought this action to recover $5,051,721.79 CDN and $1,479,515.12 USD against various defendants to recover funds it claims to have paid out under false pretences or as the victim of a fraud. Trade Capital alleges perpetrators or parties to a fraudulent scheme stole from, or defrauded Trade Capital of those funds between 2011 and 2013. One of those defendants was TCHI.

4 The bank accounts and other assets of TCHI are otherwise subject to a *Mareva* injunction obtained by Trade Capital in this action from Justice Ricchetti on May 6, 2015.

5 In its motion materials and in submissions made to the court, Maple Trust emphasises a key distinction between the terms of reference it uses on the motion, and those used by Trade Capital:

> 1. When Maple Trust refers to "The Cash House bank account", it is referring to a specific bank account as a defined term. That specific bank account is account number [#omitted] (the "701 account") at Buduchrist Credit Union ("BCU"). According to evidence filed on the motion, this account held a balance of approximately $590,000 when Justice Ricchetti's order was made on May 6, 2015.
>
> 2. Where Trade Capital refers to the Cash House bank account, it is generally referring to all bank accounts in the name of The Cash House Inc. at any bank or credit union. Trade Capital takes the position that any cash on deposit in an account at any bank or credit union is bound by Justice Ricchetti's order and is subject to preservation for the purposes of proving and enforcing Trade Capital's claim.

6 Maple Trust brings this motion under Rule 37.14(1) as a person who is affected by the *Mareva* injunction obtained by Trade Capital without notice. Maple Trust seeks an order under Rule 37.14(1) to vary Justice Ricchetti's order to permit BCU to respond to the legal process employed by Maple Trust in the form of Writs of Seizure and Sale. Maple Trust requires this order to seize funds from the 701 account without breaching, or having BCU breach paragraph 7 of Justice Ricchetti's order.

Background

The Fraud

7 Trade Capital is a factoring company. Peter Cook was the president of Trade Capital between November, 2011 and September 2013. Mr. Cook and Darcy Thompson, the Chief Executive Officer of Trade Capital, managed Trade Capital's business from its inception until the fraud against Trade Capital was discovered.

8 Mr. Cook has been accused of perpetrating a significant fraud against Trade Capital in concert with other people. Mr. Cook confessed to this fraud shortly after it was discovered in September 2013.

9 Mr. Thompson has sworn an affidavit in which he describes how the factoring industry works. Factoring is a financial transaction in which the party (the "Invoicer"), having generated an original invoice for providing goods or services to a customer (the "Debtor"), "sells" that invoice under which amounts are owing by the Debtor to a factoring company at a discount. The factoring company makes an advance, or funding, to the Invoicer for approximately 70% to 90% of the face amount shown on the invoice it is purchasing. The factoring company becomes the owner of the invoice and is then entitled to collect the full amount of the invoice from the Debtor. The factoring company may then pay the balance collected to the Invoicer after deducting its commission and other charges, depending on the contract between them.

10 Trade Capital usually enters into a general security agreement with the Invoicer when it enters a factoring relationship with an Invoicer. Trade Capital often will obtain personal guarantees from the principals of the Invoicer as additional security.

11 When an Invoicer would approach Trade Capital to purchase an invoice prior to September 2013, it was Mr. Cook's responsibility to contact the Debtor to determine whether the invoice was valid and genuine.

12 Essentially, Trade Capital alleges that the fraud was perpetrated in the following manner:

1. The Defendants, Peter Cook, Thomas Barker, Marc D'Aoust, Todd Cadenhead, Alan Keery, and/or others working with them would create a fictitious invoice.

2. a notification sheet certifying the legitimacy of the invoice purportedly signed by an officer of the Debtor would be provided to Trade Capital;

3. Mr. Cook and his accomplices would take other steps to make it appear as though the invoice was legitimate including,

(i) Making representations to officers of Trade Capital that the invoice was valid;

(ii) Forwarding emails supposedly from a representative of the Debtor confirming the validity of the invoice (Trade Capital now believes that most of these emails were actually drafted by the fraudsters);

(iii) Making payments from a bank account controlled, either directly or indirectly, by the fraudsters;

(iv) Using internet domain names and email accounts that appear to belong to the supposed Debtor; and

(v) Having actual or apparent employees at major corporations (such as Wells Fargo, Enbridge and Bell) participate in confirming the validity of the invoices.

13 From 2011 to 2013, Trade Capital was induced to advance $5,051,721.79 CDN and $1,479,515.12 USD to purchase fraudulent invoices by way of,

1. twelve fundings to Virtucall Inc. ("Virtucall") in amounts ranging from $77,000 USD to $176,295.75 USD;

2. sixteen fundings to Superior Medical Services Inc. ("Superior") (four of which Trade Capital was directed to advance to other parties) in amounts ranging from $35,000 CAD to $292,456.69 CAD;

3. ten fundings to Greenlink Canada Inc. ("Greenlink") (one of which were Trade Capital was directed to pay to LC Exchange) in amounts from to $74,905 CAD to $375,504 CAD; and,

4. five fundings to 2339989 Ontario Inc. ("233") (two of which were Trade Capital was directed to pay to Millwalk Enterprises Inc.) in amounts ranging from $125,000 CAD to $245,430.21 CAD.

14 Trade Capital obtained a Norwich Order from this court on October 28, 2013 to trace the transfer and migration of various funds it had advanced to certain parties. Trade Capital was entitled to obtain bank statements and back up documents related to TCHI accounts from major banks and from BCU under the Norwich Order. This Order allowed Trade Capital to determine where the funds had been paid, transferred or deposited, and to make further requests for documents.

15 Trade Capital was able to trace its funds to a number of recipients to which Invoicers had distributed funds received from Trade Capital. The evidence of Trade Capital shows that a significant portion of Trade Capital's funds was paid to the Cash House, which received $1,171,260.50 directly from the following entities:

a) Superior - $412,050.00;

b) Greenlink - $512,777.50; and,

c) 233 - $246,435.00.

16 According to Mr. Thompson's affidavit, Trade Capital traced further amounts from various fundings to a Canadian dollar bank account at the Toronto Dominion ("TD") bank open in the name of Virtucall (the "TD Virtucall Canadian Account"). Trade Capital's funds were difficult to trace in and out of the TD Virtucall Canadian Account given the number of transactions. However, transactions showed that after Virtucall received funds from other parties, who had received funds from Trade Capital, Virtucall transferred the funds to other Defendants, including Cash House. Trade Capital claims that during the period of time that Trade Capital was defrauded, Virtucall transferred funds from the TD Virtucall Canadian Account to the Cash House Bank Account in the amount of $2,722,222.50.

The Action

17 On May 6, 2015, Trade Capital commenced this action in Brampton. The statement of claim was subsequently amended on May 31, 2016.

18 In the amended statement of claim, Trade Capital seeks damages against Virtucall, Superior, Green Link and 2339989 Ontario Inc. in the amount of $20,000,000 for civil fraud, fraudulent misrepresentation and negligent misrepresentation. Trade Capital also claims:

(a) a *Mareva* injunction restraining these defendants from disposing of assets;

(b) a declaration that they received funds belonging to Trade Capital that were fraudulently converted by some or all of the defendants;

(c) a declaration that the defendants received funds belonging to Trade Capital;

(d) a declaration that all money, property and other assets transferred to the defendants were held on a resulting and/or constructive trust basis for Trade Capital;

(e) damages for breach of constructive trust or resulting trust; and

(f) Other relief including various tracing orders against these few defendants, among many.

19 Trade Capital has pleaded the following causes of action against some or all defendants, including TCHI:

1. Conspiracy;

2. Conversion;

3. Unjust Enrichment;

4. Breach of Trust;

5. Knowing receipt of trust funds;

6. Knowing assistance of breach of trust; and

7. Intentional interference with economic interests.

The Mareva

20 On May 6, 2015, Trade Capital obtained the *Mareva* injunction from Justice Ricchetti on an *ex parte* basis. Justice Ricchetti made the following order against the *Mareva* defendants described in that order, including TCHI:

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

(a) Selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any assets of any of the Mareva Defendants, that are located in Canada or the United States, including but not limited to the assets and accounts listed in Schedule "A" hereto;

(b) Instructing, requesting, counselling, demanding, or encouraging any other person to do so; and

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

21 The order made by Justice Ricchetti also applied to "Financial Institutions" specified in that order that are not parties to the action. These Financial Institutions include banks and credit unions where any *Mareva* defendant had money on account. Paragraph 7 of the order made by Ricchetti J. reads as follows:

7. THIS COURT ORDERS that Toronto-Dominion Bank also known as TD Canada Trust, The Bank of Nova Scotia also known as Scotiabank, Canadian Imperial Bank of Commerce also known as CIBC, Royal Bank of Canada also known as RBC, Bank of Montreal also known as BMO, City Savings and Credit Union Limited and the Buduchrist Credit Union Limited (the "Financial Institutions") to forthwith freeze and prevent any removal or transfer of monies or assets of the Mareva Defendants held in any account or on credit or on behalf of any Mareva Defendant with the Financial Institutions, including but not limited to the accounts listed in Schedule "A" hereto.

22 Justice Ricchetti ordered each *Mareva* defendant to provide a statement of assets to Trade Capital within 10 days of the date his order was served. The Financial Institutions to which the *Mareva* order applied were also ordered to disclose and deliver up to Trade Capital any and all records held by them in any way related to the *Mareva* defendants. This order required the disclosure of information relating to assets and accounts held by or on behalf of the *Mareva* defendants other than those assets and accounts listed in schedule "A" to the order.

23 In the written reasons given for his decision to grant the *Mareva* injunction, Justice Ricchetti made the following findings on the evidence put forward by Trade Capital:

(a) Trade Capital has satisfied the court that a strong *prima facie* claim of fraud has been made out;

(b) The evidence established that each of the Defendants, including Cash House, perpetrated, facilitated or received the proceeds of a fraudulent scheme against Trade Capital;

(c) This was a very complex fraud. The Defendants went to great lengths to perpetrate the fraud; and

(d) Unless the injunction was granted, there was a very real risk that the proceeds from the fraud would be disposed of or transferred beyond the jurisdiction of this court.

24 The 701 account was not included in Schedule "A" to Justice Ricchetti's order. Nor did Trade Capital's responding material to the Maple Trust motion contain any evidence to link or connect the 701 account to any funds that could be traced from transactions involving any *Mareva* defendant.

The Writs

25 In a separate and unrelated action, TCHI had made a claim against Maple Trust and others as defendants. That action was dismissed against Maple Trust. On November 20, 2013, Justice Stinson awarded costs for that action to Maple Trust in the amount of $132,862.68, payable by TCHI.

26 TCHI appealed the dismissal of its action against Maple Trust. The appeal was dismissed, with costs. The Court of Appeal awarded $17,000.00 to Maple Trust for those costs. Maple Trust filed Writs of Seizure and Sale with respect to the costs awarded under the judgment of Justice Stinson, and the costs awarded by the Court of Appeal with the Sheriff's Office in Brampton and in Toronto.

27 In order to facilitate settlement discussions between the parties, TCHI paid $40,000.00 on account of the costs orders, and agreed to pay the balance in instalments. As a result of this payment, the Sheriff's Office was instructed to stand down.

28 The outstanding balance that TCHI therefore owes to Maple Trust pursuant to the costs orders is $120,396.90, together with interest from August 6, 2016.

Analysis

29 Maple Trust intends to enforce the Writs of Seizure and Sale against the 701 account. Maple Trust takes the position that it already has a judgment and is entitled to proceed with seizing funds in the 701 account under the *Execution Act* to enforce that judgment.

30 Maple Trust takes the fundamental position at law that a *Mareva* injunction is not proprietary in nature. It submits that Trade Capital obtained a *Mareva* injunction instead of a proprietary injunction. For that reason, assets of a *Mareva* defendant on deposit at a financial institution covered by the *Mareva* injunction must yield to another legal process that make those assets or funds on account payable to another party.

31 Trade Capital takes the position that the *Mareva* injunction prohibits Maple Trust from enforcing its Writs of Seizure and Sale. Trade Capital alleges that the 701 account is one of many that contains funds stolen from it through the fraud, and that it has a proprietary claim to those funds.

32 In *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*, [2003] O.J. No. 40 (Ont. S.C.J.), Justice Molloy explains the difference between a proprietary injunction and a Mareva order:

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

33 At paragraph 16, Justice Molloy discusses the requirements for a *Mareva* injunction, and the test a plaintiff must meet to obtain that kind of order. The purpose and effect of a *Mareva* injunction becomes more apparent in this discussion:

> [16] A *Mareva* injunction does not require the plaintiff to show any ownership interest in the property subject to the injunction and does not require the plaintiff to establish a case of fraud or theft. It is a recognized exception to the rule established in *Lister v. Stubbs* (1890), 45 Ch. D. 1 that the court has no jurisdiction to attach the assets of a debtor for the protection of a creditor prior to the creditor obtaining judgment. Because of the exceptional nature of the relief, the test on the merits for obtaining a *Mareva* injunction is more onerous than for other injunctive relief and requires that the plaintiff establish a strong *prima facie* case: *Chitel v. Rothbart* (1983), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513 at 522 and 532 (C.A.). In addition to the other requirements for an injunction, the plaintiff must show that the defendant is taking steps to put his assets out of the reach of creditors, either by removing them from the jurisdiction of the court or by dissipating or disposing of them other than in the normal course of business or living: *Chitel v. Rothbart* at p. 532-533.

Position of Maple Trust

34 Maple Trust argues that the injunction granted by Justice Ricchetti on May 6, 2015 was a *Mareva* injunction, and not a proprietary injunction. Mr. Sclisizzi makes the same distinction between the two kinds of injunctions on behalf of Maple Trust that Justice Molloy made in *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*.

35 Maple Trust submits that the order obtained by Trade Capital does not give it a priority or advantage over any other creditor of TCHI. While the *Mareva* injunction prevents TCHI from paying *bona fide* creditors of its own volition, the rights of *bona fide* creditors enforcing legal process to collect under judgments that would otherwise be enforceable against TCHI assets had no *Mareva* order been granted are not extinguished.

Position of Trade Capital

36 Trade Capital argues that the *Mareva* injunction is an order designed to preserve assets for execution. The *Mareva* injunction is intended to freeze the assets of those defendants responsible for the fraud to enable Trade Capital to recover the money stolen from it. Trade Capital argues that the *Mareva* injunction it obtained in May, 2016 protects funds that will be traced in the fullness of time into assets or funds on account at financial institutions in the names of *Mareva* defendants.

37 Trade Capital argues that stolen funds or funds acquired by fraud are impressed with a trust and may be followed and recovered by its true owner: *Lennox Industries (Canada) Ltd. v. R.*, 1987 CarswellNat 337 (Fed. T.D.). Trade Capital also relies on *iTrade Finance Holdings Inc. v. Webworx Inc.*, 2006 CarswellOnt 5939 (Ont. S.C.J.), also at [2006] O.J. No. 3939 (Ont. S.C.J.) and *Elekta Ltd. v. Rodkin*, 2012 ONSC 2062 (Ont. S.C.J. [Commercial List]).

38 Mr. Carey was clear and unequivocal in his submissions that the proprietary claims made by Trade Capital in the Statement of Claim are sufficient to defeat Maple Trust's motion. He argues that these claims take precedence over the Writs of Seizure and Sale of Maple Trust not because of the *Mareva* injunction, but rather by the nature of the proprietary claims and remedies pleaded in the amended statement of claim.

Discussion

39 The Supreme Court of Canada commented on the position of a party who obtains a *Mareva* injunction relative to the creditors of a debtor in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). Justice Estey at pages 25 and 26 as follows:

> 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 Management Ltd.*, [1978] 1 W.L.R. 966, at pp. 974-75), 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 Ministry of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 488, at p. 494. 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.

40 Obtaining a *Mareva* injunction against the assets of a defendant is an extraordinary remedy. However, it does not have an extraordinary effect on the rights of other *bona fide* creditors of the defendant as a debtor. Courts are generally reluctant to tie up the assets or funds of a defendant without first finding liability, or permitting what would in effect amount to execution before judgement.

41 At paragraph 17 of *Canadian Imperial Bank of Commerce v. Credit Valley Institute of Business & Technology*, Justice Molloy explains the purpose of a *Mareva* injunction is a limited one:

[17] The purpose of the *Mareva* injunction is a limited one. It is meant to restrain a defendant from taking unusual steps to put his assets beyond the reach of the plaintiff in order to thwart any judgment the plaintiff might eventually obtain. It is not meant to give the plaintiff any priority over other creditors of the defendant, nor to prevent the defendant from carrying on business in the usual course and paying other creditors. The nature of the *Mareva* is such that it is typically sought and granted, in the first instance, without notice to the defendant, but then is subject to a motion by the defendant to vary the injunction to permit payments in the usual course of business or living As was noted by the English Queen's Bench in *Iraqi Minister of Defence v. Arcepey Shipping Co. S.A.*, [1980] 2 W.L.R. 480 at 485-486:

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

42 The *Mareva* injunction is not a remedy that operates as a charge or an instrument granting security against the assets of the defendant. It is an order inhibiting the defendant and any other party bound by the order from disposing of the assets by the transfer or removal of those assets from the jurisdiction. The injunction is not something that prefers the rights of the plaintiff as an otherwise unsecured creditor over the rights of all other creditors in the debt collection process: See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* [1998 CarswellBC 2725 (B.C. C.A.)], 1998 CanLII 6468 and *Hans v. Volvo Trucks North America Inc.*, 2014 BCSC 1123 (B.C. S.C.).

43 Certain principles emerge from the authorities and as a matter of common sense to enable a creditor to enforce a judgment against assets otherwise subject to a *Mareva* order. In my view, those principles would include the following:

1. The creditor and related claim must be legitimate;

2. The assets would be available for seizure and sale by an unsecured creditor but for the *Mareva* order;

3. The *Mareva* order must not contain any term that gives it a proprietary character, or that recognizes the creditor has a legal claim to a specific fund otherwise covered by its language and purpose;

4. The assets of the defendant are not subject to the protection of any federal or provincial statute that make seizure of those assets exempt or unenforceable at the time of the seizure; and

5. There is no other juristic reason why the assets cannot be seized.

44 It is paragraph 7 of the *Mareva* order that Maple Trust now seeks to vary to exempt the 701 account at BCU from its reach. The language in paragraph 1 of Justice Ricchetti's order against *Mareva* defendants provides the context for the nature and object of that order. The language in paragraph 7 prevents non-parties from permitting the removal or transfer of any funds or assets by the *Mareva* defendants. The order contains no reference to any proprietary claim or presumption of ownership through a trust. The language of the order clearly shows that the remedy granted is to prohibit the removal or transfer of money or assets by any *Mareva* defendant, not the recognition of a proprietary interest or a legal claim to a particular account, or to a specific fund.

45 Trade Capital initially obtained a Norwich order against TCHI and other defendants to trace and identify assets into which Trade Capital funds had flowed. The 701 account was not disclosed in Trade Capital's motion materials on which Justice Ricchetti granted the *Mareva* injunction on May 6, 2016. If there was evidence to give, Trade Capital should have given it on the *Mareva* motion. The 701 account was not listed in the schedule to Justice Ricchetti's order on May 6, 2016, or any specific reference made to that account or funds held in that account. More to the point, Trade Capital provided no evidence on this motion that the funds held in the 701 account for TCHI came directly or indirectly from any fraud committed against it.

46 The nature of the *Mareva* injunction against the assets of TCHI support the argument made by Maple Trust that Trade Capital did not obtain a proprietary injunction that would inhibit access to the 701 account through legal process to enforce the judgment of another creditor. Just because Trade Capital harbours a concern that insufficient funds will be available to collect on any judgment in the future does not give Trade Capital priority over any other unsecured creditors to which TCHI is indebted. Contrary to the submission made for Trade Capital, it is not sufficient to make proprietary claims or to claim a legal right to specific funds in the amended statement of claim. Fears are not enough.

47 Trade Capital could have moved for an order for a proprietary injunction to preserve a proprietary claim it argues on this motion, or to make its claim to a legal interest in specific funds held in the 701 account under Rule 45: *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2012 ONCA 475 (Ont. C.A.). When it did not do so under the guidance of seasoned counsel, I cannot help but conclude that it had no basis to seek either order in fact or in law.

48 In the motion before this court, there is not even evidence to argue that funds belonging to or paid from Trade Capital were comingled with other funds belonging to TCHI in the 701 account. There is simply no connection between the claim made by Trade Capital for the general recovery of funds, and the specific funds held in the 701 account at BCU. For a proprietary claim to succeed on tracing funds from one source to a recipient, identification of the assets from one place to another is key.

49 I agree with Justice Estey in *Aetna Financial* where he adopts the quote from Justice Goff in the *Iraqi Ministry of Defence v. Arcepey Shipping Co. S.A.* [[1980] 2 W.L.R. 488 (Eng. C.A.)] case that to accord the *Mareva* injunction holder a priority over a potential creditor would be to "rewrite the ... law of insolvency". In my view, any other conclusion would lead to consequences the law did not intend.

Rule 37.14 factors

50 Maple Trust bring its motion in essence to exempt BCU and its Writs and Seizure and Sale from the *Mareva* injunction that Trade Capital obtained on May 6, 2015.

51 In the event that Maple Trust seeks an order that actually varies the scope of the *Mareva* Order, I consider that Maple Trust has met the test set out in *A v. B* (1983), 133 N.L.J. 725, [1983] 2 Lloyd's Rep. 532 (Eng. Comm. Ct.) (at paragraph 534). On a motion to vary a *Mareva* injunction under Rule 37.14, the court must consider the following factors when deciding whether to vary a *Mareva* injunction at the request of a creditor:

> (1) Has the creditor established on the evidence that there are no other assets available to satisfy the debt other than those frozen by the injunction?
>
> (2) Would the payment to the creditor normally have been made by the defendant?
>
> (3) Does the payment defeat the purpose of the injunction?

52 Justice Ricchetti's order dated May 6, 2015, applies to "all assets" of each of the *Mareva* defendants. Given the broad reach of that order, it is unlikely that any other assets of TCHI fall outside of its scope to satisfy the cost orders obtained by Maple Trust in its own litigation with TCHI from Justice Stinson and from the Court of Appeal.

53 The payment of those costs orders would have normally been paid by TCHI as TCHI was bound to pay those cost orders. Maple Trust is lawfully entitled to enforce Writs of Seizure and Sale for the non-payment of cost orders TCHI would have been compelled to pay those cost orders voluntarily or involuntarily through seizure of all funds in the 701 account in the absence of the *Mareva* order.

54 For these reasons, the motion of Maple Trust to vary the *Mareva* injunction is granted. This order shall enable Maple Trust to seize the funds in account number [#omitted] in the name of The Cash House Inc. under properly issued Writs of Seizure and Sale for those funds to be remitted according to law.

55 I encourage Maple Trust and Trade Capital to resolve the costs of this motion between them. However, if either party seeks its costs, that party shall make written submissions by May 22, 2017, and the other party shall file responding materials on costs by June 5, 2017. All costs submissions shall be no more than three double-spaced typed written pages in length, not including any Bill of Costs or offer to settle. There shall be no reply submissions without leave. All written submissions may be filed by faxing them to my judicial assistant, Priscilla Gutierrez at 905-456-4834 in Brampton.

Motion granted.

Court File No. CV-18-592103-00CL

COMFORT CAPITAL INC. et al.
Applicants

-and-

ANNIE YERETSIAN et al
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF BRAUTI THORNING LLP

(*Motion for Release of Funds for Outstanding Legal Fees)*

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